A DIGEST

OF THE

HINDU LAW

OF

INHERITANCE, PARTITION, AND ADOPTION;

EMBODYING THE REPLIES OF THE ŚÂSTRIS IN THE COURTS OF THE BOMBAY PRESIDENCY,

WITH

INTRODUCTIONS AND NOTES

BY

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AND

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PREFACE.

An apology is due to the subscribers for the delay in producing the present edition. This delay has arisen, not from any want of assiduity or interest in the work, but from the bulk of the materials to be dealt with, and from official engagements which have left but a scanty and occasional leisure for carrying this book through the press. The matter is more than double that of the preceding edition, and now affords, it is hoped, a pretty full view of the principal topics connected with the Hindû Law of Inheritance, Partition, and Adoption.

Book III., on the last named subject, is a new part of the work, in which an attempt has been made to bring together both the doctrines of the Hindû sources and the most important decisions of the Courts. The latter are numerous, and not in all cases readily reconcilable with the opinions of the Śâstris. Discussions were thus made necessary, which have added something to the length of the book, and will induce the reader perhaps more readily to excuse the omission in this part of the work of the detailed statement given in Books I. and II. of each question put and answer returned by the Śâstri, and of the authorities quoted in support of his opinion. I some years ago made out a list of these authorities, and with some trivial exceptions they are discussed in the first part of Book III. The many references to the sources in the second and following Sections of the same Book are in part identical with those made by the Śâstris, but extend over a wider field, consistently with a desire to make Adoption better understood by showing what its history has been, and what relative place it holds in the development of the Hindû law. It is to be regretted that in this part of the work I have not had the aid cf Dr. Bühler's distinguished scholarship and his intimate acquaintance with

the Sanskrit law literature. Circumstances—chiefly the great distance between our spheres of work—have prevented this co-operation, and much no doubt has thus been lost. Such authorities as were within my own compass I have worked at not without diligence, and should the conclusions deduced be erroneous the references will supply the means of correcting them.

For the present edition Dr. Bühler has however revised his survey of the Hindû law literature, which now appears as Section II. of the Introduction to Book I. The advances made of late years in this branch of learning made such a revision very necessary, and it may be accepted with some confidence as presenting the latest gains of scholarship. With the exception of a few notes, the authorship of which will be easily recognized, this part of the work is entirely due to Dr. Bühler. For the rest of the new work he is not to be held answerable.

In the parts of the Introduction to Book I. bearing on the Limitations of Property, the Testamentary Power, and Maintenance, an endeavour has been made to bring together the new and old authorities, so as to contribute to the formation on each of these subjects of a definite and consistent theory. The article on Strîdhana has been transferred from the Appendix to the Introduction with some abridgement, and with several reinforcements from Hindû sources of the views set forth in it. The decisions of the Courts have, in some instances, been opposed to these views; and the decisions will probably form the law of the future; but as they do not seem to be reducible to a single and consistent system, a statement of the doctrines of the Hindû lawyers may still be practically useful. There must be some error where there is a conflict of authorities; the way to truth lies through a comparison of them, and for this the materials are laid before the reader. Much the same may be said on the subject of a widow's maintenance by her husband's family. The decisions on the subject are not

uniform, nor are the Hindû commentators themselves in complete accord as to the widow's right to a separate maintenance. The principle of a change of family, which rests immediately on the Sâstras, coupled with the equally recognized right of the family to subsistence at the hands and as dependants of the chief, leads directly to conclusions which have here been put forward as probably correct. The customary law of the castes is shown to agree, almost without exception, with these conclusions, and thus the subject is left for the further consideration of the Courts.

The problem of the father's capacity to alien and incumber the family estate to the injury of his sons is one that has much exercised the Courts in recent years. The decisions arrived at have, in some respects, been almost as various as the Courts that pronounced them. The powers of a manager or representative member of a Hindû family, and the capacity of a Hindû widow for transactions affecting different classes of property, have not been defined in precisely uniform terms or referred to exactly the same principles. The Hindû authorities themselves, as received in the different provinces, differ in their conception of the Hindû family, and the proper relations of its members; and hence naturally arrive at different results in the details of the system. Yet within their own sphere or with reference to the accepted foundations on which they have severally worked, the native writers of any particular school or province are, perhaps, on the whole, more consistent than some of the judgments which have borrowed at need from antagonistic sources. An attempt has been made to present the course of thought followed in the several High Courts and in the Judicial Committee, and to compare it with the doctrine of the Mitâksharâ. Some passages of the latter, hitherto untranslated, have been given in an Appendix, in order to correct misconceptions and to bring out more clearly what was the author's notion of the capacities and duties of a father and a son. His view of the necessary or typical

family relations as to property, though widely different from that of the English law, agrees pretty closely with the ideas on the same subject of Hegel. His discussion of the relation of a head of a family to its dependent members as partaking of the nature of property without being property will remind students of a somewhat similar dissertation in Kant. The translations have been obtained from an independent hand, (that of Dr. A. Führer) as both the more competent and more free from any suspicion of finding in the original what was suited to support a preconceived opinion.

The great accumulation in recent years of published decisions on points of Hindû law has added much to the labour of the student or practitioner who desires to be abreast of the latest developments of the case law. Though the present edition in some measure reflects the ever growing reports in a great increase of the table of cases cited, it is not pretended that the list is at all exhaustive. Only those cases have in general been referred to which were thought for one purpose or another really valuable, the others have been left unnoticed. The series of judgments delivered by Sir M. R. Westropp, late Chief Justice of the High Court of Bombay, has furnished many instructive illustrations for the present work. In one or two instances leave has been taken to differ from the conclusions arrived at by that eminent judge, but this liberty has not been used without some diffidence or in forgetfulness of the obligations under which every student of the Hindû law lies to one who has contributed with such patience, learning, and acuteness to its scientific development and adaptation to the needs of a new generation.

A more prominent place is given to Customary Law in the present than in the previous editions of this work. It began as a mere collection of the responses of the Hindû law officers with so much of introduction and comment as seemed necessary to connect the answers in a system. The authority accorded to the work has made it desirable that

within its own range it should present a tolerably full as well as accurate view of the subjects with which it deals. The usage of the people differs materially on some points from the rules laid down in books which are otherwise received as unimpeachable authorities. It may perhaps be a question whether, as a matter of policy, every fragment of custom ought to be diligently sought out and preserved. A wider and more uniform customary law may be more consistent with moral and material progress than an indefinite segmentation into slightly varying usages which causes perpetual doubt and difficulty in necessary transactions. But the usage of the country is the law of the people; and this usage amongst the Hindûs allows, at least within certain limits, the minor usages of classes and families to be their law. There is no collection pretending to completeness of the customs even of the people of Western India, but in Steele's Caste Laws are to be found a great many departures, more or less conspicuous, from the general track, and many rules of the lower castes on matters unregulated by the sacred writings. Borradaile's collection of the caste customs of Gujarât is almost equally valuable. It has long lain by in manuscript, not without some injury from time and accident, but now at last an edition is in preparation at the cost of Sir Mungaldâs Nathubhâi, under the superintendence of a competent Gujarâti scholar, whose work is revised or checked by Mr. Fulton, C. S., Registrar of the High Court of Bombay. In the mean time I have drawn pretty copiously from this collection as well as from Steele's, and I have supplemented the information thus gained by frequent personal inquiries. Native friends, who have been amused at my persistence in turning our conversation to the subject of their usages, will find the matter of our talk in many instances here set forth in print. In this way it is hoped a pretty fair view has been obtained and reproduced of the modifications of the law of the books which are established by practice and acceptance. In the case of Partition, of Adoption, and of the Rights of a Widow, the peculiarities are so important as to invite particular attention.

The extracts from several Smṛitis and from the Vîramitrodâya, which were printed in an Appendix in the previous editions, have in this been omitted. The Vîramitrodaya is now accessible in a very good translation, published by Mr. G. Sarkâr, of Calcutta. Translations of Nârada and Vishnu, by Professor Jolly, have been published by Messrs. Trübner & Co., whose series of the Sacred Books of the East contains the other works also above referred to. As they are thus placed within reach of the English scholar, it seemed needless to retain the translations of particular chapters which had formerly been a useful supplement to this work. It is, though in parts almost excessively condensed, sufficiently bulky even after discarding all matter that could well be dispensed with.

Exception may perhaps be taken to the large number of comparisons instituted between the Hindû law and the Roman, English, and other laws. In the case of adoption these comparisons have generally had a directly practical purpose. It is very desirable to know how far in this department the analogous Roman institution can help the student of the Hindû law, and how far it cannot. That it affords some valuable suggestions will be admitted by those familiar with the subject. In the other comparisons the purpose has been partly to show that the Hindû system stands much less isolated than is usually supposed, but more especially to awaken the interest of Native scholars if possible in the subject of comparative law. A complete investigation of the relations of their own to other systems would probably be of great value to the history of human development, and would be fruitful in suggestions of improvement and adaptation without a painful and destructive breaking with the past.

In the correction of the press the assistance has been had of Dr. A. Führer, especially for the references to the Hindû authorities. The references to the law reports have been verified by Mr. Śivarâm Śitarâm Vâglê, pleader of the High Court of Bombay, and now acting as Subordinate

Judge of Sâswaḍ. The latter gentleman has aided also in preparing the Index, by noting down the principal subjects as the work progressed. Another Index was independently prepared by myself; and with these two have been blended the appropriate entries in the Index to the previous edition. That was drawn up with the aid of Mr. J. B. T. Inâmdâr, who is now Subordinate Judge of Belgaum. Three or four years ago this gentleman was so kind as to copy and arrange my notes on Adoption and some others that have been used for this edition, and unwilling not to have a hand in bringing it out, he has now kindly drawn up the Table of Contents. The lists of cases cited, and of authorities referred to, were in great part prepared by Mr. J. M. Kharsedji, Assistant to the Commissioner of Customs: they have been completed by Mr. Kaikhasru F. Modi, B. A., who has also re-arranged the Index under my personal direction. In a work of so much labour it is a pleasure to acknowledge having found such cheerful and intelligent auxiliaries. Whatever may be the worth of the book, the aids to its perusal will, it is hoped, be found more than usually accurate and complete.

R. W.

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* Ráni is sometimes spelled Rány, abbreviated "Ry." *See* under the latter word.

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Dattaka Mîmâṁsâ (of Nanda Paṇḍita).—*Passim.*
Dâya Bhâga (of Jîmûta Vâhana). —*Passim.*
Dâyakrama Sangraha.—210, 222, 305, 306, 323, 337, 501, 646, 649, 653, 798, 812, 819.
Devala.—268, 579, 654.
Devâṇḍa Bhaṭṭa—*See* Smṛiti Chandrikâ.
Dhâreśvara.—286.
Dharmasindhu.—25, 120, 539, 541, 603, 862, 938, 989, 1056.
Dharmadvaitanirṇaya or Dvaita Nirṇaya.—862, 909, 1033.

G

Gautama —71, 85, 87, 275, 279, 296, 417, 418, 764, 860, 868, 873*e*, 875*b*, 876*d*, 879*b*, 889, 891, 892, &c

H

Haradatta.—889.
Hârîta.—91, 860.

J

Jagannâtha (in Colebrooke's Digest) —*Passim.*

K

Kamalâkara.—*See* Nirṇayasindhu.
Karma Purâṇa.—916.
Kâtyâyana.—90, 91, 93, 249, 255, 296, 337, 378, 519, 527, 647, 654, 673, 802, 867, 971, 1074, 1146.
Kullûka Bhaṭṭa.—126, 296, 419, 837, 928.

L

Logakshi Bhâskara.—1131.

M

Mâdhavîya.—9, 126, 193, 293, 327, 648, 716, 805, 807, 892, 1047.
Manu.—*Passim.*

Mitâksharâ.—*Passim*.
Mitramisra.—*See* Vîramitrodaya.

N

Nágoji Bhaṭṭa.—1043.
Nanda Paṇḍita (*see* Dattaka Mîmâṁsâ).—677.
Nârada —69, 81, 85, 91, 99, 100, 221, 268, 271, 281, 289, 293, 294, 295, 304, 311, 321, 379, 419, 426, 436, 541, 587, 592, 643, 644, 652, 658, 665, 666, 688, 692, 695, 698, 746, 751, 753, 758, 776, 782, 790, 799, 803, 805, 812, 821, 854, 860, 882, 883*a*, 885*n*, 897, 1090, 1190.
Nîlkaṇṭha.—*See* Vyavahâra Mayûkha.
Nirṇaya Sindhu (of Kamalâkara).—23, 387, 447, 471, 482, 494, 515, 518, 552, 862, 887, 916, 989, 1005, 1030, 1059, &c.

P

Parâśara.—920.
Prajâpati.—271.

R

Ṛig Veda.—280, 281, 289, 290.

S

Saṁskâra Ganapati.—862.
Śankara Bhaṭṭa.—*See* Dvaitnirṇâya.
Sarasvati Vilâsa.—115, 171, 199, 273, 426, 1046.
Śâtâtapa.—491.
Śaunaka.—887*b*, 919, 920, 1124.
Smṛiti Chandrikâ.—869, 894, 1047, 1076, and *passim*.
Smṛiti Kaustubha.—9.
Subodhini (by Visveśvarabhaṭṭa).—99, 124, 128, 141, 658, 890, 892.

T

Taittirîya Brâhmaṇa.—885*n*.

U

Uśanas.—271, 732.

V

Vâchaspati Misra.—919.
Varadrája Vyavahára Nirṇaya.—93, 193, 266, 270, 276, 290, 292, 805, 819.
Vasishṭha —71, 231, 267, 275, 280, 281, 289, 419, 753, 764, 860, 864, 869*e*, 872*a*, 872*b*, 875*b*, 879*a*, 882*a*, 884, 885*n*, 886, 888, 934, 935.
Vatsa.—1078.
Vedârthayatna.—282*b*.
Vijñâneśvara.—*See* Mitâksharâ.
Vîramitrodaya of Mitramisra.—*Passim*.
Vishnu.—71, 75, 76, 85, 644, 735, 745, 752, 798, 819, 860, 872*d*, 873*b*, 875*d*, 875*e*, 876*b*, 876*d*, 882*a*, 884*c*, 886*f*, 888, 889, &c.
Vishvâmitra.—1062.
Viśveśvara.—*See* Subodhini.
Vivâda Chintâmaṇi.—233, 245, 255, 270, 273, 310, 605, 746, 760, 812, 912, 921, 1041, 1090, 1104.
Vyâsa.—271, 1078.
Vyavahâra Mayûkha (of Nilkaṇṭha).—*Passim*.
Vyavasthâ Darpaṇa.—947.

Y

Yâjñavalkya.—22, 75, 76, 84, 130, 135, 231, 239, 242, 246, 268, 275, 278, 279, 281, 320, 342, 370, 379, 382, 387, 424, 639, 643, 644, 692, 695, 698, 711, 719, 732, 780, 798, 860, 867, 869*c*, 875*f*, 885*n*. 892, 897, &c. *See* Mitâksharâ.

ADDENDA AND CORRIGENDA.

Page 68 note (*c*) *for* 437 *read* 137.
„ 96 note (*a*) line 4 *for* Brammoge *read* Brammoye.
„ 169 note (*b*) *for* 'Tevan *read* Tevar.
„ 201 note (*a*) line 5, *after* p. 350, *insert* S. C. I. L. R. 7 Bom. 188.
„ 202 note (*e*) last line *add* S. C. I. L. R 6 Bom 298.
„ 202 note (*e*) last line *add* S. C. I. L. R. 6 Bom. 298, and 7 Bom. 217.
„ 207 note line 4 *for* founders, *read* founders'.
„ 217 line 2 *for* conception *read* conceptions.
„ 224 line 4 from bottom of text *for* 1871 *read* 1870.
„ 259 line 6 from bottom of text *after* it does *insert* not.
„ 267 note (*c*) *dele* 'in the appendix.'
„ 285 note (*b*) *for supra* p. 386 read *infra* pp. 818-19.
„ 333 line 11 *for* Sûlka *read* Śulka.
„ 368 line 1 *for* the *read* a.
„ 381 line 6 *for* Maina *read* Mannu.
„ 443 Remark 3 line 1 *for* Rajoneekâut *read* Rajoneekânt.
„ 604 note line 10 *for* Bhawat *read* Bhagwat.
„ 608 note *after* P. J. 1883 p. 31 *insert* S. C. I. L. R. 7 Bom. 222.

Page 612 note (*b*) *for* Jaganath read *Jagannâtha*.
„ 629 note (*c*) *after* Dig *add* Title 'Action.'
„ 653 note (*c*) line 6 *for* Gujerâth *read* Gujarât.
„ 664 note (*a*) para. 2 *for* Bilass *read* Bılaso.
„ 681 note (*a*) para. 2 line 10 *for* Ramakaunt *read* Ramakaunt.
„ 682 note line 7 from bottom *add* see below p. 703.
" 715 note (*a*) *for* Chap. VI. Sec. 7 *read* Sec. VII. para. 2 and Sec. V.
„ 732 note line 9 *for* Uśânas *read* Uśanas.
„ 742 line 12 *for* Guneshidappa *read* Gurushidappa.
„ 743 note (*c*) *for* Gocoolannund *read* Gocoolanund.
„ 751 note (*d*) line 9 from bottom, *for* bhartvyam *read* bhartavyam.
„ 777 note (*c*) line 9 *after* 1883 *add* S. C. I. L. R. 7 Bom. 155.
„ 781 note (*o*) *for* (*o*) *read* (*a*).
„ 786 note (*f*) line 4 from bottom *for* Brigg's *read* Briggs's.
„ 793 note (*d*) *for* Hîrâta *read* Hârîta.
„ 817 note (*a*) line 2 *for* Sec. *read* See

Page 873 note (*f*) *for* Samskâra *read* Saṃskâra or Saṁ-skâra.

„ 884 note (*a*) line 5 *for* Alama-uni *read* Alamanni.

„ 905 note (*d*) line 6 *for* Anund-monee *read* Anund-moyee.

Page 921 note (*c*) *for* Bhyubbnath *read* Bhyrubnath.

„ 926 note (*c*) *for* Mânasputra *read* Manasputra.

„ 964 note (*a*) *for* Bhoobyn *read* Bhoobun.

„ 1070 note (*a*) line 3 *for* p. 1 *read* 199.

„ 1115 line 7 *after* that *insert* of.

INTRODUCTION.

I.—*Operation of the Hindú Law.*

THE Hindû Law, so far as it governed the private relations of the inhabitants of any part of India, was not affected by their reduction under British rule. But the new Sovereign thus acquired a power to legislate for them, and this sovereignty was in part delegated to the East India Company during its existence and down to 1833 A. D. (*a*)

The application of the Hindû Law to litigation by the courts in British India is authorized and regulated by statutes of the Imperial Parliament and by Regulations (*b*) and Acts of the local Legislatures.

It is subject even without a statutory provision to modification by custom, (*c*) which indeed may be regarded as the

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(*a*) See *Campbell* v. *Hall*, 1 Cowp. 204; *Moodley* v. *The East India Company*, 1 Br. R. 460; *Dobie* v. *The Temporalities Board*, L. R 7. A. C. at p. 146. Lewis on the Government of Dependencies, 203, ss., and Note *m*.

(*b*) *See* the Statutes 13 Geo. III. c. 63; 21 Geo. III c 70; 4 Geo IV. c. 71; St. 24 and 25 Vic. c. 104; and the Letters Patent of the High Court under that Statute. These are discussed in the case of *Káhándás Nárandás*, I. L R. 5 Bom. 154, and other cases there referred to. For the Mofussil, *see* Bombay Reg. IV. Sec. 26 of 1827. Under this a collection of the caste rules of Gujarât was made by Mr. Borradaile, to which the Courts were directed to conform in all cases to which they applied, by a Circular Order of the late Saddar Adâlat, dated 24th December 1827.

(*c*) *See* Manu I. 108, 110. II. 12, 18. VII. 203. VIII. 41, 42, 46. Vyavahâra May. Ch. I. Sec. 13. Ch. IV. Sec. V. 10, 11. *Vijñáneśvara* on Yájñavalkya B. II. Sloka 4; Coleb. Dig., Bk. I., Ch. II., T. 49. Comm. ad fin. and note; T. 50. Bk. II., Ch IV., T. 18. Com. Yájña-valkya, Bk. II. 117 note by Roer and Montriou; *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A. 397.

basis, for all secular purposes, of the Hindû Law itself. (*a*) Thus, when a custom is proved, it supersedes the general law so far as it extends; but the general law still regulates all that lies beyond the scope of the custom. (*b*) The duty devolving, according to the Hindû sages, upon a conqueror of maintaining the customary private law of the conquered territory, (*c*) has been recognized as fully, or even more fully, by the British Courts than by the Legislature. Thus the Privy Council says in *Rámalakshmi Ammal* v. *Sivánantha Perumal Sethurayar* (*d*):—"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India." They give effect to a course of descent in a family, differing from the ordinary course of descent (*e*); and to a right of a reigning rájá to select his heir (*f*) founded on custom though for some time disused or not distinctly asserted. In the *Collector of Madurá* v. *Moottoo Rámalinga Sathupathy* (*g*) their Lordships dwell on the importance of the opinions of Paṇḍits, such as those collected in the present work. By Bombay Regulation II. of 1827, a Hindû law officer was attached to the Saddar Adálat, and one to each Zilla Court, and questions of Hindû Law were disposed

(*a*) See *Bháu Nánáji* v. *Sundrábái*, 11 Bom. H. C. R. 249; *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. 545; *Lulloobhoy Báppoobhoy* v. *Cassibái*, L. R. 7 I. A. at p. 237.

(*b*) *Neelkisto Deb Burmono* v. *Beerchunder Thákoor and others*, 12 M. I. A. 523.

(*c*) Manu VII. 203. Yájñav. I. 342. The same edited by Janárdan Mahádev, p. 358; Coleb. Dig., Bk. II., Ch. III., T. 60.

(*d*) 14 M. I. A. 570, 585.

(*e*) *Soorendranáth Roy* v. *Mussamut Heerámonee Burmoneah*, 12 M. I. A. 81, 91.

(*f*) *Neelkisto Deb Burmono* v. *Beerchunder Thákoor and others*, 12 M. I. A. 523.

(*g*) 12 M. I. A. 397, 438, 439. *See* also *Lulloobhoy Bappoobhoy* v. *Cássibái*, L. R. 7 I. A. at p. 230. That the Śâstris were under strong religious obligation, *see* Vasishṭha III. 6. Compare Savigny's History of the Roman Law, English Translation, p. 284.

subject to a different law. It may be abandoned in favour of the general law either by agreement or desuetude. (a) In *Rájáh Nugendur Nárain* v. *Rághonáth Náráyan Dey*(b) it was held that a family custom as to intermarriages might be proved by declarations made by members of the family. But still the course of devolution prescribed by law cannot be altered by a mere private agreement. (c)

In a recent case at Madras(d) it has been ruled that since the passing of the Indian Succession Act native Christian families have no longer been free to adhere to the Hindû Law of Succession, but that members born before the Act came into operation would not be deprived of their rights under the Hindû law. The latter point has been similarly ruled at Calcutta. (e)

In *Myná Boyee* v. *Ootarám* (f) it was held that the illegitimate sons of a European by two native women could not form a joint Hindû family in the proper sense, but could constitute "themselves parceners in the enjoyment of their property after the manner of a Hindû joint family." See further Lord Westbury's judgment in *Barlow* v. *Orde* (g) to the effect that in the absence of a general *lex loci*, the law applicable to the succession of any individual depends on his personal status, which again mainly depends on his religion. (h)

(a) *Abraham* v. *Abraham supra*; *Court of Wards* v. *Pirthá Singh*, 21 W. R. 89, 92, C. R.; *Baroda Debeá* v. *Rájáh Pránkishen Singh*, 2 C. W. R. 81. 12 M. I. A. *supra*. See further below, and Index "Custom."

(b) C. W. R. for 1864, p. 20.

(c) *Bálkrishna Trimbak Tendulkar* v. *Sávitribái*, I. L. R. 3 Bom. 54, 57. See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154,164.

(d) *Ponnusámi Nádan* v. *Dorasámi Áyyan*, I. L. R. 2 Mad. 209.

(e) *Sarkies* v. *Prosonomoyee Dossee*, I. L. R. 6 Cal. 794.

(f) 8 M. I. A., 400.

(g) 13 M. I. A., 277, 307.

(h) See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154.

In litigation between a Hindû on the one side and a Mahomedan, a Christian or a Parsee on the other, it sometimes happens that the decision would be different according as the law governing the one or the other party as a member of a class should be applied. The Statute 21 Geo. III., c. 70, § 17, enabling the Supreme Court to hear and determine all suits against inhabitants of Calcutta provides "that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos ; and where only one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant." The Statute 4 Geo. IV., c. 71, § 7, 17, enabled the Crown to confer a jurisdiction on the Supreme Court of Bombay, similar to that enjoyed by the Supreme Court of Bengal, and the Charter founded on this Statute, after giving authority to the Supreme Court "to hear and determine all suits and actions that may be brought against the inhabitants of Bombay," continues thus—"yet, nevertheless, in the cases of Mahomedans or Gentoos, their inheritance and succession to lands, rents, and goods and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant."

On the construction of the Statute 21 Geo. III., c. 70, § 17, Pontifex, J., would "confine the words 'their inheritance and succession' to questions relating to inheritance and succession by the defendants." "The present," he said, "is a question of the plaintiff's succession and, therefore, not

determinable by the laws and usages of the Gentoos."(a) It can hardly have been intended that a Gentoo should lose his law of inheritance whenever he entered the Court to enforce it. In the Bombay Charter (as in that of the Supreme Court of Madras, para. 32,) the expression is slightly varied, yet the mere words would, equally with the Statute, admit of the construction put on the latter at Calcutta. It cannot well be doubted, however, that the Statutes and the Charters alike were intended to preserve the Hindû and Mahomedan laws of inheritance amongst Hindûs and Mahomedans.(b) The provision for the case of only "one of the parties" being "a Mahomedan or Gentoo" had relation primarily, if not solely, to the cases of "contract and dealing between party and party" in which the principle "In pactionibus et conventionibus unusquisque se sua lege defendere potest"—is one of general though not of universal application. On a different construction of these provisions the property of a Hindû transferred to a Christian might have been freed from the claim of widows and daughters to maintenance, but at the same time subjected to dower. "It could not have been intended by the Legislature that the power of a Mahomedan to convey should be measured by the Hindû law." (c) But where there has been a contract between a Christian and a Hindû, on which the Hindû is sued, the right of each to his own law is equal to that of his adversary, and in such a case it is provided in favour of the defendant that he shall have the benefit of his own law, with which he is assumed to have been comparatively familiar. (d)

(a) *Sarkies* v. *Prosonomoyee Dossee*, I. L.R. 6 Cal. 794, 808. "Gentoo" means Hindû.

(b) See *In re* Káhándás Nárandás, I. L R. 5 Bom 154, 166.

(c) *Per* Sir M. R. Westropp, C. J., in *Lakshmandás Sarupchand* v. *Dasrat*, I. L. R. 6 Bom. 168, 184.

(d) Compare the language of Lord Ellenborough in *R.* v. *Picton*, 20 Howell's St. Trials, 944-5, quoted by Sir G. C. Lewis, Government of Dependencies, Note (m), p. 3?2.

In the mofussil of the Bombay Presidency the Regulation (IV. of 1827, § 26,) says—" The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case ; in the absence of such Acts and Regulations, the usage of the country in which the suit arose ; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone." Here the law of the defendant prevails, failing Statute law and usage of the country, but such usage there is governing inheritance, partition, adoption and the whole province of family law amongst the Hindûs. The provision in favour of the defendant is not meant to have an operation such as to enable one man to dispose of another's rights. (*a*) It is frequently a matter of accident which of the two parties to a suit is plaintiff and which defendant, and only where the plaintiff for instance could dispose and has disposed of rights of his own, is he deprived, failing Statute law and custom, in case of an alleged infringement of the right under another personal law, of a remedy adhering to the right under his own personal law. A son or a wife cannot be deprived of a real right under the Hindû law by a mere transfer to a Christian; the " ownership " transferred cannot be greater than that of him who transfers it, and cannot be enlarged in the Christian's hands merely because under the English law the (Hindû's) ownership would perhaps have been unencumbered. How far then the volition of a Hindû passes property, depends on his law, as in the case of a Christian on the English law. What personal duty can be enforced against a Hindû will sometimes depend on the Hindû law, and especially the law of Inheritance. In the sphere of contract the Statute law (*b*) has now, for most purposes, superseded the Hindû law, and even in giving effect to the Hindû law of property and family law, equitable

(*a*) *Lakshmandás Sarukchand* v. *Dasrat*, I. L. R. 6. Bom. 183.

(*b*) The Indian Contract Act IX. of 1872. See also in *Mollwo March and Co.* v. *The Court of Wards*, the dictum Supp. I. A. at p. 100.

principles derived from the English Courts are brought to bear on its development in the exigencies to which the present age gives rise. (*a*) This process is consistent with the Hindû law which seeks always to undo what has been fraudulently done, (*b*) and strives to enforce a conscientious fulfilment of engagements (*c*); but as regards a heritage or the mutual relations of the persons interested in property through family connexion or by rights derived from those so connected, it rests always on the basis of the positive law. This, therefore, is by no means superseded by the perpetual extension and the diversity of the cases brought to decision in the courts: a firm grasp of its principles and main provisions becomes all the more necessary as details and particular instances multiply in the reports, in order to prevent the confusion which must arise from the incautious admission of rules incongruous in their logical consequences with the Hindû system.

To be correctly apprehended the Hindû law, like other systems of law, must be studied in its history, and in its connexion with the religious and ethical notions of the people amongst whom it has come to prevail. The interpretation given to its ancient precepts by the commentators of authority, has been largely influenced by the philosophical systems. (*d*) The texts have in some instances been manipulated in order to bring them into accordance with notions of comparatively recent growth. Thus to reduce the law presented by the sources to precision and harmony, there is need for a strict

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(*a*) See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154. File of Printed Judgments for 1880, p. 118, referring to 1 Morl. Dig. 106; 2 Bom. H. C. R. 52; 4 Beng. L. R. 8, A. C. As to the doctrine of notice, *see* I. L. R. 6 Bom. 193, 207, referring to *Rádhánáth Doss* v. *Gisborne*, 14, M. I. A., at p. 17.

(*b*) Vyav. May. Ch. IV., Sec 7, para. 24. Stokes H. L. B. 79.

(*c*) Vyav. May. Ch. IX., 4, 10. Stokes H. L. B. 134, 136.

(*d*) See Vasishṭha, Ch. XVI., paras. 1, 5, and Note. Transl. p. 79. Co. Di. B. I., Ch. II., T. 49. Comm. and note.

and rather widely-ranging criticism. Those sources, however, or at least the more ancient ones, are looked on as of so sacred a character; the references to them by the accepted guides of ethical and legal thought, are so frequent and so submissive; the tendency of custom, even where it has diverged from their teaching, is so strong to revert to obedience to their rational commands, (*a*) that a study of them, some comprehension of their character and teachings, is indispensable as a foundation for a true mastery of the practical law of to-day.

II.—SOURCES OF THE HINDU LAW.

I.—On the Authorities of the Hindú Law as prevailing in the Bombay Presidency.

THE authorities on the written Hindû Law in Western India are, according to Colebrooke, (*b*) the Mitâksharâ of Vijñânesvara and the Mayûkhas, especially the Vyavahâramayûkha of Nîlakaṇṭha. Morley (*c*) adds the Vyavahâramâdhava Nirṇayasindhu, Smṛitikaustubha, Hemâdri, Dattakamîmâṁsâ, and Dattakachandrikâ. The quotations of the Śâstris, appended to their Vyavasthâs, which perhaps afford the most trustworthy information on the subject, show that the following works are considered by them the sources of the written law on this side of India:— Enun

1. The Mitâksharâ of Vijñaneśvara,

2. The Mayûkhas of Nîlakaṇṭha, and especially the Vyavahâramayûkha,

3. The Vîramitrodaya of Mitramiśra,

(*a*) Compare the remarks of Innes, J., as to the submission of the non-Aryan tribes to the Hindû Law in *Muttu Vadujanadha Tévar* v. *Dora Singha Tévar*, I. L. R. 3 Mad. at p. 309.

(*b*) Strange, El. H. L, 4th ed., p. 318. Preface to Treatises on Inheritance, Stokes's H. L. B., p. 173.

(*c*) Digest II. CCXXII.

4 and 5. The Dattakamîmâṁsâ of Nandapaṇḍita and the Dattakachandrikâ of [Devaṇḍabhaṭṭa] Kubera. (a),

6. The Nirṇayasindhu of Kamalâkara,

7 and 8. The Dharmasindhu of Kâśînâtha Upâdhyâya and the Saṁskârakaustubha of Anantadeva,

9, and lastly, in certain cases the Dharmaśâstras, or the Smṛitis and Upasmṛitis, which are considered to be Ṛishivâkyâni, 'sayings of the sages,' together with their commentaries. These results have been corroborated by the concurrent testimony of those Law Officers and Paṇḍits whom we have had an opportunity of consulting.

Relative position.

2. The relative position of these works to each other may be described as follows:—In the Marâṭhâ country and in Northern Kâṇara the doctrines of the Mitâksharâ are paramount; the Vyavahâramayûkha, the Vîramitrodaya and the rest are to be used as secondary authorities only. They serve to illustrate the Mitâksharâ and to supplement it. But they may be followed so far only as their doctrines do not stand in opposition to the express precepts or to the general principles of the Mitâksharâ. (b) Among the secondary authorities, the Vyavahâramayûkha takes precedence of the Vîramitrodaya. (c) The Dattakamîmâṁsâ and the Dattaka-

(a) Rao Saheb V. N. Maṇḍlik, Vyavahâramayûkha and Introd., p. lxxii., is right in objecting to Mr. Sutherland's conjecture, which attributes the authorship of the Dattakachandrikâ to Devaṇḍabhaṭṭa.

(b) See *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12, M. I. A. 438; *Náráyan Bábáji* v. *Náná Manohar*, 7 Bom. H.C.R. 167, 169, A. C. J.; *Krishnáji Vyankatesh* v. *Pándurang*, 12 Ibid. 65; *Ráhi* v. *Govind valad Tejá*, In. L. R. 1 Bom. 106; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, 565 S. C. in appeal to P. C. L. R. 7 I. A. at p. 191; *Ramkoonwur* v. *Ummer*, 1 Borr. R. 460.

(c) *See* Colebrooke's Introduction to Treatises on Inh., Stokes's H. L. B. 173, 176, 178; *Gridhari Lall* v. *The Bengal Govt.*, 12 M. I. A. 646.

chandrikâ, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahâramayûkha or of the Dharmasindhu and Nirṇayasindhu. The two latter works and the Saṁskârakaustubha, occupy an almost equal position in regard to questions on ceremonies and penances. They are more frequently consulted by the Śâstris of the Marâṭhâ country than the Mayûkhas, which refer to the same portions of the Dharma. Among these three, the Nirṇayasindhu is held in the greatest esteem.

All points of law, which may be left undecided by the works mentioned, may be settled according to passages from the Smṛitis or Dharmaśâstras, or even from the Purâṇas. The latter have less authority than the former, and may be overruled by them. (*a*) In case of a conflict between the rules of the Smṛitis either may be followed, as reasoning on principles of equity (yuktivichâra) shall decide the solution. (*b*)

The law of Gujarât in some cases, it seems, alters the order of the authorities and places the Vyavahâramayûkha before the Mitâksharâ. As an instance may be quoted the case of a sister's succession to her brother's estate, immediately after the paternal grandmother, which, in accordance with the Mayûkha, is allowed in Gujarât. How far precisely this preference of the Mayûkha goes, is a matter of some doubt, to be cleared up by judicial determination. (*c*)

(*a*) Vyâsa I. 4. "Where a conflict between the Śruti, Smṛiti and Purâṇas appears, the text of the Śruti is the norm; but in case of a conflict between the (latter) two, the Smṛiti is preferable."

(*b*) See Muir's Sanskrit Texts, II., 165, and III., 179, &c.

(*c*) See below; B. I. Introd , sect. 4, B. (7); Introductory remarks to Ch. II., sect. 14. I. A. 1.; the case of *Vijayarangam* v. *Lakshman*, 8 Bombay H. C. R. 244 O. C. J.; *Lalubhai* v. *Mankuvarbai*, I. L. R.

Aksharâ.

3. The first of these authorities, the Mitâksharâ,(*a*) is the famous commentary of Vijñânesvara on the Institutes of

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2 Bom. 388; L. R. 7. I. A. 212; S. A. No. 158 of 1870, decided on March 27, 1871. Bom. H. C. printed Judgments File for 1871.

Rao Saheb V. N. Mandlik (Introd. to Vyavahâramayûkha and Yâjnavalkya, p 1,) has found fault with the above statement of the sources of the Hindû Law in Bombay, and of their relative importance. He thinks that the editors of the Digest consider the Mitâksharâ, the Mayûkha and the Nirnayasindhu the only recognised official guides for settling the Hindû law, and adds that this opinion is a grave error. The censure however rests on an entire misapprehension of the views entertained. In the first two editions of this work, the *Dharmaśâstras and their Commentaries* have been mentioned as the ninth division of the sources of the law (as administered in Bombay), and in the amplification of that passage, the *Purâṇas*, likewise, have been named. What the editors have stated and still hold, is that the eight works, enumerated by name, hold the first rank among the legal works, used in Bombay, and that their doctrines cannot be set aside lightly in favour of conflicting opinions of other authors, however much the latter may please individual taste. The editors have further pointed out that the numerous omissions in the standard works may be supplied by information, derived from the *dicta* of the authors of Smṛitis, whether these be contained in complete original treatises (Sûtras or Dharmaśâstras), or in quotations given by the medieval Nibandhakâras, and by reasoning on principles of equity. In accordance with these principles, they have in the notes on the cases, freely drawn on published and unpublished legal works, not contained in their list, in order to elucidate points left undecided or doubtful in the Mitâksharâ Mayûkha, &c. But it did not enter into their plan to give a review of the medieval literature on Dharma or on Vyavahâra, and without such a review no useful purpose, they thought, could be served by printing a mere list of authors' names and of titles. The Rao Saheb has given such a list, at pp lx. and lix. of his Introduction, but one drawn up with so little regard to system that in some instances the same works are entered under two names, and treatises on sacrifices, astrology, astronomy and philosophy, nay poetical and story-books are placed side by side with works on the civil and religious law. The list, given at pp. lxviii. and lxix.,

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(*a*) The proper title of the work, which however is used in the MSS. only, is Ṛijumitâksherâṭîkâ.

Yâjñavalkya. The latter work, which probably is a versification of a Dharmasûtra, *i.e.*, of a set of aphorisms on Dharma belonging to the White Yajurveda, (*a*) contains about a thousand verses divided into three chapters (kâṇḍas) which treat respectively of 'the rule of conduct' (âchâra), of civil and criminal law (vyavahâra), and of penances (prâyaśchitta). As may be inferred from the small extent of Yâjñavalkya's

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which is stated to have been compiled from answers of Śástrîs, contains several double and inaccurate entries, (such as Mitâksharâ and Vijñâneśvara, Sarvamayûkha, = all the Mayûkhas and the separate titles of the twelve Mayûkhas, such as Mâdhava, Dinakaroddyota, &c., where specifications are required. It is incomplete also, as the Rao Saheb himself suspects, and appears to have been made up exclusively by Konkaṇastha and Deśastha Paṇḍits. Much fuller information on the legal books, consulted by the Bombay Paṇḍits may be obtained from Dr. Bühler's Catalogues of MSS. from Gujarâth (fasc. III., p. 67 seq.) and Dr. Kielhorn's Catalogue of MSS. from the Southern Marâthâ Country. As regards the comparative estimation in which the books, contained in the Rao Saheb's list, are held, no information is given—an omission which makes it almost valueless for the purpose which it is intended to serve The fact that a good many other books besides those enumerated in the Digest are consulted, *i. e.*, occasionally referred to by Paṇḍits, proves nothing against the opinion advanced by the editors that the eight works, named above, are the standard authorities, nor do the Rao Saheb's remarks on the Mitâksharâ (p. lxxi.) disprove its preeminence, as far as questions of the Civil Law are concerned. His *dictum* that there is nothing remarkable about the book is controverted by the view of the responsible Court Śástris as pointed out in *Krishnáji Vyankatesh* v. *Pándurang*, 12 Bom. H. C. R. 65, and in *Lallubhái Bápubhái v Mánkuverbái*, I. L. R. 2 Bo. S., at pp. 418, 445, and of many excellent native authorities, as well as by the respectful treatment accorded to Vijñânayogin, in the best native compilations of the 16th and 17th centuries. His remark that the works of Kamalâkara, Mâdhava, Nârâyaṇa and other Bhaṭṭas are more frequently consulted than the Mitâksharâ is true. But the reason of this is that, under British rule, with its organized judiciary, Paṇḍits are consulted by the people not on civil law, but on vows, penances, ceremonies, and other matters of the religious law, on which subjects the books, named by him, give fuller information than the Mitâksharâ.

(*a*) *See* below.

work, this author gives fragmentary rules only, which neither exhaust their subject, nor are in every case easily intelligible. Vijñânesvara remedies the defects of his original, not only by full verbal interpretations, but also by adding long discussions on doubtful points, and by illustrating and developing Yâjñâvalkya's and his own doctrines by quotations from the Institutes of other Rishis. For he holds the opinion, which is also the generally received one among modern Hindû lawyers, that the Smritis or various Institutes of Law form one body, and are intended to supplement each other. (*a*) But this opinion occasionally misleads him, and causes him in some few cases to explain the text of Yâjñâvalkya in a manner inconsistent with the rules of sound interpretation. With these occasional exceptions, his expositions certainly merit the high repute in which they long have stood with the learned of the greater part of the Indian Peninsula. The

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(*a*) Vijnânesvara says in his commentary on Yâjñâvalkya I. 5, which contains an enumeration of certain authors of Smritis, (Mit. Âchârak, 1*b*. 15, Bâhûrâm's edition of Samvat 1869) :—

"The meaning (of this verse, I. 5,) is that the Institutes of Law composed by Yâjñavalkya ought to be studied. The enumeration (of authors of Smritis given in this verse) is not intended to be exhaustive, but merely to give examples. Therefore (this verse) does not exclude (the works of) Baudhâyana and others (who are not mentioned) from the Institutes of Law; as each of these (Smritis) possesses authority, the points left doubtful (by one) may be decided according to others. If one set of Institutes contradicts the other, then, there is an option."—See Manu II., 10, 14 ; XII. 105, 106 ; Vyav., May., ch. I , pl. 12 ; Col. V. Dig. sect 7, 424 ; Mit. in 1 Macn. H. L. 188. Muir's Sanskrit Texts II , 165 ; III., 179, ss., and as to the applications of the texts, *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. 390, and *Collector of Madura* v. *Mootoo Ramalinga Sâthapathy*, 12 M. I. A., at p. 438.

The Hindû commentators always endeavour, even at the cost of much straining, to extract consistent rules from texts which they regard as equally above human censure "comme d'après la méthode des légistes il faut que les textes aient raison lorsqu'ils ne présentent aucun sens." *See* Goldstücker "On the Deficiencies in the Administration of the Hindu Law," p. 2.

discussions and amplifications, added by Vijñâneśvara to his explanation of Yâjñâvalkya's text, make the Mitâksharâ rather a new and original work, based on Yâjñâvalkya than a mere gloss, and one more fit to serve as a code of law than the original. But extensive as the Mitâksharâ is, it does not provide for all the cases arising, and, if used alone, would often leave the lawyer without guidance for his decision.

Regarding the life and times of Vijñâneśvara little is known. Recent discoveries, however, make it possible to fix his date with greater certainty than could be done formerly. Mr. Colebrooke (*a*) placed Vijñâneśvara between 800—1300 A. D., because, on the one hand, he is said to have belonged to an order of ascetics founded by Śankarâchârya, who lived in the 8th century A. D., and because, on the other hand, Viśveśvara, the oldest commentator, flourished in the 14th century of the Christian era. He adds that if the Dhâreśvara, (*b*) 'the lord of Dhârâ,' quoted in the Mitâksharâ is the same as the famous Bhojarâja, king of Dhârâ, the remoter limit of Vijñâneśvara's age will be contracted by more than a century. In favour of Mr. Colebrooke's latter statement, Kamalâkara's testimony may be adduced, who in the Vivâdatâṇḍava (succession of a widow) ascribes the same opinion to Bhojarâja, which the Mitâksharâ attributes to Dhâreśvara (the lord of Dhârâ).

A much better means for settling the date of Vijñâneśvara is, however, furnished by some verses, which are found at the end of the Mitâksharâ in some of the oldest MSS. (*c*) and in the Bombay lithographed edition, and which were apparently not unknown to Mr. Colebrooke. (*d*)

(*a*) Stokes's Hindû Law Books, p. 178.

(*b*) *See, e. g.*, Col. Mit. II. 1., 8 (Stokes, p. 429).

(*c*) The MS. of the Govt. of Bombay, dated Śaka Saṁvat 1389, Dr. Bhâû Dâjî MS. and Ind. Off. No. 2170, dated Vikrama Saṁvat, 1835.

(*d*) Stokes, p. 178.

There we read verses 4 and 6 (*a*) :—

4. "There has not been, nor is nor will be on earth a city, comparable to Kalyâṇapura; no king has been seen or heard of, who is comparable to the illustrious Vikramânka; nothing else that exists in this kalpa bears comparison with the learned Vijñâneśvara. May these three who resemble (three) kalpa-creepers, be endowed with stability."

6. "Up to the bridge of famous (Râma), the best of the scions of Raghû's race, up to the lord of mountains, up to the western ocean, whose waves are raised by shoals of nimble fishes, and up to the eastern ocean, may the lord Vikramâditya protect this world, as long as moon and stars endure."

Vijñâneśvara lived, therefore, in a city called Kalyâṇapura, under a king named Vikramâditya or Vikramânka. As the learned Paṇḍit, by speaking of his opponents as 'the Northerners' shows (*b*) that he was an inhabitant of Southern India, it cannot be doubtful that the Kalyâṇapura named by him is the ancient town in the Nizâm's dominions, which from the 10th to the 14th century was the seat of the restored Châlukya dynasty. (*c*) This identification is supported by the consideration that Kalyâṇa in the Dekhan is the only town of that name, where princes, called Vikramâditya, are known to have ruled. One of these, Vikramâditya-Kalivikrama-Parmâḍirâya, bore also, according to the testimony of his chief Paṇḍit and panegyrist, Bilhaṇa, the not

(*a*) *See* Journ. Bo. Br. Roy. As. Soc. IX., pp. 134-138, and lxxiv.—lxxvi. The recovery of the Vikramânkadevacharita makes it probable that Vikramânkopamaḥ, not Vikramârkopamaḥ, is the correct reading in verse 4. The statement made at the end of the article, that the concluding verses belong not to Vijñâneśvara, but to some copyist, is no longer safe. Recent researches show that most if not all Sanskṛit authors appended to their works statements regarding their own private affairs, which frequently are not in harmony with our notions of modesty.

(*b*) See Journ. Bo. Br. As Soc. IX., p. lxxv.

(*c*) Regarding the Châlukya dynasty, *see* Sir W. Elliott, Journ. Bengal Br. As. Soc. IV., p. 4.

very common appellation, Vikramânka. (a) He appears to be the prince named as Vijñâneśvara's contemporary. His reign falls according to his inscriptions between the years 1076—1127 A.D. Hence it may be inferred that Vijñâneśvara wrote in the latter half of the eleventh century, a conclusion which agrees well enough with his quoting Bhoja of Dhârâ, who flourished in the first half of the same century. (b) It may be added that Vijñâneśvara certainly was an ascetic, because he receives the title paramahaṁsapârivrâjakâchârya. By sect he was a Vaishṇava. His father's name was Padmanâbha-bhaṭṭa and belonged to the Bhâradvâja gotra. The discovery that Vijñâneśvara was an inhabitant of Kalyâṇa in the Dekhan, and a contemporary, if not a protegé, of the most powerful king whom the restored Châlukya dynasty produced, explains why his book was adopted as the standard work in Western and Southern India, and even in the valley of the Ganges.

The explanation of the Mitâksharâ is facilitated by two Sanskrit commentaries, the above-mentioned Subodhinî of Viśveśvarabhaṭṭa and the Lakshmîvyâkhyâna, commonly called Bâlambhaṭṭaṭîkâ, the work of a lady, Lakshmîdevî, who took the *nom de plume* Bâlambhaṭṭa. (c) Viśveśvara's comment explains selected passages only, while Lakshmîdevî gives a full and continuous verbal interpretation of the Mitâksharâ accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yâjñavalkya.

Instances of this tendency may be seen in the quotations given below. Her opinions are held in comparatively small esteem, and are hardly ever brought forward by the Śâstris, if unsupported by other authorities.

(a) *See* Vikramânkadevacharita of Bilhaṇa, *passim.*

(b) *See* Indian Antiquary, VI., p. 50, seq.

(c) *See* Colebrooke Stokes's H. L., p. 177, Aufrecht, Catal. Oxf. MSS p. 262*a*; F. E. Hall Contribution *towards* Ind. Bibl., p. 175. The correct form of Lakshmîdevî's family name is *Pâyaguṇḍe.*

Two other works, the Vîramitrodaya and the Yâjñavalkya-dharmaśâstranibandha, a commentary on Yâjñavalkya, by Aparâdityadeva, or Aparârka, also give great assistance for the explanation of the Mitâksharâ. About the former more will be said below. As regards Aparârka's bulky work, it must be noted that Mr. Colebrooke recognised its importance, and frequently quoted it. (a) If his example has not been followed in the first edition of this work, the sole reason was that no MSS. were then procurable in Bombay. The Nibandha is now accessible in several copies, and has been used to elucidate several important points. Aparârka or Aparâdityadeva belonged to the Konkaṇa branch of the princely house of the Śilâras, or Śilâhâras, who had their seat at Purî, and held the Konkaṇa as well as the adjacent parts of the Dekhan as feudatories, first of the Râṭhors of Mânyakheṭa-Mâlkheṭ, and later of the Châlukyas of Kalyâṇa. He reigned and wrote between 1140—1186 A. D., shortly after Vijñâneśvara's times. (b) His doctrines closely resemble those of his illustrious predecessor; several passages of his work look like amplifications of Vijñânesvara's dicta, and are of great value for the correct interpretation of the Mitâksharâ. It is, however, difficult to say whether Aparârka in these cases actually used the Mitkṣharâ, or whether both drew from a common source.

Besides the native commentaries and Nibandhas, there is the excellent translation of the Mitâksharâ on Inheritance, by Colebrooke, (c) which has always been made use of in translating the authorities appended to the Vyavasthâs. In some places we have been compelled to dissent from Colebrooke;

(a) Stokes's Hindu Law Books, p. 177, and Translation of the Mit. on Inh., *passim*.

(b) *See* Journ. Bo. Br. As. Soc., Vol. XII. Report on Kaśmîr, p. 52.

(c) Two treatises on the Hindû Law of Inheritance, translated by H. T. Colebrooke, Calcutta, 1810, 4to. Reprinted in Wh. Stokes's Hindû Law Books, Madras, 1865, and by Girish Chandra Tarkalankar, Calcutta, 1870.

but we are persuaded that in nearly all these instances Colebrooke had different readings of the text before him. The first part of the Vyavahârakâṇḍa of the Mitkâsharâ has been translated by W. H. Macnaghten. The edition of the Sanskrit text of the Mitâksharâ used for the Digest is that issued by Bâbûrâm, Saṁvat 1869.

Vyavahâra-mayûkha.

4. The Vyavahâramayûkha is the sixth Mayûkha or 'ray' of the Bhagavanta-bhâskara, 'the sun,' composed (with the permission of, and dedicated to, king Bhagavantadeva,) by Nîlakaṇṭhabhaṭṭa. The Bhâskara, which consists of twelve 'rays' or divisions, forms an encyclopedia of the sacred law and ethics of the Hindûs. It contains:—

1. The Saṁskâramayûkha, on the sacraments.

2. The Âchâramayûkha, on the rule of conduct.

3. The Samayamayûkha, on times for festivals and religious rites.

4. The Śrâddhamayûkha, on funeral oblations.

5. The Nîtimayûkha, on polity.

6. The Vyavahâramayûkha, on Civil and Criminal Law.

7 The Dânamayûkha, on religious gifts.

8. The Utsargamayûkha, on the dedication of tanks, wells, &c.

9. The Pratishṭhâmayûkha, on the consecration of temples and idols.

10. The Prâyaśchittamayûkha, on penances.

11. The Śuddhimayûkha, on purification.

12. The Śântimayûkha, on averting evil omens.(a)

The Vyavahâramayûkha, which has the greatest interest

(a) *See* Borradaile in Stokes's H. L. B., p. 8. The correctness of the order in which the books are enumerated is proved by the introductory verses of each Mayûkha, where the immediately preceding one is always mentioned, as well as by the longer introduction to one of the MSS. of the Nîtimayûkha.

for the student of Hindû law, is, like all the other divisions of the Bhâskara, a compilation based on texts from ancient Smṛitis, and interspersed with explanations, both original and borrowed from other writers on law. It treats of legal procedure, of evidence, and of all the eighteen titles known to Hindû law, which, however, are arranged in a peculiar manner differing from the systems of other Paṇḍits. In his doctrines Nîlakhaṇṭha follows principally the Mitâksharâ and the Madanaratna of Madanasiṁhadeva(*a*), sometimes preferring the latter to the former. From a comparison of the portions on inheritance of the Mayûkha and Madanaratna, it would seem that Nîlakaṇṭha sometimes even borrowed opinions from Madana without acknowledgment. Some passages of the Mayûkha, *e.g.*, the discussion on the validity of certain adoptions, are abstracts of sections of the Dvaitanirṇaya, a work by Sankara, the father of Nîlakaṇṭha, and are not intelligible without the latter work. (*b*)

Of Nîlakaṇṭha's life and times some account has been given by Borradaile. (*c*) According to him, that Paṇḍit was of Deśastha-Mâhârâshṭra descent and born in Benares. He lived, as one of his descendants, Harabhaṭṭa Kâśîkar, told Captain Robertson, the Collector of Puṇa, upwards of two hundred years ago, *i.e.*, about 1600, sixteen generations having passed since his time. Other Puṇa Paṇḍits gave it as their opinion that Nîlakaṇṭha's works came into general use about the year 1700, or 125 years before Borradaile wrote. (*d*)

(*a*) This author compiled an encyclopedia, similar to that of Nîlakaṇṭha, the twelve Uddyotas The work, commonly called Madanaratna, bears also the title Vyavahâraddyota.

(*b*) Stokes's Hindu L. B , p. 58, seq.; May , chap. IV , sect. V., ss. 1—5.

(*c*) Stokes's H. L. B., p. 7, seq.

(*d*) The correctness of the information given to Borradaile is now attested by the paper of Professor Bâl Śástri, translated in the Introd to Rao Saheb V.N. Maṇḍlik's Vyavahâramayûkha, p. lxxv. For it appears that Nîlakaṇṭha was the grandson of Nârâyaṇabhaṭṭa, who wrote in Śaka Saṁvat 1459, or 1535 A. D

Borradaile adduces also the statement made at the end of some MSS. of the Vyavahâramayûkha, that Nîlakaṇṭha lived, whilst composing the Bhâskara, under the protection of Bhagavantadeva, or Yuddhaśûra, a Râjput chief of the Sangara tribe, who ruled over the town of Bharcha, near the confluence of the Chambal and of the Jamnâ. A possible doubt as to whether the passage containing these notes is genuine and its contents trustworthy, is removed by the fact that many copies of the Śrāddha, Saṁskāra and Nîtimayûkhas likewise contain the statement that Nîlakaṇṭha-bhaṭṭa, son of Sankara-bhaṭṭa, and grandson of Nârâyaṇasûri, was ordered by Bhagavantadeva, a king of the Sangara dynasty, to compose the Bhâskara. Some copies of the Nîtimayûkha and of the Vyavahâramayûkha enumerate also nineteen or twenty ancestors of Bhagavantadeva. (a) At the same time the author calls himself there Dâkshiṇâtyâvataṁsá 'of Dekhanî descent,' and thus confirms the report of the Puṇa Brahmins. The edition of the Sanskṛit text of the Vyavaharamayûkha used for the Digest is the oblong Bombay edition of 1826. The translation of the passages from the Mayûkha quoted in the Digest has been taken from Borradaile's translation. This work, though in general of great service, is frequently inaccurate. Some passages of the text have been misunderstood, and others are not clearly rendered. Where this occurs in the passages quoted, the correct translation has been added in a note. (b)

5. The Vîramitrodaya is a compilation by Mitramiśra, which consists of two kâṇḍas on Âchâra and on Vyavahâra. (c)

Vîramitrodaya.

(a) *See* Aufrecht, Oxf Cat., pp. 280-81 His list does not quite agree with that given in the 1st edition of the Digest. The text of the verses is so corrupt that it cannot be settled without a collation of fresh and more ancient copies.

(b) The translation of Rao Saheb V. N. Maṇḍlik, published in Bombay, 1880, is, though in some respects better than Borradaile's, not sufficiently accurate to warrant its adoption in the place of the old one.

(c) This would not be a matter of surprise if a third kâṇḍa on penances (prâyaśchitta) were found. But hitherto only two have become known.

The latter is written nearly in the same manner as the Mayûkha. But Mitramiśra adheres more closely to the Mitâksharâ than any other writer on law. He frequently quotes its very words; to which he adds further explanations and paraphrases. At the same time he enters on lengthy discussions regarding the opinions advocated by Jîmûtavâhana, Raghunandana, and the Smritichandriká. Occasionally he goes beyond or dissents from the doctrines of the Mitâksharâ. In the Vyavahârakâṇḍa (a) which has been published, Mitramiśra says that he was the son of Paraśurâma and grandson of Haṁsapaṇḍita, and that he composed his work by order of king Vîrasiṁha, who, according to the last stanza of the book, was the son of Madhukarasâha. The beginning of the unpublished âchârakâṇḍa gives a fuller account of the ancestors of Mitramiśra's patron, among whom, Medinîmalla, Arjuna, Malakhâna, Pratâparudra, and Madhukara are enumerated. Besides, it is stated that these kings were Bundelâs. (b) This last remark makes it possible to identify the author's patron.

Vîrasiṁha is nobody else but the well-known Bîrsinh Deo of Orchhâ, who murdered Abul Fazl, the minister of Akbar, and author of the Ayîn-Akbarî.(c) This chief, who was violently persecuted by Akbar for the assassination of his minister, was also a contemporary of Jehangîr and Shâh Jehân. The Vîramitrodaya, therefore, must have been written in the first half of the 17th century, or a little later than we had placed it according to internal evidence in the first edition of this work. The references in the Digest are to the quarto edition published by Chûḍâmani at Khidirapura, 1815. A careful translation of the part of the Vîramitrodaya relating to inheritance has been published,

(a) Vîramitrodaya, śloka 2.

(b) Vîramitrodaya, Ind. Off. No. 930, ślokas 1—37.

(c) *See* Gazetteer North-West Provinces, I., pp. 21-23, where Bîrsiṁh's pedigree, which exactly corresponds with Mitramiśra's genealogy of Vîrasiṁha, has been given.

accompanied by the text, by Mr. Golâpchandra Sarkâr Śâstrî, Calcutta, 1879.

Dattakamîmâṁsâ and Dattakachandrikâ.

6. The next two authorities, the Dattakamîmâṁsâ and Dattakachandrikâ, do not call for any remark here, as they have little importance for the law of inheritance. The discussion of them belongs to the law of adoption.

Nirṇayasindhu.

7. The Nirṇayasindhu of Kamalâkara, called also Nirṇayakamalâkara, consists of three parichhedas, or chapters. The first and second contain the kâlanirṇaya, *i.e.* the division of time, the days and seasons for religious rites, eclipses of the sun and moon, and their influence on ceremonies, &c. The third chapter is divided into three prakaraṇas or sections. The first of these treats of the sacraments or initiatory ceremonies, the second of funeral oblations, and the third of impurity, of the duties of Saṁnyâsîs and other miscellaneous topics of the sacred law. The book is a compilation of the opinions of ancient and modern astronomers, astrologers, and authors on sacred law, from whose works it gives copious quotations. The passages quoted are frequently illustrated by Kamalâkara's own comments, and occasionally lengthy discussions are added on points upon which his predecessors seem to him to have been at fault. Kamalâkara himself tells us that in the first and second chapters he chiefly followed Mâdhava's Kâlanirṇaya and the section of Hemâdri's work which treats of Times.(*a*) His learning is esteemed very highly in Western India, especially among the Marâṭhâs, and the Nirṇayasindhu is more relied upon in deciding questions about religious ceremonies and rites than any other book.

In the introductory and in the concluding ślokas of the Nirṇayasindhu, Kamalâkara informs us that he was the son of Râmakrishṇa, the grandson of Bhaṭṭa Nârâyaṇasûri, and the great grandson of Râmeśvara. He also names his mother Umâ, his sister Gaṇgâ, and his elder brother

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(*a*) Nirṇayasindhu I. 7.

Dinakara, the author of the Uddyotas. (*a*) His literary activity was very extensive. He wrote, also, the Vivâdatâṇḍava, a compendium of the civil and criminal law, based on the Mitâksharâ, a large digest of the sacred law, called Dharmatattva-Kamalâkara, divided into 10 sections : 1, vrata, on vows ; 2, dâna, on gifts ; 3, karmavipâka, on the results of virtue and sin in future births ; 4, śânti, on averting evil omens ; 5, pûrta, on pious works ; 6, âchâra, on the rule of conduct ; 7, vyavahâra, on legal proceedings ; 8, prâyaśchitta, on penances ; 9, śûdradharma, on the duties of Śûdras ; 10, tîrtha, on pilgrimages. The several parts are frequently found separate, and many are known by the titles śûdrakamalâkara, dânakamalâkara, &c. Kamalâkara, further, composed a large work on astronomy, the siddhântatattva, vivekasindhu and other treatises. (*b*) He himself gives his date at the end of the Nirṇayasindhu, where he says that the work was finished in Vikrama Saṁvat 1668 or 1611—12 A. D. The edition of the Nirṇayasindhu, used for the Digest, is that issued by Viṭṭhal Sakhârâm, Śaka 1779, at Puṇa.

Saṁskrakaustubha.

8. The Saṁskârakaustubha of Anantadeva, son of Âpadeva, or one of the numerous compilations treating of the sixteen sacraments and kindred matters. It is said to belong to the same time as the Nirṇayasindhu.

The author (*c*) compiled a good many other treatises on philosophical subjects, a Smṛitikaustubha and a Dattakaustubha on the law of adoption. (*d*) The edition referred to in

(*a*) Compare also Professor Bâl Śâstrî's paper in Rao Saheb Maṇḍlik's Vyavahâramayûkha, &c. pp. lxxv.—vi.

(*b*) *See* Râjendralâl Mitra, Bikaner Catalogue, pp. 499, 504.—Hall, Index of Indian Philosophical Systems, pp. 177, 183, where the date is, however, given wrongly. The latter is expressed by words : vasu (8), ṛitu (6), bhû (1), mite gatébde narapativikramato. The second figure has, as is frequently required in dates, to be read twice.

(*c*) The author's patron was a certain Râjâ Chaṇḍadeva Bahâdur, about whom nothing further is known.

(*d*) Compare F. E. Hall, l. c, p. 62, 145, 186, 190, 191, and particularly p. 185, Râjendralâl Mitra, Bikaner Catalogue, p. 466.

the Digest is the one printed at Bâpû Śadâśiv's Press, Bombay, 1862.

9. The Dharmasindhu or Dharmasindhusâra, by Kâśînâtha,(a) son of Anantadeva, is a very modern book of the same description as the Nirṇayasindhu. The author, according to the Paṇḍits, was a native of Paṇḍarpur, and died about forty or fifty years ago.

Dharmasindhu.

10. The word Smṛiti means literally 'recollection,' and is used to denote a work or the whole body of works, (b) in which the Ṛishis or sages of antiquity, to whose mental eyes the Vedas were revealed, set down *their recollections* regarding the performance of sacrifices, initiatory and daily rites, and the duty of man in general. The aphorisms on Vedic sacrifices (Śrautasûtras), the aphorisms on ceremonies for which the domestic fire is required (Gṛihyasûtras) and the works treating of the duties of men of the various castes and orders (Dharmasûtras, Dharmaśâstras,) are all included by the term Smṛiti. In the common parlance of our days, however, the term has a narrower meaning, and is restricted to the last class of works. Of these there exist, according to the current tradition, thirty-six, which are divided, at least by the Śástris of the present day, into Smṛitis and Upasmṛitis, or supplementary Smṛitis. Neither the limitation of the number, nor the division is, however, found in the older works on law, such as the Mitâkâsharâ and those books which contain it, do not always place the same works

Smṛitis.

(a) Prof. Goldstücker 'On the Deficiencies in the present Administration of Hindu Law,' App., p. 35, is mistaken in stating that the Editors of the Bombay Digest have invented the abbreviation 'Dharmasindhu.' Paṇḍits of the Marâṭhâ Country generally use this form, and the Law Officers quote the book under this title. The form Dharmasindhusâra finds just as little favour with the learned of Western India, as the full title of Vijñâneśvara's great commentary, Ṛijumithâksharâ, instead of which the abbreviation Mitâksharâ, alone, is current.

(b) Hence the word is sometimes used in the singular as a collective noun and sometimes in the plural.

in the same class.(*a*) According to Hindû views, the Smṛitis were mostly composed and proclaimed by the Ṛishis whose names they bear. But in some cases it is admitted that the final arrangement of these works is due to the pupils of the first composers.(*b*) The Hindûs are driven to this admission by the circumstance that some times the opening verses of the Dharmaśâstras contain conversations between the composer and other Ṛishis, stating the occasions on which the works were composed. In other cases the Smṛitis are considered to have originally proceeded from gods or divine beings, and to have descended from them to Ṛishis, who in their turn made them known among men. Thus the Vishṇu Smṛiti is ascribed to Vishṇu; and Nandapaṇḍita in his commentary suggests that it must have been heard by some Ṛishi who brought it into its present shape. Or, in the case of the Mânava Dharmaśâstra, it is asserted that Brahmâ taught its rules to Manu, who proclaimed them to mankind. But his work was first abridged by Nârada, and the composition of the latter was again recast, by Sumati, the son of Bhṛigu. (*c*) But, as even such Smṛitis were proclaimed by men, they partake of the *human* character, which the Mîmâṁsakas assign to this whole class of works, and the great distinction between them and the revealed texts, the Veda or Śruti remains.

Hindû tradition is here, as in most cases where it concerns literary history, almost valueless. Firstly, it is certain that more than thirty-six Smṛitis exist at the present time, and that formerly a still greater number existed. From the quotations and lists given in the Smṛitis, their commentaries,

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(*a*) Borradaile in Stokes's Hindû Law Books, p 4, seq.

(*b*) Mit. Âčhâra 1*a*, 13. "Some pupil of Yâjñavalkya abridged the Dharmaśâstra composed by Yâjñavalkya, which is in the form of questions and answers, and promulgated it, just as Bhṛigu, that proclaimed by Manu."

(*c*) *See* preface to Nârada, translated by Sir W. Jones, Institutes of Manu, p. xvi. (ed. Haughton).

the Purâṇas and the modern compilations on Dharma, as well as from the MSS. actually preserved, it appears that, counting the various redactions of each work, upwards of one hundred works of this description must have been in existence. Their names are: 1, Agni; 2*a*, Aṅgiras; 2*b*, Madhyama-Aṅg.; 2*c*, Bṛihat-Aṅg.· (two redactions in verse exist, which seem to be different from the treatises quoted); 3, Atri (two redactions exist); 4, Âtreya; 5*a*, Âpastamba (prose, exists); 5*b*, Ditto (verse, exists); 6, Âlekhana; 7, Âsmarathya; 8*a*, Âśvalâyana (verse, exists); 8*b*, Bṛihat-Â. (verse, exists); 9*a*, Uśanas (prose, fragment exists); 9*b*, Ditto (verse, exists); 10, Ṛishyaśṛiṅga; 11, Eka; 12, Audulomi; 13, Aupajandhani; 14, Kaṇva (verse, exists); 15, Kapila (verse, exists); 16, Kaśyapa (prose, exists); 17*a*, Kâṇva; 17*b*, Kâṇvâyana (prose, exists); 18 Kâtya; 19*a*, Kâtyâyana (verse); 19*b*, Ditto (karmapradîpa, exists); 19*c*, Vṛiddha Kâty (verse); 20, Kârshṇâjini; 21*a*, Kâśyapa; 21, Upa-Kâśyapa (prose, exists) (*a*); 22, Kuṭhumi; 23, Kuṇika; 24, Kutsa; 25, Krishṇâjini; 26, Kauṇḍinya; 27, Kautsa; 28, Gârgya; 29*a*, Gautama (prose, exists); 29*b*, Ditto (verse, exists); 29*c*, Vṛiddha Gaut; 30, Chidambara; 31, Chyavana; 32, Chhâgaleya; 33, Jamadagni; 34, Jâtukarṇya; 35, Jâbâli; (*b*) 36, Datta; 37*a*, Daksha (verse, exists); 37*b*, Ditto (quoted); 38, Dâlbhya (verse, exists); 39*a*, Devala (verse, exists); 39*b*, Ditto (quoted); 40, Dhaumya; 41, Nâchiketa; 42, Nârada (verse, vyavahâra-section exists); 43*a*, Parâśara (verse, exists); 43*b*, Bṛihat Par. (verse, exists); 44, Pâraskara; 45, Pitâmaha; 46*a*, Pulastya; 46*b*, Laghu Pul; 47, Pulaha; 48, Paiṭhînasi; 49, Paushkarasâdi or Pushkarasâdi; 50*a*, Prachetas; 50*b*, Laghu. Prach.; 51, Prajâpti (verse, exists); 52, Budha (prose, exists); 53*a*, Bṛihaspati (verse, part exists); 53*b*, Bṛihat Bṛihaspati; 54, Baudhâyana (prose, exists); 55, Bharadvâja (verse, exists); 56, Bhṛigu (said to exist); 57*a*,

(*a*) Burnell, Tanjor Cat., p. 124.
(*b*) Sometimes spelt Jâbâla.

Manu (prose, quoted); 57*b*, Ditto (verse, exists); 57*c*, Vṛiddha M.; 57*d*, Bṛihat M.; 58, Marîchi; 59, Mârkaṇḍeya; 60, Maudgalya; 61*a*, Yama; 61*b*, Laghu Y. (verse, exists); 62*a*, Yâjñavalkya (verse, exists); 62*b*, Vṛiddha Y.; 62*c*, Bṛihat Y. (exists); 63, Likhita (verse, exists); 64, Lohita (verse, exists); 65, Laugâkshi; 66, Vatsa; 67*a*, Vasishṭha (prose, exists); 67*b*, Ditto (verse, exists); 67*c*, Ditto (verse, exists); 67*d*, Vṛiddha V.; 67*e*, Bṛihat V.; 68, Vârshyâyaṇi; 69, Viśvâmitra (verse, exists); 70*a*, Vishṇu (prose, exists); 70*b*, Laghu V. (verse, exists); 71, Vyâghra; 72, Vyâghrapâda (verse, exists); 73*a*, Vyâsa; 73*b*, Laghu Vy. (verse, exists); 73*c*, Vṛiddha Vy.; (verse, exists); 74*a*, Śankha (prose); 74*b*, Ditto (verse, exists); 74*c*, Bṛihat or Vṛiddha Ś. (chiefly verse, exists); 75, Śaṅkha, and Likkita (verse, exists); 76, Śâkaṭâyana; 77, Śâkalya (verse, part exists); 78, Śâṅkhâyana (verse, part exists); 79, Śâtyâyana; 80, Śâṇḍilya (verse, exists); 81*a*, Śâtâtapa (verse, exists); 81*b*, Vṛiddha or Bṛihat Ś. (verse, exists); 82*a*, Śaunaka (prose); 82*b*, Ditto (kârikâ or bṛihat, verse, exists); 82*c*, Ditto Yajñâṅga (verse, exists); 83*a*, Saṁvarta (verse, exists); 83*b*, Laghu S.; 84, Satyavrata; 85, Sumantu; 86, Soma; 87*a*, Hârîta (prose); 87*b*, Bṛihat H. (verse, exists); 87*c*, Laghu H. (verse, exists); 88*a*, Hiraṇyakeśin (prose, exists). (*a*)

Even this list most likely does not comprise all the ancient works on Dharma, and a more protracted search for

(*a*) All those Smṛitis, to which the word 'exists' has been added, have been actually procured. The remainder of the list is made up from the authorities quoted in Wh. Stokes's Hindu Law Books, p. 5, note (*a*) in the Âpastamba, Baudhâyana, Vasishṭha Dharmasûtras, in the Mâdhava Parâśara and other modern compilations. Owing to the looseness of the Hindû Pandits in quoting, it is not always certain if the redactions, called Vṛiddha (old) and Bṛihat (great) had a separate existence. In some cases the same book is certainly designated by both. Collections of Smṛitis, and extracts from them, such as the Chaturviṁśati, Shaṭtriṁśat, Kokila and Saptarshi Smṛitis have been intentionally excluded from the above list.

MSS., and a more accurate investigation of the modern compilations, will, no doubt, enlarge it considerably.

As regards the value of the Hindû tradition about the origin and history of the Smṛitis, the general assertion that these works belong to the same class of writings as the Śrauta and Gṛihyasûtras, and that in many instances they have been composed by persons who were authors of such Sûtras, is in the main correct. But the tradition is utterly untrustworthy in the details regarding the names and times of the authors, and the immediate causes of their composition, and it neglects to distinguish between the various classes, into which the Smṛitis must be divided.

It is, of course, impossible for the critic to agree with the Hindû in considering Vishṇu or any other deity of the Brahmanic Olympus, or Manu, the father of mankind, as authors of Dharmaśâstras. But it is, in most cases, also highly improbable that the Ṛishis, who may be considered historical personages, composed the Smṛitis which bear their names. For, to take only one argument, it is not to be believed, that, for instance, Vasishṭha and Viśvâmitra, the great rival priests at the court of King Sudâs, or Bharadvâja or Samvarta, are the authors of the hymns preserved in the Ṛigveda under their names, and of the Smṛitis called after them, as the language of the former differs from that of the latter more considerably than the English of the fifteenth century from that of the present day. Much less can it be credited that Aṅgiras or Atri, who, in the Ṛigveda, are half mythic personages, and spoken of as the sages of long past times, proclaimed the treatises on law bearing their names, the language of which obeys the laws laid down in Pâṇini's grammar. Nor can we, with the Hindûs, place some of the Smṛitis in the Satyayuga, others in the Tretâ, others in the Dvâpâra, and again others in the Kali age.(*a*) The untrustworthiness of the Hindû tradition has also been always recognised by European scholars, and, in discussing the age and

(*a*) This division is found in Parâśara Dharmaśâstra I., 12.

history of the Smṛitis they have started from altogether different data. In the case of the Mânava and of the Yâjña-valkya Dharmaśâstras, Sir W. Jones, Lassen, and others have attempted to fix their ages by means of circumstantial, and still more, of internal evidence, and the former work has been declared to belong perhaps to the ninth century, B.C. (*a*) or, at all events, to the pre-Buddhistic times, whilst the latter is assigned to the period between Buddha and Vikramâditya.(*b*) But the bases on which their calculations and hypotheses are grounded are too slender to afford trustworthy results, and it would seem that we can hardly be justified in following the method adopted by them. The ancient history of India is enveloped in so deep a darkness, and the indications that the Smṛitis have frequently been remodelled and altered, are so numerous, that it is impossible to deduce the time of their composition from internal or even circumstantial evidence.(*c*)

(*a*) Sir W. Jones, Manu, p xi.

(*b*) Lassen, Ind. Alt II., 310

(*c*) A statement of the case of the Mânava Dharmaśâstra will suffice to prove this assertion. Tradition tells us that there were three redactions of Manu,—one by Manu, a second by Nârada, and a third by Sumati, the son of Bhṛigu, and it is intimated that the Dharmaśâstra, proclaimed by Bhṛigu, and in our possession, is the latter redaction Now this latter statement must be incorrect, as the Sumati's Śâstra contained 4,000 ślokas, whilst ours contains only 2,885. Sir W. Jones, therefore thought that, as we find quotations from a vṛiddha or "old" Manu, the latter might be a redaction of Bhṛigu, a conjecture for which it would be difficult to bring forward safe arguments Besides the Vṛiddha Manu, we find a Brihat-Manu, "great Manu," quoted. Further, Manu VIII., 140, quotes Vasishṭha on a question regarding lawful interest, and this rule is actually found in the Vâsishṭha Dharmaśâstra, (last verse of chapter II). But nevertheless the Vâsishṭha Dharmaśâstra quotes four verses from Manu (mânavân ślokân), two of which are found in our Mânavadharmaśâstra, whilst one is written in a metre which never occurs in our Saṁhitâ. Besides, the Mahâbhârata and Varâhamihira, who lived in the sixth century, A. D., quote verses from Manu which are only found in part in our Dharmaśâstra. *See* Stenzler in the Indische Studien I., p. 245, and Kern Bṛihatsaṁhitâ, preface, p. 43.

Of late, another attempt to fix the age of the Dharmaśâstras, at least approximately, and to trace their origin, has been made, by Professor M. Müller. According to him, the Dharmaśâstras formed originally part of those bodies of Sûtras or aphorisms in which the sacrificial rites and the whole duty of the twice-born men is taught, and which were committed to memory in the Brahminical schools. As he is of opinion that all the Sûtras were composed in the period from 600—200 B. C, he, of course, assigns Dharmaśâstras in Sûtras or Dharmasûtras to the same age, though he states his belief that they belong to the latest productions of the period during which the aphoristic style prevailed in India. (*a*) He moreover considers the Dharmaśâstras in verse to be mere modern versifications of ancient Dharmasûtras. Thus he takes the Mânava Dharmaśâstra not to be the work of Manu, but a metrical redaction of the Dharmasûtra of the Mânavas, a Brahminical school studying a peculiar branch or Śâkhâ of the Black Yajurveda This view of the origin of the Smṛiti literature was suggested chiefly by the recovery of one of the old Dharmasûtras, that of Âpastamba, who was the founder of a school studying the Black Yajurveda, and author, also, of a set of Śrauta and Gṛihyasûtras.

The results of our inquiries in the main agree with those of Professor Müller, and we hope that the facts which, through the collection of a large number of Smṛitis, have come to light, will still more fully confirm his discovery, which is of the highest importance, not only for the Sanskṛit student, but also for the lawyer and for the Hindû of our day, who wishes to free himself from the fetters of the âchâra.

We also divide the Smṛitis into two principal classes, the Sûtras and the metrical books. In the first class we distin-

(*a*) *See* M. Müller's Hist. of Anc. Skt. Lit., pp. 61, 132, 199, 206—208, and his letter printed in Morley's Digest and Sacred Books, vol II., p. lx. That Sûtras, especially the Gṛihyasûtras, were the sources of the Smṛitis, was also stated by Professors Stenzler and Weber in the first volume of the Indische Studien.

guish between those Dharmasûtras which still form part of the body of Sûtras studied by a Charaṇa or Brahminical school, those which have become isolated by the extinction of the school and the loss of its other writings, those which have been recast by a second hand, and finally those which appear to be extracts from or fragments of larger works.

The second class, the poetical Dharmaśâstras, may be divided into—

1. Metrical redactions of Dharmasûtras and fragments of such redactions.
2. Secondary redactions of metrical Dharmaśâstras.
3. Metrical versions of Gṛihyasûtras.
4. Forgeries of the Hindû sectarians.

As regards the Dharmasûtras, it will be necessary to point out some of the most important facts connected with the history of the ancient civilization of India, in order to make the position of these works in Indian literature more intelligible. The literary and intellectual life of India began, and was, for a long time, centred in the Brahminical schools or Charaṇas. It was from the earliest times the sacred duty of every young man who belonged to the twice-born classes, whether Brahman, Kshatriya, or Vaiśya, to study for a longer or shorter period under the guidance of an âchârya, the sacred texts of his Śâkhâ or version of the Veda. The pupil had first to learn the sacred texts by heart, and next he had to master their meaning. For this latter purpose he was instructed in the auxiliary sciences, the so called Angas of the Veda, phonetics, grammar, etymology, astronomy, and astrology, the performance of the sacrifices, and the duties of life, the Dharma.

In order to fulfil the duty of Vidyâdhyayana, studying the Veda, the young Aryans gathered around teachers who were famous for their skill in reciting the sacred texts, and for their learning in explaining them; and regular schools were established, in which the sacred lore was handed down from

one generation of pupils and teachers to the other. We still possess long lists which give the names of those âchâryas who successively taught particular books. These schools divided and subdivided when the pupils disagreed on some point or other, until their number swelled, in the course of time, to an almost incredible extent. If we believe the Charaṇavyûha, which gives a list of those schools or Charaṇas, the Brahmans who studied the Sâmaveda were divided into not less than a thousand such sections.

The establishment of these schools, of course, necessitated the invention of a method of instruction and the production of manuals for the various branches of science. For this purpose the teachers composed Sûtras, or strings of rules, which gave the essence of their teaching. In the older times these Sûtras seem to have been more diffuse, and more loosely constructed than most of those works are, which we now possess. Most of the Sûtras, known to us, are of a highly artificial structure. Few rules only are complete in themselves; most of them consist of a few words only, and must be supplemented by others, whilst certain general rules have to be kept constantly in mind for whole chapters or topics. The Sûtras are, however, mostly interspersed with verses in the Anushṭubh and Trishṭubh metres, which partly recapitulate the essence of the rules, or are intended as authorities for the opinions advanced in the Sûtras.

Each of the Charaṇas seems to have possessed a set of such Sûtras. They, originally, probably, embraced all the Aṅgas of the Veda, and we still can prove that they certainly taught phonetics, the performance of sacrifices, and the Dharma or duties of life. We possess still a few Prâtiśâkhyas, which treat of phonetics, a not inconsiderable number of Śrauta and Gṛihyasûtras, and a smaller collection of Dharmasûtras. Three amongst the latter, the Sûtras of Âpastamba, of Satyashâḍha Hiraṇyakeśin, and of Baudhâyana, still form part of the body of Sûtras of their respective schools.

In the cases of the Âpastamba- and Hiraṇyakeśi-Sûtras, the connection of the portion on Dharma with those referring to the Śrauta and Gṛihya sacrifices appears most clearly. The whole of the Sûtras of the former school are divided into thirty Praśnas or sections, among which the twenty-eighth and twenty-ninth are devoted to Dharma.(*a*) In the case of the Hiraṇyakeśi-Sûtras, the twenty-sixth and twenty-seventh of its thirty-five Praśnas contain the rules on Dharma. As no complete collection of the Sûtras of the Baudhâyana school is as yet accessible, it is impossible to determine the exact position of its Dharmasûtra.(*b*) All these three books belong to schools which study the Black Yajurveda. The first and second agree nearly word for word with each other. Among the remaining Dharmasûtras, those of Gautama and Vasishṭha stand alone, being apparently unconnected with any Vedic school. But, in the case of the Gautama Dharmasûtra we have the assertion of Govindasvâmin, the commentator of Baudhâyana, that the work was originally studied by the Chhandogas or followers of the Sâmaveda. Moreover, its connection with that Veda has been fully established by internal evidence, and it is highly probable that, among the adherents of the Sâmaveda, one or perhaps several schools of Gautamas existed, which also possessed Śrautasûtras. The obvious inference is that our Gautama Dharmasûtra formed part of the Kalpa of one of these sections of Sâmavedîs.(*c*) In the case of the Vasishṭha Dharmasûtra it is clear from the passage of Govindasvâmin, referred to above, that it originally

(*a*) Compare Burnell Indian Antiquary I, 5-6; Sacred Books of the East, vol. II., pp. XI.—XV.

(*b*) The Baudhâyana Dharmasûtra seems to have suffered by the disconnection of the whole body of the Kalpas of that school, and has been considerably enlarged by later hands. *See* Sacred Books, vol. XIV., Introd. to Baudhâyana.

(*c*) For the details of the arguments which bear on this question, *see* Sacred Books of the East II., XLI.—IX.

belonged to a school of Ṛigvedîs.(a) Though it has not yet been possible to determine the name of the latter with certainty, it is not improbable that it may have been called after the ancient sage, Vasishṭha, who plays so important a part in the Ṛigveda. It is, however, hardly doubtful that a considerable portion of our Vasishṭha Dharmasûtra has been recast or restored after an accidental mutilation of the ancient MSS.(b) while Gautama has probably suffered very little. (c)

As regards another Dharmasûtra, the so-called Vishṇu-smṛiti, which formerly was considered to be a modern recension of a Vishṇusûtra, further investigations have shown that it is a somewhat modified version of the Dharmasûtra of the Kâṭha school of the Yajurveda. The first information on this point was furnished by a Puṇa Paṇḍit, Mr. Dâtâr, whose opinion was subsequently confirmed by the statements of several learned Śâstrîs at Benares.(d) The recovery of the Kâṭhaka Grihyasûtra in Kaśmîr, and a careful comparison of its rules with those of the Vishṇusmṛiti, as well as of the mantras or sacred formulas prescribed in the Smṛiti, with the text of the Kâṭhaka recension of the Yajurveda, and with those given by Devapâla, the commentator of the Gṛihya-sûtra, leave no doubt as to the correctness of the tradition preserved by the Paṇḍits.(e) It is now certain that the Vishṇusmṛiti on the whole faithfully represents the teaching of the Kâṭha school on dharma, the sacred law. The portions which have been added by the later editor, who wished to enhance the authoritativeness of the work by vindicating

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(a) Sacred Books, II., XLIX. The older theory that the work belonged to the Sâmaveda is, of course, erroneous.

(b) Sacred Books, XIV. Introduction to Dr Bühler's translation of the Vasishṭha Dharmaśâstra.

(c) Sacred Books, II., LIV

(d) Journ. Bo. Br. Roy. As. Soc. XII, p. 36 (Supplement, Report on Kaśmîr).

(e) *See* Jolly, Das Dharmasûtra des Vishṇu und das Kâṭhaka-gṛihyasûtra, and Sacred Books VII, X.—XIII.

Nirukta, who belongs to a much remoter age than Patanjali, quotes a number of rules on the civil law in the Sûtra style, it may be inferred that Dharmasûtras existed in his time too. (*a*) But, of course, this does not prove anything for the age of the particular Dharmasûtras which have come down to us. Regarding them we learn from the Brahminical tradition which in this case is confirmed by other evidence, (*b*) that among the three Sûtras connected with the Taittirîya Veda, Baudhâyana is older than Âpastamba and Hiraṇyakeśin Satyâshâḍha. Among the latter two Âpastamba is the older writer, as is shown by the modern tradition of the Paṇḍits, and by the fact that the Hiraṇyakeśi-Dharmasûtra, which agrees almost literally with Âpastamba's work, is clearly a recast of the latter. Further, the quotations from Gautama and the unacknowledged appropriation of several lengthy passages of Gautama. which occur in the Sûtras of Baudhâyana and Vasishṭha, show that Gautama is older than both, and, in fact, the oldest Dharmasûtra which we possess. (*c*) As regards the absolute determination of the age of the existing Sûtras, the school of Âpastamba, or, Âpastambha, as the name is also spelt, is mentioned in inscriptions which may be placed in the fourth century A. D. (*d*) The Âpastambasûtras on sacrifices, together with a commentary, are quoted in Bhartṛihari's gloss on the Mahâbhâshya, which, as Professor Max Müller has discovered, was composed in the seventh century A. D. (*e*) The oldest quotations from the Âpastamba Dharmasûtra occur in the Mitâksharâ, the date of which has been shown to be the end of the eleventh century A. D. From internal evidence it would, however, appear that the Âpastamba Dharmasûtra

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(*a*) Yâska, Nirukta I., 3.

(*b*) Sacred Books II., XXII.—XXIV.

(*c*) Sacred Books II., XLIX.—LIV.

(*d*) Sacred Books II., XXXIII.

(*e*) MS. Chambers, 553, fol. 10*b*. (Berlin Collection).

cannot be younger than the fifth century B. C. (*a*) If that is so, the works of Baudhâyana and Gautama must possess a much higher antiquity. It is of some interest for the practical lawyer to know that four of the existing Dharmasûtras, those of Gautama, Baudhâyana, Âpastamba and Hiraṇyakeśin, have been composed in the South of India, while the fifth, Vasishṭha, probably belongs to the North.

The original of the remodelled Kâṭhaka Dharmasûtra or Vishṇu Smṛiti was probably composed in the Panjâb, the original seat of the ancient Kaṭha school, and, no doubt, dates from very remote times. (*b*) The existing recension, the Vishṇu Smṛiti cannot be older than the third century A. D. For in chapter 78, 1–7, the week days are enumerated, and the Thursday is called *Jaiva*, *i. e.*, the day of Jîva. Jîva is the usual Sanskṛit corruption of the Greek Ζεύς, or rather of its modern pronunciation Ζεύς (Zevs). Whatever the origin of the Indian week may be, there can be no doubt that a Sanskṛit work which gives a Greek name for a week-day cannot be older than the time when these names came into use in Greece. (*c*)

Among those Smṛitis which are quoted, but no longer preserved entire, there were probably many Dharmasûtras. In most cases, however, especially in those where the quotations occur in the old Dharmasûtras, it is difficult to decide, if the opinions attributed to the ancient authors, are given in their own words, or, if the quotations merely summarise their views. But, in a few instances, it is possible to assert with some confidence that the works quoted really were Dharmasûtras and written in aphoristic prose, mixed with verses. This seems certain for that Mânava Dharmaśâstra, which Vasishṭha repeatedly quotes, for the work of Hârîta, which Âpastamba, Baudhâyana and Vasishṭha cite, and for the Śaṅkha Smṛiti

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(*a*) Sacred Books VII., XIV.—XV.

(*b*) Sacred Books VII., XIV.—XV.

(*c*) Sacred Books VII., XXIX. XXXII.

to which the medieval compilators frequently refer. About Manu more will be said below. As regards Hârîta there is a long passage in prose, attributed to him by Baudhâyana and by Âpastamba (*a*) which looks like a verbal quotation, while Vasishṭha II., 6, quotes a verse of his. It has long been known that Hârîta was a teacher of one of the schools connected with the Black Yajurveda. A quotation from his Dharma-sûtra, given by the Benares commentator of Vasishṭha (XXIV., 6), indicates that the particular school to which he belonged was that of the Maitrâyaṇîyas.

As regards the third work, the Dharmaśâstra of Śaṅkha, our knowledge of its character is not derived from quotations alone. We still possess a work which is partly an extract from and partly a versification of the old Smṛiti. Among the now current Smṛitis, there is Bṛihat Śaṅkha, or, as it is called in some MSS., a Vṛiddha Śaṅkha, consisting of eighteen chapters, which treat of the rule of conduct (âchâra) and penances (prâyaśchiṭṭa). The whole work is written in verse, with the exception of two chapters, the twelfth and thirteenth, where prose and verse are mixed. A comparison of the passages from the Śaṅkha Smṛiti, quoted by Vijñâneśvara in the Prâyaśchittakâṇḍa of the Mitâksharâ, with the corresponding chapters of the existing Bṛihat Śaṅkha, shows that the latter contains nearly all the verses of the work which Vijñâneśvara had before him, while the Sûtras have either been left out, or in a few instances, have been changed into verses.(*b*) As at the same time our Bṛihat Śaṅkha does not contain anything on civil law which, according to the quotations in the Mitâksharâ and other works, was treated of in the old Śankha Smṛiti, it appears that the existing work is not even a complete extract. But, nevertheless, it possesses

(*a*) Âpastamba I., 10, 29, 13-14.

(*b*) The verses identified are Vijñâneśvara on Yâjñ. III. 260 = B. Ś. XVII. 1*b*—3*b*; on Yâjñ III. 293 = B. Ś. XVII. 46*b*—47*a*, 48*b*—49*a* and 50*b*—51*a*; on Yâjñ. III. 294 = B. Ś. XVII. 43*a*, 37*b*, 38*a*, 39*a*; on Yâjñ. III. 309 = B. Ś. XII. 7—9.

great interest, as it clearly shows how the metrical law-books arose out of the Sûtras. In the classification of the Smṛitis, a place intermediate between the Dharmasûtras and the metrical Smṛitis must be assigned to the Bṛihat Śaṅkha.

In the first division of the second class of Smṛitis to which the metrical versions of Dharmasûtras have been assigned, we may place the works, now attributed to Manu and to Yâjñavalkya, and perhaps those of Parâśara and Saṁvarta as well as the fragments of Nârada and Bṛihaspati. The first two among these works begin, like many other metrical Smṛitis, with an introduction in which the origin of the work is described, and its composition or rather revelation is said to have been caused by the solicitations of an assembly of Ṛishis. In the case of the Manu Smṛiti this exordium has been excessively lengthened by the introduction of philosophical matter, and has been so much expanded that it forms a chapter of 119 verses. Moreover, the fiction that the book is being recited, is kept up by the insertion of verses in the middle of the work, in which the conversation between the reciter and the sages is again taken up, while in the Yâjñavalkya Smṛiti the Ṛishis in the last verses are made to praise the rules promulgated by the Yogin. This kind of introduction which the metrical Smṛitis have in common with the Purâṇas, Mâhâtmyas, the sectarian Upanishads and the forged astronomical Siddhântas, though based on the ancient custom of reciting literary productions at the festive assemblies of the Paṇḍits, the Sabhâs of our days may be considered as a sign of comparatively recent composition. For most of the works, in which it occurs, have been proved to be of modern origin, or to have been remodelled in modern times.

Another reason to show that the metrical Dharmaśâstras are of modern date has been brought forward by Professor Max Müller.(a) He contends that the use of the Indian

(a) Hist. Anc. Lit., p. 68.

heroic metre, the Anushṭubh śloka, in which they are written, belongs to the age which followed the latest times of the Vedic age, the Sûtra period. Professor Goldstücker has since shown(*a*) that works written throughout in ślokas, existed at a much earlier period than Professor Müller supposed; in fact long before the year 200 B. C., which Professor Müller gives as the end of the Sûtra period. Still it would seem that we may avail ourselves of Professor Müller's arguments in order to prove the late origin of the metrical Smṛitis. For, though the composition of works in ślokas and of Sûtras may have gone on at the same time, nevertheless, it appears that in almost every branch of Hindû science where we find text books, both in prose and in verse, one or several of the former class are the oldest. If we take, for instance, the case of grammar, the Saṁgraha of Vyâḍi, which consisted of one hundred thousand ślokas, is certainly older than the Sûtras of Vopadeva, Malayagiri and Hemachandra, authors who flourished in the twelfth century A. D. But we know that in its turn it was preceded by the works of Śâkaṭâyana, Pâṇini and others who composed Sûtras. In like manner the numerous Kârikâs on philosophy are younger than the Sûtras of the schools to which they belong, just as the Saṁgrahas, Pradîpas and Pariśishṭas are mostly of more recent date than the Sûtras on Śrauta and Gṛihya sacrifices, which they illustrate and supplement. For all we know, the Gṛihyasaṁgraha of Gobhilaputra, or the Karmapradîpa of Kâdyâyana may be older than the Gṛihyasûtras of Pâraskara or Âśvalâyana, but both are of later date than the Gṛihyasûtra of Gobhila which they explain, and the Pradîpa is younger than the writings of Vasishṭha, the founder of the Vasishṭha school of Sâmavedîs, whose Śrâddhakalpa it quotes. In short, we never find a metrical book at the head of a series of scientific works, but always a Sûtra, though, at the same time, the introduction of metrical hand-

(*a*) Mânavakalpasûtra, p. 78.

books did not put a stop to the composition of Sûtras. (a) If we apply these results to the Smiṛtis, it would seem probable that Dharmaśâstras, like those ascribed to Manu and Yâjñavalkya, are younger than the Sûtras of the schools to which they belong, though, in their turn, they might be older than the Sûtra works of other schools.

The opinion that the metrical Smṛitis are versifications of older Sûtra may be supported by some other general reasons. Firstly, if we take off the above-mentioned introductions, the contents of the metrical Dharmaśâstras, entirely agree with those of the Dharmasûtras, while the arrangement of the subject-matter differs only slightly, not more than the Dharmasûtras differ among themselves. Secondly, the language of the metrical Dharmaśâstras and of the Sûtras is nearly the same. Both show archaic forms and in many instances the same irregularities. Thirdly, the metrical Smṛitis contain many of the ślokas or gâthâs given in the Dharmasûtras, and some in a modified more modern form. Instances of the former kind are very numerous. A comparison of the gâthâs from Vasishṭha, Baudhâyana and Âpastamba with the Manu Smṛiti shows that a considerable number of the former has been incorporated in the latter. As an instance of the modernisation of the form of ancient verses in the metrical Dharmaśâstras, we may point out the passage in Manu II., 114–115, containing the advice given by Vidyâ, the personification of sacred learning, to a Brahman regarding the choice of his pupils, which is clearly an adaptation of the Trishṭubh verses, found in Nirukta II., 4, Vasishṭha II., 8–9, and Vishṇu XXIX., 10. Another case where Manu has changed Trishṭubh verses into Anushṭubhs occurs II., 144, where the substance of Vasishṭha II., 10, has been given. Finally, the fact that several peculiarities of the Sûtra style are, also, found in the metrical Smṛitis, affords a strong presumption that the latter draw

(a) The most modern Sûtra of which I know, is a grammar of the Kaśmîrian language in Sanskṛit aphorisms, which in 1875 was not quite finished.—*G. B.*

their origin from the former. As the great object of Sûtra writers was shortness, in order that the pupils in their schools might, by learning as few words as possible, be able to remember the more explicit teaching of the masters, they invented a peculiar and very intricate system for arranging their subjects, according to which certain fundamental rules have constantly to be kept in mind, and, certain important words given once in the main rule, have to be understood with a long string of succeeding ones. Besides, they use certain words, especially particles, in a peculiarly pregnant sense, which is unknown in the common language. All these peculiarities occur in the metrical Smṛitis also. Every body who has read Manu in Sir W. Jones's translation, will know how frequently the text is expanded by the addition of words, printed in italics, without which it would be either unintelligible or self-contradictory. Students of the Mitâksharâ, moreover, will remember how considerable the additions are which Vijñâneśvara is obliged to make in order to render Yâjñavalkya's rules intelligible. This cramped and crabbed style of the metrical Smṛitis finds an easy explanation if their derivation from the Sûtras is admitted. Without such a supposition it is difficult to account for the fact. As regards the peculiar meanings in which particles are used, it will be sufficient to point out that the particle cha 'and,' as well as chaiva 'likewise,' in the Yâjñavalkya Smṛiti repeatedly are intended to include something that is known from other sources, but not specially mentioned in the text. Thus Yâjñavalkya II., 135, the particles chaiva 'likewise' which follow in the enumeration of heirs to a separated male deceased without leaving sons, indicate, according to the very plausible explanation of the Mitâksharâ, that the daughter's son must be inserted after the daughter. (*a*) Similar eccentricities of language occur frequently in the Sûtras where 'the saving of

(*a*) Stokes's Hindú Law Books, p. 441. For similar cases, *see* the Sanskṛit text of the Mitâksharâ, 16; 12; 26 a 1 and *passim*.

half a short vowel is considered as joyful an event as the birth of a son.' If they are found in the metrical Smṛitis, too, the probable reason is that they are remnants of the style of the works on which the metrical Smṛitis are based.

If we turn from these general considerations to the particular books, placed in the first class of metrical Smṛitis, we find that several facts, connected with the Dharmaśâstras, attributed to Manu and Yâjñavalkya, further corroborate the views expressed above. As regards Manu, Professor Max Müller (*a*) conjectured as long ago as 1849 that the existing Smṛiti, attributed to the son of Brahman Svayambhû, was a modern redaction of a lost Dharmasûtra, belonging to the Mânava school, a subdivision of the Maitrâyaṇîyas, (*b*) who study a peculiar version of the Yajurveda. One portion of this conjecture has been fully confirmed. Owing to the discovery of trustworthy MSS. of the Vasishṭha Dharmasûtra, it is now possible to assert with confidence that Vasishṭha IV., 5—8, quotes a *Mânavam, i e.* a work proclaimed by Manu, which was written, like most of the Dharmasûtras, partly in prose and partly in verse. In the note of the translation on the above passage (*c*) it has been pointed out that Vasishṭha gives two Sûtras (5 and 8) and two verses (6—7) taken from a Mânava Dharmasûtra. At the end of the first Sûtra the unmistakeable words *iti* mânavam, 'thus (says) the mânava' are added. The first of the following verses (6), which is marked as a quotation by the addition of the word *iti*, 'thus,' is found entire in the existing Manu Smṛiti. The second (7) has been altered so as to agree with the ahiṁsâ doctrine which forbids the slaughter of animals under any circumstances, while the verse, quoted by Vasishṭha, declares 'the slaughter of animals at sacrifices not to be slaughter' (in the ordi-

(*a*) Letter to Mr. Morley, Sacred Books II, p. IX.

(*b*) *See* L. von Schroeder's edition of the Maitrâyaṇî Saṁhitâ.

(*c*) Sacred Books XIV., p. 26.

nary sense of the word). This discovery furnishes a firm basis for Professor Müller's opinion that the existing Manu Smṛiti is based on a Dharmasûtra, and makes it a good deal more than an ingenious speculation. The other half of his proposition that the Mânava Dharmasûtra on which the metrical Smṛiti is based, originally belonged to the school of the Mânavas, can, as yet, not be proved with equal certainty. For, though the Śrautasûtra and the Gṛihya-śûtra of the Mânavas have been recovered, and though these works are distinctly ascribed by the tradition of the school to a human teacher, called Manu or Mânava, (*a*) the Dharma-sûtra has not yet been recovered, and no clear proof has been furnished that the teaching of the Manu Smṛiti regarding the ritual closely agrees with that of the Sûtras of the Mânava school. Nevertheless, Professor Muller's suggestion seems very probable. On the question when the Mânava Dharmasûtra was turned into a metrical Smṛiti very little can be said. From the times of Medhâtithi, the oldest commentator known to us, who certainly cannot have lived later than in the 9th century, A. D., the text has not undergone any great change. But the earliest quotation from a metrical Manusmṛiti which occurs in the Bṛihatsaṁhitâ of Varâhamihira (died 580, A. D.) differs very considerably from the text known to us. (*b*) It would, however, be dangerous to infer from this fact that the existing metrical law book dated from a later time than Varâhimira, because, firstly, several metrical works ascribed to Manu Svâyambhuva or to his pupils seem to have existed, and, because inscriptions of the 4th century A. D., when speaking of the Smṛitis, invariably place Manu first, (*c*)

(*a*) Both forms occur in the commentary on the Gṛihyasûtra, which probably belongs, like that of the Śrautasûtra, to the ancient Mîmâṁsaka, Kumârila.

(*b*) Kern, Bṛihatsaṁhitâ, p. 43.

(*c*) *See, e.g.*, the description of Mahârâja Droṇasiṁha on the plates of Dhruvasena I. of Valabhî, dated 207 and 216; Indian Antiquary IV. 106, V. 205.

and thereby indicate the existence of a law book which possessed greater or more general authoritativeness than would belong to a simple school book studied and reverenced by the title Mânava Charaṇa alone.

In the case of the Yâjñavalkya Smṛiti, it is possible to determine with perfect exactness the Vedic school to which its original belonged. But, hitherto, no trace of the actual existence of the Dharmasûtra has been found. As regards the former point, Yâjñavalkya is known to have been the founder of the school of the Vâjasaneyins, who study the White Yajurveda. In the Smṛiti III., 110, it is expressly stated that its author is the same Yâjñavalkya, to whom the Sun revealed the Âraṇyaka, *i. e.* the Bṛihadâraṇyaka, which forms part of the Brâhmaṇa of the Vâjaneyins, the Śatapatha. On account of this assertion, and because a number of the Mantras or sacred formulas, the use of which is prescribed in the Yâjñavalkya Smṛiti for various rites (*a*) have been taken from the Vâjasaneyi-Saṁhitâ of the White Yajurveda, it is highly probable that the Sûtra on which the Smṛiti is based, belonged to one of the Charaṇas in which the Vâjasaneyi-Śâkhâ was studied. Possibly the lost Sûtra may even have been composed by the founder of the Vâjasaneyi-Charaṇa himself.

As regards the Parâśara and Saṁvarta Smṛitis and the fragments of Bṛihaspati and Nârada, it is, at present, not possible to say to what Vedas or schools they or their originals belonged. But a verse of Bṛihaspati which Nandapaṇḍita quotes in elucidation of Vishṇu IV. 9, shows that the

(*a*) *See, e.g.*, Yâjñ. I. 229 = Vaj. Saṁh. VII. 34; Yâjñ I. 231 = Vaj. Saṁh. XIX. 70; Yâjñ. I. 238 = Vaj. Saṁh XIII. 27. It is a general maxim that the Mantras, used for daily and occasional rites, must be taken from that redaction of the Veda which is hereditary in the family of the sacrificer. Hence it is only necessary to find out from which redaction the Mantras prescribed in any work or those used by any individual are taken in order to ascertain the Vedic school to which the author or the sacrificer belongs.

metrical law book ascribed to the Guru of the gods, probably was written within the last sixteen or seventeen hundred years.

In the passage quoted there, Bṛihaspati gives an accurate definition of a gold *dînâra.* It has been pointed out long ago,(*a*) that the occurrence of the word *dînâra,* which is a corruption of the Latin *denarius,* is a test for the date of Sanskṛit works, and that no book in which it occurs can belong to a remote antiquity. Golden denarii were first coined at Rome in 207 B.C., and the oldest Indian pieces corresponding in weight to the Roman gold denarius, which are known are those of the Indo-Scythian kings,(*b*) who reigned in India from the middle of the first century B.C. It is, therefore, impossible to allot to Sanskṛit authors, who mention golden *dînâras,* and accurately define their value, an earlier date than the first century A.D., and, it is not improbable, that that limit is fixed rather too high than too low. If, then, the verse of Bṛihaspati, quoted by Nandapaṇḍita, is not a later interpolation, the Smṛiti called after him cannot be older than sixteen or seventeen hundred years.

The same remark applies to the lost metrical Smṛiti of Kâtyâyana, from which Nandapaṇḍita quotes (*loc. cit.*), also a verse, defining the value of the dînâra and to the fragment of Nârada which treats of civil and criminal law. With respect to the latter work, it must, however, be noted that the *vulgata,* which has been translated by Professor J. Jolly, (*c*) does not contain the verse giving the definition of the term dînâra, while another recension of the same work which is accompanied by the commentary of Asahâya, re-arranged by one Kalyâṇabhaṭṭa, has it.(*d*)

(*a*) *See, e g.,* Max. Müller, Hist. Anc. Sansk Lit, p. 245.

(*b*) E. Thomas, Jainism, p 71, *seqq.*

(*c*) The Institutes of Nârada, translated by J. Jolly. London, Trübner, 1876.

(*d*) Sacred Books VII., p. XXV., and Report on Sansk. MSS. for 1874-75.

Asahâya is one of the oldest and most esteemed writers on civil law, whose name is quoted in several of the older Nibandhas and commentaries. In Bâlambhaṭṭa's commentary on Mitâksharâ I., 7, 13, where the opinion of Asahâya, Medhâtithi and others is contrasted with the view of Bhâruchi, it is stated that Asahâya, literally 'the Peerless,' is an epithet of Medhâtithi. Colebrooke, however, doubts the correctness of Bâlambhaṭṭa's statement, because he found the word Asahâya used as a proper name in the Vivâdaratnâkara. His doubts are confirmed by the circumstance that in other digests, too,(a) Asahâya is mentioned as an individual writer, and that Kalyâṇabhaṭṭa says nothing about the identity of Asahâya and Medhâtithi, but evidently takes the former for a separate individual. As in the passage of the Mitâksharâ, quoted above, Asahâya stands before Medhâtithi, and as it is the custom of Sanskṛit writers in quoting the opinions of others to name the oldest and most esteemed author first, it may be inferred that Asahâya preceded Medhâtithi, who probably wrote in the 8th or 9th century A.D. Under these circumstances it must be conceded that the version of Nârada's Institutes accompanied by Asahâya's commentary has greater weight than the *vulgata* and that the definition of the term dînâra belongs to the original. Hence it would appear that the Nârada Smṛiti cannot lay claim to any greater antiquity than the first or second century A.D. On the other hand, the discovery that as ancient an author as Asahâya composed a commentary on the work, gives support to the view of Professor Jolly (b) that the Nârada Smṛiti is not later than the fourth or fifth century of our era. To the same conclusion points also the circumstance that the prose introduction, prefixed to the *vulgatu* of the Nârada Smṛiti, (c) which gives a clearly erroneous and mythical account of the origin of the work, belongs to the commentary of

(a) *e.g.* in Varadarâja's Vyavahâranirṇaya, p. 38 (Burnell).

(b) Institutes of Nârada, p. XIX.

(c) *Ibidem*, pp. 1-3.

Asahâya. The tradition, given there, asserts that the Nârada Smṛiti is a recast of Śumati's abridgment of the original Manu Smṛiti. But a comparison of the doctrines of Nârada with those of Manu shows that the connection between the two authors is not very close. They differ on most essential points, such as the titles or heads of the civil and criminal law, the number and manner of the ordeals, the permissibility of the Niyoga, and the remarriage of widows, the origin of property, the kinds of slavery, and so forth.(a) Now if Asahâya's erroneous statement regarding the origin of the Nârada Smṛiti is not a deliberate fabrication, its existence can be accounted for only by the assumption that between his own times and those of the real author of the Nârada Smṛiti so long a period had elapsed that the true origin of the latter work had been forgotten. With respect to the latter point it may be mentioned that hitherto it has not been possible to determine the Vedic school to which the Nârada Smṛiti belongs.

Among the lost metrical Smṛitis, that ascribed to Laugâkshi, was possibly based on the Kâṭhaka Dharmasûtra. For, according to the tradition of the Kaśmîrians, Laugâkshi was the name of the author who composed the Sûtras of the Kaṭha school.

The Smṛitis which may be placed under the second head, that of secondary redactions of metrical Dharmaśâstras, may be subdivided into extracts and enlarged versions. Of the first kind are the various Smṛitis which at present go under the names of Aṅgiras, Atri Daksha, Devala, Prajâpati, Yama, Likhita, Vyâghrapâda, Vyâsa, Śaṅkha, Saṅkha-Likhita and Vṛiddha Sâtâtapa. All these works are very small and of small importance. That they are really extracts from, or modern versions of more extensive treatises, and not simply forgeries, as has been supposed, seems to follow from the fact that some of the verses quoted by the older commentators, such as Vijñâneśvara, from the works of Aṅgiras and so forth, are actually found in them. On the other hand, it is clear that they cannot be the original ancient works,

(a) *Ibidem*, pp. XIII–XVIII.

which Vijñânesvara and other old Nibandhakâras knew, because many verses quoted from the latter are not traceable in them. In the case of the Vṛiddha Sâtâtapa-smṛiti, the author himself states in the beginning (śl. 1) that he gives only so much of the ancient work 'as is required to understand its meaning.' To the second sub-division, that of the enlarged metrical Smṛitis, belongs the so-called Bṛihat Pârâśara. It is expressly stated that the book was composed or proclaimed by Suvrata (Suvrataproktâ Saṁhitâ). Though it is divided, like the original Pârâśara, into twelve chapters, it contains 3,300 ślokas against the 581 or 592 of the older book.

To the third class, that of the more recent compilations in verse which are not based on any particular old works belong, besides the Kokila, Saptarshi, Chaturviṁśati and similar Smṛitis, mentioned above, the existing Lohita Smṛitis, and perhaps that ascribed to Kapila. The author of the Lohita Smṛiti states in the last verse of his book "that Lohita having extracted the quintessence from the Śâstras, has proclaimed this work for the welfare of mankind."

The fourth division, that of the versified Gṛihyasûtras, includes the two Âśvalâyanas, the so-called Bṛihat Śaunaka, or Śaunakîyâ Kârikâ, and the fragments of Śàkala and Sâṇ-khâyana. Both the Âśvalâyana Dharmaśâstras are simply metrical paraphrases of the Âśvalâyana Gṛihyasûtra, and the Bṛihat Âśvalâyana is distinguished only by the peculiarity that it contains the same matter twice, "for the sake of the slow-minded," together with some verses on Râjanîti, or 'polity.' The Bṛihat Śâunaka is particularly interesting not only because it seems to be the last remnant of the Smârta writings of that famous teacher of the Ṛigveda, but also because it apparently has been remodelled by a Vaish-ṇava of the sect of Râmânuja, and affords another instance of the activity which the Vaishṇavas displayed in turning ancient writings to their account. A detailed notice of this work will be found in a paper laid before the Asiatic Society of Bengal in September 1866. It is characteristic of the

negligence and want of critical discernment shown by Hindû writers, that Nîlakaṇṭha in the Vyavahâra Mayûkha treats the Bṛihat Śâunaka as a genuine production of the old Âchârya.

The fifth class, or that containing the forgeries, is unfortunately of not small extent. The Vaishṇavas seem to have been most unscrupulous in using old names in order to give weight to their doctrines. They have produced the Bṛihat Hârîta, two Vasishṭha Smṛitis, a Śâṇḍilya and the Laghu Vishṇu. These books represent various shades of the Vaishṇava creed. Some are extremely violent in their diatribes against other sects, and teach practices and doctrines which would have astonished the ancient Ṛishis whose names they appropriated, while others are more moderate and conform more to the Smârta practices. The most extreme are the Bṛihat Hârîta and the third Vasishṭha of our list. There is only one work which may be safely called a Saiva forgery, the second Gautama of the list. It is distinguished from the common Smârta works only by occasionally inculcating the worship and pre-eminence of Śiva. The rites prescribed are what one at the present day would call Smârta. Besides these, some other small works belong to this class, among which the second Âpastamba and the second Uśanas may be named. Their rules do not show any particular sectarian tendencies. It will, however, be proper to call them forgeries, because they bear the names of ancient teachers, though they apparently have nothing to do with the authentic writings of these persons. On the other hand, it must for the present remain undecided whether the commonplace Śâstras attributed to Viśvâmitra and Bhâradvâja are modern fabrications, or versifications of older Sûtras. In the case of Bhâradvâja there is some foundation for the latter opinion, as a great portion of the Sûtras of a Bhâradvâja school, which belongs to the Black Yajurveda, is still in existence.

In concluding this sketch of the Smṛiti literature, it ought to be remarked that the opinions advanced with respect to its origin and development are supported by the analogies of

other branches of Hindû literature. The older portions of the Upanishads, or the philosophical portions of the Vedas which inculcate the 'road of knowledge,' either still form part of the collections of texts or Śâkhâs studied by the various Vedic schools, or can be shown to have belonged to such collections. Thus the Aitareya and Kaushîtaki Upanishads are incorporated in the Śâkhâs of the Ṛigveda which bear these names. The Taittirîyâ, the Vâruṇî and other Upanishads still form part of the Taittirîya Śâkhâ, the Maitrâyaṇî of the Maitrâyaṇa Śâkhâ, the Bṛihadâraṇyaka of the Mâdhyandina and Kâṇva Śâkhâs of the White Yajurveda. Again, the names and contents of such works as the Bâshkala and Jâbâla Upanishads show that they belonged to extinct Śâkhâs of the Ṛig and Sâmavedas. Next we have the Upanishads which have been recast by the adherents of the fourth Veda, the Âtharvaṇas, further Upanishads which, though counted as parts of the Atharvaveda, proceed apparently from adherents of the philosophical schools, and lastly, the fabrications of sectarians, Vaishṇavas, Śaivas, Gâṇapatas and so forth. While the first classes of Upanishads are written in archaic Sanskṛit prose, or in prose mixed with verse, the later works show the common Sanskṛit, and many of them are *in verse*. In some instances the connection between the prose and the metrical treatises can be clearly traced. In all this the analogy to the Smṛiti literature is obvious, and in the case of the Upanishads, too, the truth of our fundamental position is apparent, viz., that the fountain of intellectual life in India and of Sanskṛit literature is to be found in the Brahminical schools which studied the various branches of the Vedas. Even in the case of grammar, of astrology and astronomy, the correctness of this principle might be demonstrated, though not with equal certainty, because the oldest works in those branches of science are lost, or at all events have not yet been recovered.

The bearing of our view regarding the history of the Smṛitis, on their interpretation, and on the estimation in

which they must be held, is obvious. The older still existing Smṛitis, and the originals of the rest, are not codes, but simply manuals for the instruction of the students of the Charaṇas or Vedic schools. Hence it is not to be expected that each of these works should treat its subjects in all its details. It was enough to give certain general principles, and those details only which appeared particularly interesting and important. It is, therefore, inappropriate to call the Smṛitis "codes of law," and unreasonable to charge their authors with a want of precision of discrimination between moral and legal maxims, &c.(*a*) Such strictures

(*a*) In the ancient societies in their earlier stages there was no such thing as systematic legislation on a utilitarian basis. The civic or national consciousness was developed under the influence mainly of religious conceptions, and all that belonged either to the State in its relation to individuals or to the mutual rights and duties of members of the community was wrought out under this sacred control. The ethical and the social laws spring forth as offshoots from the relations of mortal men to supernatural beings, to their own ancestors, and to their families united to them in close ties of religious interdependence. The ceremonial law seeking to propitiate beings, whose nature may be variously conceived, acquires the intricacy of a purely artificial system, and its interpreters are invested with a sacred character on account of their association with awful thoughts, and their exclusive command of potent formulas. The priesthood shared—and could not but share—the chief emotions of the people, but they moulded these into forms consonant to their own ruling notions, by connecting every phase of moral or legal change with some doctrine or some phrase regarded as of divine authority. As inventiveness and constructive faculty were set to work by the prompting of new needs in altered circumstances, the expression of the result, whether wholly original or partly borrowed, was grafted on to the existing system, and if it corresponded to any permanent want or form of moral energy it was preserved by frequent recitation; and as in India the people, owing perhaps to physical conditions, were much less stirred to distinctly civic activity than in Greece or Rome, the purely religious element in their body of thought has maintained its early predominance down even to modern times. The source and the sanction of the "municipal" being thus in the religious law, it was natural that a severe discrimination of the one from the other should

would only be justified if the Smṛitis were really "codes" intended from the first to settle the law between man and man. At the same time it will appear that the statement of the modern Nibandhakâras and commentators that the various Smṛitis are intended to supplement each other is, at least to a certain extent, correct. As none of the Smṛitis is complete in itself, it is, of course, natural that the lawyer should, if one fails, resort to the others which, on the whole, are written in a kindred spirit. It would, however, be unwise

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not be attempted. In the Mosaic law, as in the Hindû law, we find sacrificial ceremonies, family relations, the conditions of property, criminal laws, and legal procedure all put pretty much on the same level and all in some degree intermingled because all regarded mainly from the same stand-point of their supernatural origin. Thus viewed, many parts of the law have a certain harmony with one another, which, from our modern stand-point, seem incongruous, otiose, or unmeaning. Amongst the Greeks and Romans, as amongst the Hindûs, the laws being regarded as of divine origin, were committed to the memory and the care of the priestly class. This class furnished the only jurists, and when laws were reduced to writing, their proper repositories were the temples of the gods. A council of priests, as of Levites or of Brahmans, could alone pronounce on the most important questions of the civil law, or give the requisite assent to some proposed deviation from established use and wont. It seems that in the early period the Greek laws were mostly, if not wholly, rhythmical.* The same form of the Roman laws is suggested by the word "Carmina," commonly applied to them. They were special to the Greeks and to the Romans as the Brahmanic law is special to Hindûs. Rights as existing beyond the pale of the religious connexion are hardly recognized except by a faint analogy. The Smṛitis therefore and the mental evolution which they embody may be regarded as a most natural product of the human mind at a particular stage of growth. An economical, or purely political aim not having been admitted except as subordinate, the conduct of men was not prescribed by reference to it as distinguished from the religious aim. The rhythmical form of the precepts has its analogue even in the English law, many rules of which and even the statutes were in early times converted into verse, as a convenient means of committing them to memory.

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* Wachsmuth Hist. Ant. of Gr., Ch. V. § 39.

to use them indiscriminately, since they contain also a great many contradictory or conflicting statements. It will be necessary to examine in each case, whether the Smṛiti from which supplementary information is to be derived, agrees in its principles on the point in question with the book which serves as the fundamental authority. For in the latter case only will it be possible to use the additional information. A considerable caution in the use of unknown texts, said to belong to Dharmaśâstras, regarding which we possess no full information, is also advisable on account of the great number of forgeries and recasts of ancient works which exist at the present day. A full enquiry into the authenticity of such texts is very necessary.

The Vedas.

11. *The Vedas.*—The fountain-head of the whole law is, according to the Hindûs, the Veda, or Śruti. By the latter term they understand the four Vedas, the Ṛik, Yajus, Sâman and Atharvan in all their numerous Sâkhâs or recensions, all of which they believe to be eternal and inspired. Each Veda consists of two chief portions, the Mantras and the Brâhmaṇas. The former are passages in prose and verse which are recited or sung by the priests at the great sacrifices; the latter contain chiefly rules for the performance of the sacrifices and theological speculations on their symbolical meaning and their results, as well as, in the Âraṇyaka portion, discussions of philosophical problems. As may be expected, the Vedas include no continuous treatises on Dharma, but, incidentally, a good many statements of facts connected with all sections of the law are found. The authors of the Dharmasûtras frequently cite such passages as their authorities. But it is a remarkable fact that they by no means agree regarding their applicability. (*b*) For the practical lawyer of the present day the Veda has little importance as a source of the law. But a careful investigation of the state of the law, as it was in the Vedic age, will no doubt yield important results for the history of the Hindû law.

(*b*) Sacred Books II., p. XX.

BOOK I.—INTRODUCTION.

THE LAW OF INHERITANCE.

General View of the Hindú Law of Inheritance, according to the authorities current in the Bombay Presidency.

§ 1.—DEFINITION OF THE LAW OF INHERITANCE.

The Law of Inheritance comprises the rules according to which property, on the civil or natural death of the owner, devolves upon other persons, solely on account of their relation to the former owner.

REMARKS.

The title of the Hindû Law under which the law of inheritance falls is the Dâyavibhâga, *i.e.*, according to the usual translation, "the division of inheritance." Dâya, *lit.* a 'portion,' is defined by Vijñâneśvara as 'the wealth (property) which becomes the property of another solely (*a*) by reason of his relation to the owner,' and vibhâga, *lit.* 'division,' as 'the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate.'(*b*)

It thus appears that the Dâyavibhâga includes not only the law of inheritance, but the rules for the division of any estate, in which several persons have vested rights, arising out of their relation to the owner. Actually, however, the contents of the chapter called Dàyavibhâga are still more miscellaneous, as the Hindû lawyers were obliged to introduce into it discussions on the nature and the various kinds of property, on account of the want of a separate title for these matters in the system of the Smṛitis.

(*a*) Colebrooke, Mit. Chapter I., Sec. I., para. 2.

(*b*) *Ibid.*, para. 4. *See* Book II, Introduction.

D. To a professed student (naishṭhika brahmachârin) and to an ascetic (Yati or Sannyâsin).

II. RULES REGARDING THE SUCCESSION TO FEMALES.

A. To unmarried females.

B. To married females having issue.

C. To childless married females.

III. RULES REGARDING PERSONS EXCLUDED FROM INHERITANCE.

"Deus facit heredem," says Glanville : that is, heirship properly so called arises only from natural relation. In the Tagore case, Willes, J., says, "Inheritance does not depend upon the will of the individual ; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy." (*a*)

Under the Roman Law inheritance was a devolution of the property and rights, with the obligations and duties of a deceased as an indivisible aggregate on the heir designated by the law or appointed by will. The heir might be bound to carry out bequests and discharge debts as directed, but the defining characteristic was that he essentially continued, for legal purposes, the persona of the deceased. The sacra were not conceived as divisible, nor consequently was the familia which sustained them. Thus it was said Nemo pro parte testatus, pro parte intestatus decedere potest. Under the Hindû Law also the heir or the group of heirs (wills not being contemplated), who in the undivided family take a succession, continue the person with which they have already been identified. (*b*) One joint owner of the common property having been removed, the others take it as an undivided aggregate, capable of partition, but subject to a primary obligation in favour of the family sacra (*c*) and of creditors of a father

(*a*) L. R. S. I. A., at p. 64.

(*b*) See Vîramit. Trans. p. 2.

(*c*) Vîramit. Trans. pages 133, 256.

whose claims have not arisen from transactions of an obviously profligate character, tending to defraud the manes and the children bound to sacrifice to the manes of past ancestors. It is in accordance with this theory that Vijñâneśvara construes the text on the origin of property (Mitâksharâ ch. I., sec. I, para. 13). "Inheritance" as a source of property he conceives as pointing to a continuation of the legal person by the unobstructed heir as joint owner. "Partition" he refers to the case of property descending to obstructed heir as collaterals taking necessarily according to distinct and several shares, on rights arising to each severally at the owner's death. So too at chap. I., sec. I., para. 3, he carefully distinguishes between the cases of sons, whose the patrimony *becomes* immediately and indefeasibly on their birth, and of parents, &c., on whom the estate *devolves* only on the death of the owner, and who meanwhile have not like sons a share in the ownership, only an expectancy which may be defeated by the act of the owner unembarrassed by a joint ownership of sons or grandsons. (*a*)

The Teutonic laws preferring males to females divided the allodial holding equally. They distinguished inherited property from acquisitions and moveables from immoveables: the inheritance under them might pass by different rules to several successors. Then came the right of primogeniture and the other extensive modifications induced by the Feudal system. The historical development of the English, having been so widely different from that of the Hindû Law of Inheritance, great caution ought to be exercised in applying any analogy derived from the former to the solution of questions arising under the latter. The language of Willes, J., in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (*b*) rests on a principle of general application. He says: "The questions presented by this case must be

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(*a*) Comp. Vîramit Chap. I., p. 54, Transl. p. 39.
(*b*) L. R. S. I. A. at p. 64.

dealt with and decided according to the Hindû law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindû system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty, a distinction not known in Hindû law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property: *Dyke* v. *Walford*. (a) In the Hindû law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased."

Resting on this, he says: —"the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindû law." (b) But after rejecting these, His Lordship, from the principle that an owner may by contract bind himself to allow another the usufruct, deduces the consequence that a temporary possession and enjoyment may be given by will, to be followed by other interests simultaneously constituted. Here he follows the English as distinguished from the Roman Law.

Special care should be taken not to build on particular expressions in the English text books. In translating from

(a) 5 Moore P. C., 434. (b) L. R. S. I. A. at p. 74.

the Sanskrit law-books the most nearly equivalent words have to be used to render those of the original, but this is in many cases an equivalence only for the particular purpose and in the context where the words occur. For drawing inferences the original must in cases of any nicety be referred to with as much care as the Greek or Hebrew text of the Bible for the support of a theological doctrine, or the Pandects for determining the true sense of a Roman law.

"The law of inheritance amongst the Hindûs is regulated generally by the performance of funeral oblations" (*a*) in this sense that the duty of performing the obsequies and subsequent rites being regarded as of paramount importance, the determination of the person on whom it devolves and the nature of the ceremonies to be celebrated settles incidentally who in sequence are entitled to the estate. The interest in it of the deceased is supposed not to be wholly extinguished, and as the possession of property is essential to an effectual sacrifice, the proper performer of the Srâddh is endowed with the means of performing it. A rigid regulation of the right to succession by funeral oblations is however peculiar to Bengal, having been adopted as a general principle by Jîmûta Vahána. (*b*) In other parts (*c*) of India the criterion is admitted only partly, (*d*) and the Mitâksharà and the Mayûkha make the duty and the right collateral, meeting usually in the same person but not connected necessarily as cause and consequence. Consanguinity has greater influence, and may be looked on as the foundation on which the rules as to succession on the one hand and as to inheritance on the other

(*a*) H. H. Wilson's Works, V., 11 *Soorendronath Roy* v. *Musst. Heeramonee Burmoneah*, 12 M. I A., at p. 96; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, Ibid. at p. 541.

(*b*) Dayabh., Ch. XI., Sec. VI. para. 29, 2.

(*c*) Viramit. p. 39 Col. Dig., B V. T. 420, Comm.

(*d*) Ib. 14.

really rest.(*a*) Where there is a connexion of blood through males or females, there is, except in remote cases, a possibility of succession. A new connexion is established by marriage, and the family springing from this union is linked both to the father's and less closely to the mother's ancestors and their descendants. Except amongst those in whom there is really or by a fiction a sharing of identical blood, as derived from an identical source, there is no relationship giving rise to the ordinary rights of succession with which the law of inheritance is concerned, and the accompanying duties prescribed by the religious law. (*b*)

The law of inheritance is divided by the Hindûs, according to the nature of the rights of heirs, into unobstructed (apratibandha) succession, and succession liable to obstruction (sapratibandha). Unobstructed succession comprises the rights of sons, sons' sons, and their sons, to the inheritance of their fathers and ancestors, whether these were members of undivided or of divided families, and the succession in an undivided family in general. Succession liable to obstruction is subdivided into succession—(1) to a male who dies without sons, sons' sons, or great-grandsons in the male line, (2) to a reunited coparcener, (3) to an ascetic, and (4) to women. This arrangement of the subject-matter is necessary if, as is done by the Hindû lawyers, the laws of inheritance and of division are treated of under one title. But, as it is greatly wanting in clearness, especially in the first part, relating to unobstructed succession, it seems advisable to desert it when the Law of Inheritance is treated of by itself.

As the descent of property varies under the Hindû law, chiefly according to the natural and the legal status of the

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(*a*) How far this is carried in favour of females by Bâlambhaṭṭa may be seen from the extracts given in the Tagore Lectures, 1880, Lec. X.

(*b*) The succession of one spiritually related, as of a teacher or pupil, may be ascribed to an imitative method of preserving religious ceremonies and the property dedicated to them. The Brahmin community and the king serve to complete the scheme. *See* below.

last possessor, it will be more convenient to divide the rules on this subject according to the latter principle. 'Succession' should therefore be first divided into succession to males and to females. Hindû males are divided according to their castes into Brâhmins, Kshatriyas, Vaiśyas, and Śûdras. (*a*) The members of the first three castes are divided according to the 'orders' (âśramas) into Brahmachâris, "students," Gṛihasthas, "householders," and Yatis or Sannyâsîs, "ascetics." The Brahmachâris again are of two kinds, paying or temporary students, Upakurvâṇas, or else Naishṭhikas, 'professed students,' such as from the first renounce the world. Gṛihasthas, householders, also are of three kinds. They may be avibhakta, members of an undivided family, vibhakta, 'separate,' or saṁsṛishtîn, 're-united,' and lastly the avibhakta or united householder may be separate, in some respects, *i.e.*, he may hold property to which his coparceners have no right.

It is, however, unnecessary to take into account all these several varieties of status. Under the present law, especially as amended by the Acts of the Government of India, caste has little importance for the descent of property. In one instance only, that of the illegitimate son of the Śûdra, the old distinction holds good. Besides the separate property (*b*) of the united householder, the property of the Upakurvâṇa Brahmachârî, the temporary student, descends like that of the Vibhakta Gṛihastha, the divided householder. (*c*) The principles, at least, applicable to the succession to Naishṭhika Brahmachâris, professed students, are the same as in the case

(*a*) Śûdras are always considered Gṛihasthas, as the study of the Veda is forbidden to them.

(*b*) There are no particular rules regarding the descent of this kind of property. But the fact that it is exempted from the rules regarding the division of the property of united coparceners, shows that it must fall under the rules regarding the property of separate males. For the definition of such 'separate property' (avibhâjya), *see* Mit. Chap. I., Sec. V.; Vyav. May. Chap. IV., Sec. VII.; and Book II., Introduction.

(*c*) *See* Mit. Chap. II., Sec. VIII., para. 3.

of Sannyâsîs. We obtain therefore for the succession to males four subdivisions : (1) the succession to the Avibhakta Gṛihastha, a householder of an undivided family ; (2) to the Upakurvâṇa Brahmachârî, a temporary student, and to a Vibhakta Gṛihastha, a separate householder ; (3) to a Sansṛishṭî Gṛihastha, a reunited householder ; (4) to Sannyâsîs or Yatis, ascetics, and to Naishṭhika Brahmachârîs, professed students.

In the case of females, it is of importance whether they are unmarried or married, and whether, if married, they leave issue or not. The rules regarding the succession to their property may therefore be divided under three heads as above.

§ 3 *A*. SUCCESSION TO THE PROPERTY OF AN AVIBHAKTA GṚIHASTHA.

(1) SONS, SONS' SONS, AND THEIR SONS.—*The property of a male member of a united family, Avibhakta Gṛihastha, descends,* per stirpes, *to his sons, son's sons, and son's son's sons, who were united with the deceased at the time of his death.*

See Book I., Chapter I., Section I., Question 1.

"That under the law of the Mitâksharâ each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable."(*a*)

"The ownership of the father and the son is the same in acquisitions made by the grandfather, whether of land, of a fixed income, or of moveables." (*b*)

The three descendants in the male line take the inheritance by virtue of the right which vests in them from their birth to the ancestral family estate, and to the immoveable property acquired by their father, grandfather, or great-grandfather (apratibandha dâya), and they *represent* these

(*a*) P. C. in *Suraj Bunsi Koer* v. *Sheo Prasad Singh,* L. R. 6 I. A. 88, 99.

(*b*) Mitâksharâ, Chap. I., Sec. 5, para. 3 ; Vîramitrodaya, Tr. p. 68.

persons in the undivided family. (*a*) The ultimate reason for their preference to other coparceners must be sought in the importance attached by the Hindû to the continuation of his race, and to the regular and continuous presentation of the oblation to his manes (śráddha). (*b*)

(*a*) Mit., Chap. I., Sec. 5, and Sec. 1, para. 3; Vyav. May. IV., Sec. 1, para. 3.

(*b*) Gaius, Lib. II. § 55, points to the importance attached by the Romans in early times to the due performance of the sacra and the connexion of these with the inheritance. Compare the remarks at 11 B. H. C. R., 265.*

In § 152, et sqq., Gaius deals with heredes necessarii, sui et necessarii, aut extranei. Of the "sui et necessarii" he says § 157:—"Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente, quodam modo domini existimantur."

Against these joint owners, "Nihil pro herede posse usucapi suis heredibus existentibus, magis obtinuit.† This passage may perhaps indicate that the "sui" formed a fourth class."‡ Sons and daughters of the last proprietor or of his son were forced to take the inheritance with its burdens. They were thus "necessarii" as well as "sui."

The death of the son was necessary to bring in his children§ and they must have been still within the potestas of the grandfather at his death.

Paulus in the Digest describes the position of the son inheriting his own, "suus heres," in a way very analogous to that found in the Hindû treatises.

"In suis herdibus evidentius apparet continuationem domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur, unde etiam filiusfamilias appellatur sicut paterfamilias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit, itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur, hac ex causa licet non sint heredes instituti, domini sunt; nec obstat, quod licet eos exheredare, quod et occidere licebat."

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* *Bháu Nánáji Utpát* v. *Sundrábái.*

† Cod. Lib. VII., 29; 2.

‡ Tomkins and Lemon's Gaius, p. 341.

§ Gaius, Lib. II. § 156.

Actual birth is necessary to the full constitution of right as son. The succession is not suspended for one not begotten. (a) *See* below Bk. II. Chap. I., Sec. 1, Q. 8, Remark 2.

The rule extending the apratibandha dâya to three descendants conforms to the views of Nîlakaṇṭha, Bálambhaṭṭa, Mitramiśra, and of the eastern lawyers.(b)

The Mitâksharâ nowhere mentions the right of the son's son's son, and its commentator, Viśveśvara, states, in the Madanapârijâta, that the vested right to inherit

In the Hindû as in the Roman law the essential notion of what we call "Inheritance" was that of a continuity of the "persona" and of the "familia" over which headship was exercised, while in "Partition" the central idea is that of a break of continuity, of a substitution of new relations and of new rights, individualized or differently aggregated, for the group out of which they have been formed; and as a true union of the composite persona taking a family estate on the death of the former head implies, according to Hindû notions, a joint family united in domestic worship and in interests, we see how it is that the Mitâksharâ chap I, sec 1, para. 13 says "dâya" is the unobstructed inheritance of the "sui heredes" taking fully and jointly what was partly theirs before, while "partition" intends "heritage subject to obstruction." In the latter case wholly new rights come into existence, the continuity is broken up; and the several collateral heirs, supposing there are more than one, take several shares by means of a parcelling inconsistent with the mere replacement of one head by another, the family corporation still preserving its personal and proprietary identity, as in inheritance not subject to obstruction. It is in this sense and in this only that the Mitâksharâ* recognizes partition as a source of property; the several rights of those entitled cannot in some cases be made effectual without partition, though they come into existence simultaneously with the devolution of the estate; and thus they in a manner spring from the partition as a source of property, which the Smṛiti declares it may be, but which in ordinary cases Vijñâneśvara says it is not.

(a) *Koylasnath Doss* v *Gyamonee Dossee*, C. W. R. for 1864, p. 314. *Musstt. Gowra Chowdhrain* v. *Chummun Chowdhry*, Ibid. 340.

(b) *See* Vyav. Mayûkha Ch. IV. Sec. IV.; Manu IX. 185; Col. Dig. B. v. T. 396, Comm.

* Chap. I., Sec. I., paras. 3, 7, 8, 13, 17, and 18.

does not extend further than the grandson. (*a*) Among the authors of the Dharmaśâstras a like difference of opinion seems to have existed. But at present the right of the great-grandson may be considered to be established, and the Śâstris assume that the word 'son' includes the son's son's son.

Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him, or were born after the separation. (*b*)

This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it, or who having been exceptions have since ceased to be so, are treated accordingly. Their rights of succession are, as to their mutual extent, their rights as they would be in a partition made immediately on the death of the propositus. This is brought out most clearly perhaps in the first Section of the Dâya Kramasangraha. It is in general rather assumed than propounded, as after providing for representation of sons by grandsons and great-grandsons, the discussions proceed on the basis of the deceased owner's having held separately, without which there would be no room for the several rules to operate, since in a partition on his death, the then joint owners with him would take the whole. Even "a widow cannot claim an undivided property." (*c*) And the widow comes first amongst the heirs on failure of male descendants. She and her daughter are entitled only to maintenance and residence (*d*) from the coparceners, (*e*) or successors to a separate owner. (*f*)

(*a*) Madanapârijâta, *f.* 228 p. 2, l. 7 (of Dr. Bühler's MS.). In the Subodhini, however, commenting on Mitâkshara Ch. I., S. 1, pl. 3, Viśveśvara Bhaṭṭa seems to recognize a representation extending to the great-grandson, if not even farther.

(*b*) Mit. Chap. I, Sec. 2, paras. 1 and 5; Vyav. May. Chap. IV., Sec. 4, paras. 16, 33, ss.

(*c*) *Rewan Pershad* v. *Musstt Radha Beebee*, 4 M. I. A. 437.

(*d*) *Parvati* v. *Kisansing*, Bom. H. C. P. J. F. for 1882 p. 183.

(*e*) *Mankoonwur et al.* v. *Bhugoo et al.*, 2 Borr. 162.

(*f*) *Ramaji Huree* v. *Thukoo Baee*, Ibid. 497.

In *Chaudhri Ujagar Singh* v. *Chaudhri Pitam Singh* (*a*) the Privy Council say of a father whose son was a plaintiff on the ground that by an imposition the father had been allotted but a quarter instead of a half of an estate, "supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be—whether it could be enforced by a suit or by a representation to the Government—it does not come within the rule of the Mitâksharâ law, which gives a son, upon his birth, a share in the ancestral estate of his father." Regarded as a bounty, the property could not be recovered by a suit, but if there was a right in the father to property enforceable by suit that right would not indeed be shared by the son except subordinately, the property not being ancestral, but it would be inherited by him on his father's death. The property recovered by one of several sons would be subject to the rules of Book II. Introd. § 5 *A*.

The ancient Hindû law presents many traces of a once subsisting law of primogeniture in this sense that on the father's death the eldest son succeeding as the paterfamilias, exercised the same or nearly the same functions of authority and protection as the previous head of the household. (*b*) This rule and the rule of absolute dependence of the junior members was gradually superseded by the present

(*a*) L. R. 8 I. A. at p. 196.

(*b*) Manu Chap. IX. 105; Nârada Pt. I. Chap. III. 2, 36, 39. The preference given by several texts to the first born, combined with the principle of representation, may in the case of an impartible estate form a ground for preferring the son of a deceased first-born son as heir before his uncle, the former owner's eldest surviving son.* Other

* See Manu Chap. IX. 124, 125; the Rámáyaṇa quoted Col. Dig. B. II, Chap. IV. T. 15, Com.; Ait. Brahm. IV. 25, VII. 17, 18 quoted Tagore Lec. 1880, Lec. V.; *Ramalakshmi Ammal* v. *Sivanantha*, 14 M. I. A., at p. 591.

law of equal joint succession of all the sons standing in a like legal relation apart from priority of birth. The nature of

texts in some degree favour the son of the first married wife, though later born, in competition with the earlier born son of a second or third wife*; yet this may have originally rested on the taking of wives in the order of the classes.† Recourse must be had in practice to the custom of the family for a rule which cannot be gathered with absolute certainty from the texts.‡ At Madras it has been held that a junior brother, allowed by the others to take an impartible joint estate, transmitted it to his own descendants, the other members being entitled only to subsistence, but that on the extinction of his line an heir was to be sought in the descendants of the eldest of the original group of brothers. The rule of precedence by seniority of outgrowth from the parent stem and by representation was thought to apply to an estate which, though impartible, had all along been joint family property, and this though the eldest brother was apparently dead when the fourth one took the estate.§ In the Tipperah case|| the Judicial Committee had ruled that the nearest in blood to the last holder was his heir, not the senior member of the whole group of agnates. This the Madras High Court thought inconsistent with the statement in the Shivaganga case,¶ that the succession to a ráj is governed by "the general Hindû Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject," such character being consistent with a continued joint ownership, survivorship, and precedence by seniority of origin in the group; but it would seem that the Judicial Committee *did* think a rule of survivorship and of latent rights to succession of collaterals was excluded by the impartibility of the estate and the singular succession to it.** The view of the Madras High Court is indeed expressly rejected; as it had been by the High Court at Calcutta. The Madras decision therefore, however well reasoned, cannot be regarded as a safe precedent.

* Manu Chap. IX. 123, Col. Dig. B. IV. T. 51 and Com.

† Manu Chap. IX. 122, and Kulluka ad loc.; Manu III. 4, 12, 13.

‡ *Ramalakshmi Ammal* v. *Sivanantha Perumal*, 14 M. I. A. 570. *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523.

§ *Naraganti Achammagáru* v. *Venkatachalapati Nayanivâru*, I. L. R. 4 Mad. 250.

|| *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523.

¶ *Katama Natchiar* v. *The Rájáh of Shivaganga*, 9 M. I. A. at p. 593.

** *See Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. at pp. 540, 541.

the transition may be gathered from the authorities referred to below. (*a*) See also § B (1).

§ 3 *A.* (2) ADOPTED SONS.—*On failure of legitimate issue of the body, adopted sons inherit. If sons be born to the adopter after he has adopted a son, the latter inherits a fourth share.*

EXAMPLES.

1. A, B, C form a united family. A adopts A^1. On A's decease, A^1 or his descendant A^2 or A^3 takes A's share.

2. A, B, C form a united family. A has a legitimate son, A^1. The latter adopts a son, A^2. If A^2 survives A^1 and A, he inherits A's share. The same would be the case if A^2 were a legitimate son of the body of A^1, and adopted A^3, and the latter survived A^2, A^1, and A.

3. A, B, C form a united family. A adopts A^1, and a son, A^a, is born to him afterwards. On the death of A, A^1 will inherit a fourth of a share, and A^a the rest of A's share.

AUTHORITIES.

Book I., Chapter II., Sec. 2, Q. 1, 3, and 15; and Sec. 4, Q. 2.

There are no special authorities mentioning the right of the adopted son of a son or grandson to inherit his adoptive grandfather's or great-grandfather's shares. But it may be inferred from the maxim that a person adopted occupies in every respect the position of a son of the body of the adopter. *See* Synopsis of the H. L. of Adopt., Head Fourth, Stokes's H. Law Books, p. 668.

(*a*) Mit. Chap. I., Sec. I., para. 24, Chap. I., Sec. II., para. 6.; Vyav. May. Chap. IV., Sec. I.,paras. 4-10; Âpast. II. VI.; 10, 14.; Gaut. Chap. XXVIII., paras. 5-16.; Manu Chap. IX. 105*ff*, 112*ff*; Vasishṭha XVII.; Nârada Chap. XIII., paras. 4, 5, cited Coleb. Dig. Bk. V. T. 32; Vishnu Chap. XVII. 1, 2.

§ 3 *A*. (3) ILLEGITIMATE SONS, GRANDSONS, AND GREAT-GRANDSONS.—*In the case of a Śûdra, being an avibhakta, his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grandsons, or great-grandsons. If legitimate descendants are living, the illegitimate inherit half a share.*

AUTHORITIES.

Book I., Chap. II., Sec. 1, Q. 4; Sec. 3, Q. 1; Sec. 11, Q. 1, 2, 3; Vyav. May. Chap. IV., Sec. IV., para. 32; 2 Strange H. L. 70.

The expression "half a share" must be interpreted in accordance with the principles laid down by Vijñâneśvara, Mit. Chap. I., Sec. 7, para. 7, regarding the "fourth of share" which a daughter inherits. Consequently, if A leaves a legitimate son, A^1, and an illegitimate son, A^a, A's property is divided first into two portions, and A^a receives one-half of such a portion, and A^1 the rest. (*a*)

In the passage of the Mitâksharâ referring to the rights of the illegitimate son, it is stated that the latter inherits the whole estate of his father only on failure of daughter's sons. But this can only refer to cases wherein the father is separated (vibhakta), as daughters' sons do not inherit from a member of an undivided family. On the other hand, the text states that the illegitimate son inherits on failure of legitimate brothers. Here it must be assumed that the author omitted to mention the sons and grandsons of legitimate brothers, as these take their fathers' and grandfathers' place by the law of representation (*see* p. 65), and it would be plainly anomalous that a daughter's son, but not a son's son, should exclude the illegitimate son of the propositus. *See* further below, § 3 *B*. (3).

(*a*) This explanation is also expressly given in the Vîramitrodaya.

§ 3 *A.* (4) DESCENDANT OF EMIGRANT HEIR.—*In the case of coparceners who have emigrated, the descendants in the male line within six degrees inherit, on return, their forefather's share.*

AUTHORITIES.

Mayûkha, Chap. IV., Sec. 4, para. 24; so also the Vîramitrodaya. *See* the case of *Moroji Vishvanâth* v. *Ganesh Vithal*, 10 Bom. H. C. R. 444.

No difference in the rule as to representation arises from the parcener's residing abroad. Mere non-possession does not bar until the seventh from the common ancestor in a branch settled abroad; but the failure at the same time of three intermediate links prevents a right from vesting in the fourth so as to be further transmissible as a ground for claiming a share from those who have meanwhile come into possession of the property. When they have resided in the same province, such a claim can be set up by the descendants as far as the fourth only from a common ancestor, who was sole owner of the property. *See* Coleb., Dig. B. V. T. 396 Comm.; *see* however Book II. Introduction, § 4 *D*, and Index, Limitation.

§ 3 *A.* (5) COPARCENERS OF THE DECEASED.—*The share of an undivided coparcener who leaves none of the abovementioned descendants goes to his undivided coparceners.*

See Book I., Chap. I., Sec. 2; Chap. II., Sec. 10, Q. 5; and for Authorities, *see* Chap. I., Sec. 2, Q. 3.

The Mitâksharâ (Chapter II., Sec. 1, p. 7 and 20) and Vyav. May. state distinctly that the rule, as given above, holds good in the case of brothers, but not that it touches the case of more remote relations. The Śâstris generally hold that the word "brothers" in the text in question is

intended more remotely to include coparceners; in fact that it contains a "dikpradarśana," or indication of the principle to be followed. There can be no doubt that they are right. For the law of representation secures also to remote relations the succession to their coparcener's share. Thus if A, B, C, and their descendants B^1, B^2, and C^1, live as a united family, and at the death of A, B^2, and C^1 only are alive, these will be the sharers of A's property, as they represent their grandfather and father respectively, and the latter, according to the authorities cited, would have inherited A's share.

The rule of survivorship in an undivided family was recognized by the Privy Council in *Katama Natchiar* v. *Rajah of Shivaganga,* (a) but in a subsequent case it has been made subordinate to that of nearness of kin to the late Raja.(b) In another case(c) reference having been made in argument to Mit. Chap. II., S. 4, their Lordships seem (*see* Rep. p. 504) to have thought that the plaintiff, one of four brothers once co-existing as a united family, in claiming one-fourth only, instead of one-half, of a share in a joint estate, had made a needless concession to his nephews, who would be excluded by him and his brother from succession to a third brother their uncle deceased, but the Mitâksharâ in the place referred to is treating of separate property. So too the Vîramitrodaya, Tr. p. 194. In the same treatise, p. 72, it is laid down that a son dying is replaced by his son or sons in a united family with reference to uncles or cousins, each group taking their own father's share. Vijñâneśvara, Mit. Ch. I., S. 5, insists on the equal rights of father and son to the ancestral estate; so also Vishnu, XVII., 17, quoted below; and by the exclusion of nephews in favour of brothers, the case would frequently arise of a united family, in which the whole of the property

(a) 9 M I. A. 539.

(b) *See* above p. 70.

(c) *Ramprasad Tewarry* v. *Sheochurn Doss,* 10 M. I. A. 490.

belonged to one member. The law of partition gives to the nephew the same right as his uncle, and requires that a division of the common property be deferred until the delivery of the pregnant widow of a deceased coparcener.(*a*) The case of *Debi Parshâd* v. *Thakur Dial* (*b*) supports the views just stated.

In a Bengal case (*c*) the Privy Council have held that even in an undivided family the uterine brother inherits, to the exclusion of the half-brother, his deceased brother's share. After proving in opposition to Śrikara that while Yâjñavalkya's text (II., 135, 136) in favour of brothers, includes both those of the full blood and those of the half-blood, the subsequent texts, as to connexion by blood and by association, give equal rights to the reunited half-brother and the separated whole-brother. Jîmûta Vâhana in the Dâya Bhâga quotes Yama to show that the rule applies only to divided immoveable property, since the undivided property appertains to all the brethren. This has apparently been understood by their Lordships as in the case of half-brothers, meaning only *reunited* brethren, so as to leave to the uterine brother a superiority in a family wherein no division has taken place; but the true sense seems to be that the divided half-brother has no rights of inheritance, if a whole brother survive, until he becomes re-associated, while the whole brother on account of his connexion by blood retains a right of inheritance in spite of separation. The half-brother is restored to a place by reunion. (*d*) The whole brother has not quite forfeited his place by division; though in competition with another whole brother, unseparated or reunited, his single connexion does not avail

(*a*) Mitâksharâ Chap. I., Sec. VI., pl. 11, 12; Chap. II., Sec. I., pl. 30; Vishnu, Chap. XVII., Śloka 23; Yâjñ. II., 120, 135.

(*b*) In. L. R. 1 All. 105.

(*c*) *Sheo Soondary* v. *Pirtha Singh*, L. R. 4, In. A. 147.

(*d*) See *Prankishen Paul Chowdry* v. *Mathooramohan Paul Chowdry*, 10 M. I. A. 403; and Manu IX. 212.

against the double connexion of the latter; and on his return, having a double connexion with his own whole brothers, he succeeds to them.

However the case may be in Bengal, the Mitâksharâ says of the application of the Ślokas (Yâjñ. II. 134, 139) that "partition had been premised (to the general text on succession) and reunion will be subsequently considered," so that in Bombay no preferential inheritance of brothers in a united family can arise from the texts. It is the same in Vishnu, Chap. XVII., Sût. 17. The joint property being traced back to the single original owner the rights of partition amongst descendants, and of inheritance, so far as inheritance can subsist, are derived from the same source *per stirpes* without distinction of mothers, these being now all of equal caste. (*a*) In *Neelkisto Deb* v. *Beerchunder Thakur* (*b*) title by survivorship is said to be a rule alternative to that founded on efficacy of oblations, and it is on this latter that the decision of the Calcutta High Court is founded (*c*) which has been followed by the Privy Council in *Sheo Soondary's* case. The Bengal case indeed admits a difference of doctrine under the Mitâksharâ. (*d*)

A grant to united brethren without discrimination of their shares constitutes a joint tenancy with the same consequences as in the case of a joint inheritance. (*e*)

As to charges on the inheritance, undivided property is not generally in the hands of survivors answerable for the separate debt of a coparcener deceased. (*f*) A son's

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(*a*) *See* Mit. Chap. II, Sec. 1, pl. 30; and Chap. I., Sec. 5, pl. 2; Yâjñ. II. 120, 121; *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H. C. R. 444.

(*b*) 12 M. I. A. 523.

(*c*) See *Rajkishore* v. *Govind Chunder*, L. R. 1 Calc. 27.

(*d*) Loc. cit.

(*e*) *Rádhábái* v. *Nánáráo*, I. L. R. 3 Bom. 151.

(*f*) *Udárám Sitárám* v. *Ránu Pánduji et al.*, 11 Bom. H. C. R. 76, 85. *Goor Pershed* v. *Sheodin*, 4 N. W. P. R. 137.

obligation to pay his father's debt depends on the nature of the debt, not on the nature of the property that he has inherited,(*a*) And the property, even where a son is liable, is not so hypothecated for the father's debts as to prevent a clear title from passing to a purchaser from the son in good faith and for value. (*b*) Securities created by a father, unless they are of a profligate character, bind his sons as heirs. (*c*) The widows of deceased cosharers are entitled to maintenance and residence. (*d*) *See* below § 3 *B* (1).

§ 3 *B*.—HEIRS TO THE SEPARATE GṚIHASṬHA, UPAKURVÂNA BRAHMACHÂRÎ, AND TO THE SEPARATE PROPERTY OF AN UNDIVIDED COPARCENER.

The separated householder being father of a family becomes the origin of a new line of succession within that family. (*e*) His sons are by their birth joint owners with him of the ancestral estate in his hands, but he has no other cosharers in it, and in the absence of son or after separation from them he is free to dispose of it. (*f*) Should he fail to

(*a*) *Ibid.* and *Laljee Sahoy* v. *Fakeer Chand*, I. L. R. 6 Cal. 135.

(*b*) *Jamiyatrám* v. *Parbhudás*, 9 Bom. H. C. R. 116.

(*c*) *Girdhari* v. *Kanto Lall*, L. R 1 I. A. 321; *Suraj Bunsee Kooer* v. *Sheo Prasád*, L. R. 6 I. A. 104; *Jetha Naik* v. *Venktappá*, I. L. R. 5 Bom. at 21; *Ponnappa* v. *Pappuváyyangar*, I. L. R. 4 Ma. 1.

(*d*) Mit. Ch. II., § 1, para. 7, ss. Vîram. p. 153 transl., *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353, referring to *Gauri* v. *Chaudramani*, I. L. R. 1 All. 262, and *Mangala Debi* v. *Dinanath Bose*, 4 B. L. R. 72 O. C. G.

(*e*) See *Rájáh Rám Náráin Singh* v. *Pertwin Singh*, 20 C. W. R. 189.

(*f*) *Bhiká* v. *Bháná*, 9 Harr. 446; *Narottam Jagjîvan* v. *Narsandás Hárikisandás*, 3 Bom. H. C. R. 6 A. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. at p. 39; *Tuljárám Morárji* v. *Mathurádás Dayárám*, Bom. H. C. P. J. for 1881 p. 260.

dispose of his estate, and die separated, his sons (*a*) take equally, and failing sons, others take in the order following:—

§ 3 *B.* (1) SONS, SON'S SONS AND SON'S SON'S SONS.—*The three first descendants of a separate Gṛihastha in the male line inherit* per stirpes.

See Book I., Chap. II., Secs. 1 and 4, and for Authorities, *see* above § 3 *A* (1).

The householder, though unseparated generally, may have acquired property which ranks as his separate estate. The conditions of such an acquisition are discussed under the head of Partition. The succession to such property is governed generally by the same rules as if the acquisition had been wholly separate estate. When there has not been a general separation of interests, the presumption is in favour of acquisitions by the several members uniting with the joint estate, a presumption which has to be met by evidence directly proving a separate acquisition or from which it can be reasonably inferred. (*b*) But under circumstances the usual presumption will not be raised as ruled by the Judicial Committee in *Musst. Bannoo* v. *Kasharam.* (*c*)

Seniority in marriage of their mothers gives no advantage to the sons over their seniors in birth by another wife; (*d*) and the wives being equal in class, seniority by birth

(*a*) *Mt. Anunda Koonwur* v. *Khedoo Lal,* 14 M. I. A. 412. (Mithila law agreeing here with that of the Mitâksharâ.)

(*b*) *See Dhurm Das Pandey* v. *Mussumat Shama Sundri Debea,* 3 M. I. A. 229, 240; *Védavalli* v. *Náráyan,* I. L. R. 2 Mad. 19.

Prankishen Paul Chowdhry v. *Mothooramohun Paul Chowdry,* 10 M. I. A. 403.

(*c*) *Musst. Bannoo* v. *Kasharam,* 7th December 1877.

(*d*) *Ramalaksmi* v. *Shivanantha,* 14 M. I. A. 570.

arrangements made to secure it.(*a*) Purchasers from the successor are bound or not, as they have or have not notice of the widow's claim according to *Srimati Bhagavati Dasi* v. *Kanailal et al.*;(*b*) a Bengal case. (*c*) As to the nature of the widow's right as an indefeasible charge on the estate, opinions have differed. (*d*) In *Lakshman Rámchandra* v. *Satyabhámábái* (*e*) it was held that notice was not conclusive against the purchaser of property held by a surviving coparcener subject to a widow's claim. The subject is in that case fully discussed.

Even a concubine and her offspring are entitled to support. *See* below.

The son is bound to pay his father's debts and even those of his grandfather. (*f*) The contracts and obligations of his father in connexion with the estate pass to the heir

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(*a*) *Sakvárbái* v. *Bhavánji*, 1 Bom. H. C. R., at p. 198; *Vrandávandás* v. *Yamunábái*, 12 Bom. H. C. R. 229.

(*b*) 8 B. L. R. 225 A. C. J.

(*c*) See *Adhiranee Narain Coomary et al.* v. *Shona Mallee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; *Baboo Goluck Chunder* v. *Ranee Ohilla Dayee*, 25 C. W. R. 100. *See* also *Rámlál Thákursidás* v. *Lakshmichand Munirám et al.*, 1 Bom. H. C. R. 71 App.; and *Johurra Bibee* v. *Sreegopal Misser et al*, I. L. R. 1 Cal. 470.

(*d*) See *Rámchandra* v *Sávitribái*, 4 Bom. H. C. R. 73 A. C. J.; *Heeralall* v. *Musst. Konsillah*, 2 Agra R. 42; *Musst. Lallikuar* v. *Ganga Bishan et al.*, 7 N. W. P. R. 261; *Baijun Doobey et al.* v. *Brij Bhookun Lall*, L. R. 2 I. A. 279; *Koomaree Debia* v. *Roy Luchmeeput Singh et al.*, 23 C. W. R. 33; *Adhiranee Narain Coomary et al.* v. *Shona Mallee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; Mitákshará Ch. I. Sec. VII. 1, 2; Sec. I. 27.

(*e*) I. L. R. 1 Bom. 262; 2 *Ib.* 494; I. L. R. 2 Mad. 339.

(*f*) The obligation is made dependent on his taking property from the ancestor, and limited by its amount by Bombay Act VII. of 1866. A similar limitation is provided by the same Act in the case of family debts incurred during the minority of a member afterwards sued for them. The protection extends to obligations incurred before a member attains 21 years of age. The general age of majority is now 18. See Act IX. of 1875.

taking it, except when improperly incurred. (*a*) The Judicial Committee indeed have laid down in the case of an estate expressly held not to have been self-acquired by a father that "all the right and interest of the defendant in the zamindâri which descended to him from his father, became assets in his hands" "liable for the debts due from his father." (*b*)

§ 3 *B*. (2) ADOPTED SONS.—*An adopted son and his descendants inherit in the same manner as natural sons and their descendants. In case, after an adoption has been made, of the adopter having a legitimate son of his body, the adopted son receives a fourth of a share.*

See Book I., Chap. II., Sec. 2, and Sec. 4, Q. 2, and for Authorities, *see* above § 3 *A*. (2) (3).

If a widow adopts a son in her husband's name, the adopted son immediately inherits the deceased's property. *See* Book I., Chap. II., Sec. 2, Q. 8, ss.

Regarding the interpretation of the expression "a fourth of a share," *see* § 3 *A*. (3) page 72.

Adopted sons of son's sons, or son's son's sons, likewise, take the places of their adoptive fathers. *See* above, § 3 *A*. (2), page 71.

§ 3 *B*. (3) ŚÛDRAS' ILLEGITIMATE SONS.—*On failure of legitimate sons of the body, son's sons, or son's son's sons, the illegitimate son of a Śûdra and his descendants in the male line inherit the ancestor's property. If legitimate children be living, the illegitimate son takes half a share.*

(*a*) *See* Nârada Pt. I. Chap. III., 2, 4, 18; *Ponnappa Pillai* v. *Pappuváyyangár*, I. L. R. 4 Mad. 1. *Gopál Kristna Śástri* v. *Rámayyangár*, I. L. R. 4 Mad. 236. As to the contract of tenancy see *Venkatesh Náráyan Pai* v. *Krishnáji Arjun*, Bom. H. C. Print. Judg. 1875, p. 361; *Báláji Śitárám Náik* v. *Bhikáji Soyare Prabhu*, Bom. H. C. P. J. 1881, p. 181.

(*b*) *Muttayan Chettiar* v. *Sangili Vira Pandia*, decided 10th May 1882, reversing I. L. R. 3 Mad. 370.

See Book I., Chap. II., Sec. 3, and for Authorities *see* above, § 3 *A.* (3).

See § 3 *A.* (3) above, page 72. That illegitimates of the higher castes can claim maintenance only, while those of the Śûdra caste are not outcastes but inherit, is laid down in *Pandaiyá* v. *Puli et al.* (a) *See* also *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn.* (b)

According to Book I., Chap. II., Sec. 5, Q. 1, the legitimate son of an illegitimate son inherits his father's share, though the latter has died before his grandfather. There is no express authority for this opinion. But still it appears to be in accordance with the general principles of the law of inheritance. For the claim of the Śûdra's illegitimate son to his father's property, or, at least, to a part of it, is not contingent, but absolute, since, even if he has legitimate half-brothers or half-sisters, half a share must be given to him. The Śûdra's illegitimate son is therefore in a position more analogous to that of a legitimate son, than to

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(a) 1 M. H. C. R. 478.

(b) 7 M. I. A. 48, 50.

The Vîramitrodaya, following the Mitâksharâ Ch. I., Sec. XI., paras. 40–43, in contemplating unequal marriages as possible though reprehensible, assigns to the sons born from them a one-third or a half-share of the paternal property, admitting of augmentation, except in the case of a Brahman's son by a Śûdra wife, to a full share at the father's discretion. Vîram., Tr. 98, 129. An exception is, in the case of Brahmans, made of land; that a son by a Brahmani wife may take back from the donee, his half-brother of inferior grade. *Ib.* 98.

According to the Celtic laws of Ireland and Wales bastards might inherit, taking with the legitimate sons a share regulated by the will of the head of the clan. *See* Co. Lit. 176 *a* and Hargrave's Note. The laws were connected as amongst the Śûdras with the general looseness of the marriage tie, which the husband could dissolve at will. *See* Ancient Laws of Wales, p. 46 § 54. According to the Lombard law the illegitimate was excluded from succession, but the legitimate son had to give him a provision in money.

that of relations who inherit by a right liable to obstruction. Hence it would seem a correct doctrine that those laws which apply to the succession of sons and grandsons of legitimate sons, should also be applied to his sons, *i. e.* that his sons should be considered to represent him, and to take, in case he dies before his father, the share which would have fallen to him.

In favour of this view we may adduce also the fact, that the rules treating of the rights of the illegitimate son are given by Vijñâneśvara at the end of the chapter on the 'apratibandha dâya,' inheritance by indefeasible right, and form as it were an appendix to it. Hence it may be inferred that Vijñâneśvara intended all the rules, previously given, regarding sons in general, to apply also to him, except as far as they were apparently modified by the text of Yâjñavalkya. According to this, the failure of daughters and their sons is necessary before the illegitimate son can inherit the whole property. (*a*) *See* Mit. Chap. I., Sec. 12, and Chap. II., Sec. 2, pl. 6; and also above § 3 *A.* (3) page 72.

The illegitimate offspring of a casual connexion may inherit, if duly recognized, (*b*) but a son born in sin (adultery or incest) is not entitled to a share of the inheritance. (*c*) He can claim only maintenance. (*d*)

Illegitimates inherit collaterally only by caste custom. *See* Book I., Ch. II., Sec. 13, Q. 9; 2 Macn. H. L. 15; Mit. Ch. I., Sec. 11, pl. 31. (*e*) *Inter se* the sons of the same concubine are regarded as brothers of the whole blood.

(*a*) See *Mûttûswamy Jagavera* v. *Venkataswara,* 12 M. I. A. 220.

(*b*) *Thukoo Baee* v. *Ruma Baee,* 2 Borr. R. 499; *Ráhi* v. *Govind,* In. L. R. 1 Bom. 97.

(*c*) S. A. No. 124 of 1877, *Náráyanbhárthi* v. *Lavingbhárthi*; Bom. H. C. P. J. F. for 1877, p. 173; S. C. I. L. R. 2 Bom. 141.

(*d*) *Ibid.* and 2 Str. H. L. 68.

(*e*) *Nissar Murtojah* v. *Kowar Dhunwunt Roy,* I. Marsh. R. 609.

See Book I., Ch. II., Sec. 11, Q. 4. They may form a united family with their legitimate half-brothers. *See* Book I., Ch. II., Sec. 3, Q. 12.

The rule given by Yâjñavalkya in favour of the illegitimate son of a Śûdra, though separated in the Mitâksharâ by a long commentary on the preceding ślokas, yet in the original immediately follows them as part of a complete statement of the succession of sons according to their rank. Next follows the statement of heirs to one who leaves no male issue, that is, none of the sons just enumerated. (*a*) What Yâjña-valkya obviously meant therefore was that in the absence of an auras son and of a daughter's son, a Śûdra's son by his slave should succeed. The daughter's son is the one just before specified as equal to a son, though there is a slight variance of expression owing to the term putriká suta first used not being in strictness applicable to the offspring of a Śûdra. (*b*) Hence the word duhitra suta is substituted. By Yâjñavalkya the daughter as well as the wife is brought in after the sons of all classes. (*c*) It is only by interpretation on the part of the commentators that the daughter herself having been first allowed to be an appointed son has been placed before her son under texts probably intended to meet the case of no son of the enumerated classes surviving, nor any son or grandson of such a son. (*d*) If Yâjñavalkya had intended to give to the Śûdra's daughter a place before his illegitimate son, he would not in the next line have placed the widow below that son and the daughter below the widow. The texts quoted in the Mitâksharâ Chap. II., Sec. II., para. 6 from Manu and Vishnu (apart from Bálambhaṭṭa's gloss) show that on failure of descendants in the male line both the

(*a*) Mitâksharâ Chap. II., Sec. I., paras. 2, 39. The term is aputra= sonless.

(*b*) *See* Vîramitrodaya p. 121. *Infra* Bk. I., Ch. II., S. 3, Q. 12, 13.

(*c*) *See* too Mitâksharâ Chap. II., Sec. I., para. 17.

(*d*) *See* Mitâksharâ Chap. II., Sec. II., paras. 2, 6.

Rishis prescribed the succession of the daughter's son and not without appointment (*a*) of the daughter herself, who came in at a later stage. (*b*) This makes it the more probable that the daughter's son but not the daughter was intended to precede the illegitimate son, though the precedence assigned to him by some commentators over his own mother in ordinary cases is to be rejected, as Mitramiśra says, on account of the specification by Yâjñavalkya of the daughter and not of her son, as an heir. (*c*) In the case below Book I., Chap. II., Sec. 3, Q. 8, the illegitimate son of a Mâli is preferred to the widow. The widow could claim recognition, but she is postponed by the Śâstri to the illegitimate son through the operation of Yâjñavalkya's text (*d*) and Vijñáneśvara's comment, (*e*) which provides for the daughter's son and daughter but not for the widow. (*f*)

It seems anomalous that the widow should be thus postponed to the illegitimate son, and her own daughter and the daughter's son. But according to the recognized rule of construction (*g*) the text of Yâjñavalkya can be controlled only by another not reconcilable with its literal sense. Then the passages from Vishnu and Manu quoted Mit. Ch. II., Sec. II., para. 6 show that at one stage of the development of the Hindû Law, the daughter's son and even the daughter were made equal to a man's own son, while the widow was still unprovided for, or reduced to a lower place. (*h*) Yâjñavalkya's text belongs to this stage : so little progress had been

(*a*) Vîramitrodaya, Transl. p. 121.

(*b*) *Bháu Nánáji* v. *Sundrábai,* 11 Bom. H. C. R. 274. *See infra* Book I., Ch. II., Sec. 3., Q. 10.

(*c*) Vîramitrodaya, Transl. p. 184.

(*d*) Mitâksharâ Chap. I., Sec. XII., para. 1.

(*e*) Mitâksharâ Chap. I., Sec. XII., para 2.

(*f*) So too the Vîramitrodaya, Transl. pages 130, 176.

(*g*) *See* Vîramitrodaya, Transl. p. 236.

(*h*) *See* Manu Chap. IX., 130, 146, 147. Vishnu Ch. XV., 4, 47. Compared with Gautama XXVI., 18, ss., and Âpastamba II. VI., 14; Nârada XIII., 50, 51.

made that the Ṛishi does not even name the daughter's son except in this place; but this mention is enough.

It is to the patnî only that the sacred texts assign a right of inheritance. (a) The English translation "wife" fails to indicate the distinction between the wife sharing her husband's sacrifices and the wife of an inferior order. (b) The Śûdra having no sacrifices to celebrate like the twice-born has no "patnî" to share them. The Ásura marriage being a purchase gave to the wife no higher status than that of a "dási" or concubine. (c) But this or some even lower form was the appropriate one for Śûdras: (d) the higher forms were not allowable until custom in some measure made them so, (e) and the different consequences of marriage according to the different forms (f) are traceable to a time and a custom in which community of property between the married pair was not recognized. (g) Under such a system it is not at all surprising that the wife's right of inheritance should not be admitted. Nor is it strange that the development of the purely Brahminical law by which widows in the higher castes benefited should not have embraced in its full extent the degraded Śûdras. As to the wives in this caste the expanding law left them as it found them, while it readily adopted an existing custom in favour of illegitimate

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(a) *See* below Book I., Ch. II., Sec. 6 A, Q. 6 and above Introd. *See* too Vîramitrodaya, Transl. p. 173.

(b) Mit. Ch. I., Sec. XI. 2. Dá. Bhág. Ch. XI., Sec. I., 48. Vîramitrodaya, Transl. p. 132.

(c) Smriti Chand, 150; Vîramitrodaya, loc. cit.

(d) Baudháyana makes mere sexual connexion a lawful form of union for Vaiśyas and Śûdras, "for," he says, "Vaiśyas and Śûdras are not particular about their wives." Shortly afterwards he says: "A female who has been bought for money is not a wife. She cannot assist at sacrifice offered to the gods or the manes. Kâsyappa has pronounced her a slave." Baudh., Tr. p. 207.

(e) Cf. *Vijiyárangam* v. *Lukshuman*, 8 B. H. C. R. 255–56 O. C. J.

(f) Mitâk. Chap. II., Sec. XI., 11.

(g) *See* the Chapter on Strîdhan.

sons, which appeared reasonable to those whose own heirs might be sons irregularly contributed to their families, and who looked on the Śûdra marriages as virtually no more than licensed concubinage.(a)

The express provision in Yâjñavalkya's text in favour of the daughter's son may not improbably be traced in reality to a time when this kind of descent afforded the better assurance of a real connexion of blood. But it may be really an adoption for the Śûdras of a rule much repeated, though not intended for that caste. The advantageous position assigned to the daughter's son is traced by Jîmûta Vâhana to his identification with the son of the appointed daughter, (b) in whose favour only, Jîmûta Vâhana says, the texts expressly pronounce. He cites Baudháyana's text (c) that the "Putrika Sutam" is to offer the piṇḍas and apparently excludes the mere "dauhitra" from this right, which is assigned to him also however by Manu. (d) The introduction of the daughter as well as her son may be due to a similar course of thought. The daughter appointed *as* a son being once recognized as a regular heir, (e) the daughter not appointed gained a place, (f) and in the passages cited as well as in Brahaspati (g) is mentioned without any mention of the wife. The texts were so far admitted as to the

(a) See Gautama Ch. XIX.; Baudháyana, II., 2.

The Roman law furnishes an analogy in the case of slaves: "quas vilitates vitae dignas observatione legum non credidit," and whose unions, even under the Christian system, remained mere concubinage in law until late in the 9th century. *See* Milman Hist. of Latin Christianity, vol. II., p. 15; Lecky, History of European Morals, II. 67.

(b) Dáya Bhága Chap. XI., Sec. II, 21.

(c) At 1 W. & B. (1st Ed.) 310, 315.

(d) Cf. also Sankha and Likhita. Stokes' H. L. B. 411.

(e) Mit. Chap. I., Sec. XI., para. 3.

(f) Manu Chap. IX., 130; Nârada Chap XIII., 50.

(g) Dáya Bhága Chap. XI., Sec. II., 8.

Śûdras, but those specially favouring the wife as an heir, bearing only on the "patnî," were not. (*a*)

§ 3 *B.* (4) WIDOWS.—*On failure of the three first descendants in the male line, of adopted sons, and in the case of Śûdras of illegitimate sons, a faithful widow inherits the estate of a separate householder, and the separate estate of a united coparcener.*

See Book I., Chap. II., Sec. 6, and for Authorities, *see* Book I., Chap. I., Sec. 2, Q. 4; Chap. II., Sec. 6 A, Q. 11; Vyav. May. Chap. IV., Sec. VIII., p. 1, seq.

Under the strict Hindû law only such a widow inherits who was a dharmapatnî, "a wife taken for the fulfilment of the law," who was lawfully wedded, and able to assist in the performance of the sacrificial rites. (*b*) As only a female married as a virgin could occupy such a position, the females who had been widowed and remarried (by Pâṭ) were excluded from the succession to their second husband's property. By Act XV. of 1856 this disability has been removed, and the legal relation of wife to a husband, whether

(*a*) *See* Book I., Ch. II., S. 6, A. Q. 6, and the instance at Book I., Ch. V., S. II., Q. 1 and 2.

The Salic and Burgundian laws excluded women from inheritance to land. The Wisigoths more influenced by the Roman law admitted the daughter's succession, and this was in part adopted by the Franks. In England boc-land was heritable by females, but in the folc-land they could take no share. Hence possibly their exclusion by custom in some manors, *see* below.

(*b*) "A wife of the same class is indicated by the term 'patnî' itself, which signifies union through sacrifice." Vîramit., Transl. p. 152. A wife of a rank below a "patnî" would be entitled only to maintenance according to the Smṛiti Chandrika Ch. XI., and comments in Vîramit., Tr. p. 133, 153; to succession only on failure of the wife of equal class, and that by analogy only, the texts giving the right only to the "patnî," to whom the Smṛiti Chandrikâ, loc. cit. paras. 11, 25, confines it. As to the relative rank of wives the first married has precedence. *See* Steele, L. C. 170.

she is technically a patnî or not, is recognized as giving a right of inheritance to the woman and legitimacy to the children.(*a*)

If a householder leaves more than one widow they share the estate equally. *See* Book I., Chap. II., Sec. 6A, Q. 35 and 36.

Two or more widows are usually regarded as taking a joint estate; but this, though established by judicial decision in Madras and Bengal, does not appear to be the doctrine of the Mitâksharâ or of the Vyavahâra Mayûkha. (*b*) In Madras it has been thought that the interest of one only of the widows could not be sold.(*c*)

Proved adultery bars the succession of a widow to her deceased husband's estate. But if she has once obtained it, subsequent unchastity does not afford a reason for depriving her of it. *See* Book I., Chap. VI., Sec. 3, Q. 6, Remark.

During the widow's survival no right vests in her husband's brothers or the other heirs. Her life with respect to the subsequent inheritance of heirs sought amongst her husband's relatives is as a prolongation of his. (*d*) Succession on the widow's death opens to the husband's qualified heirs then in existence. (*e*)

(*a*) *See* Vyav. May Chap. IV., Sec. VIII., para. 3.; Steele, Law of Castes, 168, 169, 175, and the answers of the Sâstris below, Bk. I., Ch. II., Sec. 6A.

(*b*) *Balákhidas Govindas* v. *Keshavlal Chhotalal*, B. H. C. P. J. for 1881, p. 320; *Kotarbasapa* v. *Chanverova*, 10 Bom H. C R. 403. Comp. *Rindamma* v *Venkata Ramappa et al.*, 3 Mad H. C. R 268.

(*c*) *Kathaperumal* v *Venkabai*, I. L. R 2 Mad 194; *Gajapathi Nilmani* v. *Gajapathi Radhamani*, 1 Ib. 300; *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I A. 487.

(*d*) *Rooder Chunder* v. *Sumbhoo Chunder*, 3 Cal. S. D. A. R. 106; *Musst Jymunee Dibiah* v. *Ramjoy Chowdree* Ibid 289.

(*e*) *Laxmi Narayan Singh et al.* v. *Tulsee Narayan Singh et al.*, 5 Sel. S. D. A. R. 282 (Calc.); *Nobin Chunder* v. *Issur Chunder et al.*, 9 C. W. R. 508 C. R.; *Bháskar Trimbak* v. *Mahádeo Rámjee et al.*, 6 Bom. H. C. R. 14, O C J.; P. C. in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279.

The duties and rights attached to the married state are governed by the customary law of the class or caste (*a*) which regulates the form of the ceremony as well as the relations arising from it. (*b*) The law of the caste has been more or less subordinated in cases of disagreement to the general Hindû law, (*c*) and private agreements are not allowed to control the customary law so as essentially to modify the obligations which it imposes, (*d*) as by making the union dissoluble which the law regards as indissoluble.

The heritable rights of the widow are mainly derived from a moral unity existing between her and her deceased husband. (*e*) The domestic fire must be maintained as a primary duty, and in its maintenance and the performance of the household rites the Hindû wife must take part with her husband. (*f*) Thus, as the Mahâbhârat says: (*g*)—" A wife is necessary to the man who would celebrate the family sacrifices effectually." Hence the husband comes for some purposes to be regarded as " even one person with his wife" (*h*)

(*a*) *Ardaseer Cursetjee* v. *Perozebái*, 6 M. I. A. 348, 390; *Moonshee Buzloor Ruheem* v. *Shumsoonissa*, 11 *Ib.* 551, 611; *Skinner* v. *Orde*, 14 M. I. A. 309, 323; *Ráhi* v. *Govind valad Tejá*, I. L. R 1 Bom. 97, 116; *Reg* v. *Sambhu Raghu*, *Ibid.* 347; *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. 545, at 565 ss.

(*b*) *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee*, 14 Beng. Law. Rep. 298; *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya*, 25 C. W. R. 404, 414.

(*c*) *Reg.* v. *Karsan Gojá*, 2 Bom. H. C. R. 117, 125. Comp. Gaut. XI. 20; Manu II., 12, 18.

(*d*) *Seetaram* alias *Kerra Heerah* v. *Mussamut Aheeree Heeranee*, 20 C. W. R. 49.

(*e*) Kâtyâyana cited in M. Williams' In. Wis. 160; Brihaspati in the Smriti Chandrikâ, Ch. XI., Sec. 1, para. 4; Manu, IX., 45.

(*f*) Manu III., 18; Baudhâyan, Transl. p. 193.

(*g*) Manu III., 67; II., 67; IX., 86, 87, 96; Âpast. 99, 125, 126; Coleb. Dig. B. IV., T. 414; Smriti Chandrikâ, Ch. XI., Sec. 1, para. 9.

(*h*) Manu IX., 45; Brihaspati, quoted by Kullûka on M. IX., 187.

As under the Roman Law, "*Nuptiæ sunt divini juris et humani communicatio.*" The wife's gotra becomes that of her husband; (*a*) her complete initiation is effected by her marriage; she renounces the protection of her paternal manes and passes into the family of her husband. (*b*) The connexion being thus intimate there should be no litigation between the married pair, (*c*) and according to Âpastamba (*d*) there can be no division between them. Any property which the married woman may acquire is usually her husband's. (*e*) A thing delivered to her is effectually delivered to the husband, and what is received from her is as if received

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(*a*) Steele 27 (*n*); *infra* B. I., Ch. IV. B., Sec. 6, II. (b), Q. 3; *Lallubhoy* v. *Cássibái*, L. R. 7 I. A. at p. 231.

Under the Teutonic laws which recognized the birth-law of each as permanently adhering to him, there were exceptions (1) in the case of a married woman whose coverture brought her under the birth-law of her husband, and (2) in that of a priest who came under the Roman law. *See* Savigny's History of the Roman Law, Chap. III.

(*b*) 2 Str. H. L. 61; *Śri Raghunadha* v. *Śri Brozokishore*, L. R. 3 In. A. 191. So amongst the Romans. Dio. Halic. II., 25.

(*c*) 2 Str. H. L. 58. Co. Di. B. III. Ch. I., T. 10. Conjugal rights were refused to the husband where the lower courts thought that compelling the wife to go to his house would be dangerous to her personal safety. *Uká Bhagván* v. *Bái Hetá*, Bom. H. C. P. J. File for 1880, p. 322.

(*d*) *See* Hârîta in Smṛiti Chan., Ch. II., Sec. 1, para. 39. Vîramit., Trans. p. 59. Âpastamba, Transl. p. 135.

(*e*) Vyav. May., Ch. IV., Sec. 10, para. 7; Coleb. Dig. Book III. Ch. I., T. 10; Nârada II., XII. 89; Âpast. 156; Manu VIII. 416; 1, Str. H. L 26. Kâtyâyana quoted in Smṛiti Chandrikâ, Ch. IX., Sec. 1, para. 16. But see also Mit. Ch. II., Sec. 11. *Rámasámi Padeiyátchi* v. *Vírasámi Padeiyátchi*, 3 Mad H. C. R 272. She is liable in her strîdhan only for a contract made jointly with her husband, while a woman contracting as a widow remains subject generally to the liability after her remarriage. *Narotam* v. *Nánká*, I. L. R. 6 Bom. 473. *Náhálchand* v. *Bái Shivá*, *Ibid.* 470. S. A. 261 of 1861; S. A. 467 of 1869. When living separate without necessity she is fully liable for her debts. *Nathubhái Bháilal* v. *Javher Raiji*, I. L. R. 1 Bom. 121.

from him.(*a*) Her full ownership of her strîdhan is subject to the qualification that her husband may dispose of it in case of distress, and that her own power to alienate it is subject to control by him with the exception of the so-called Saudâyakam, the gifts of affectionate kinsmen. (*b*) *See* the Chapter on Strîdhan.

The identity between the married pair being thus complete, Jagannâtha cites Datta (*c*) to the effect that "wealth is common to the married pair"; but this he explains as constituting in the wife only a secondary or subordinate property. Her right in the husband's estate is not mutual like the co-extensive rights of united brethren. It is dependent on the husband's and ceases with its extinction. (*d*) Her legal existence is thus, in some measure, absorbed during her coverture in that of her husband. (*e*) His assent is specially necessary to her dealings with land according to Nârada, Part I., Ch. III., p. 27–29. (*f*) In case of unauthorized transactions she is liable in her strîdhan, but not in her person. (*g*) On her decease she shares in the benefit of

(*a*) Col. Dig B V. Ch. VII., T. 399 Comm. Her authority would, however, be revoked perhaps by adultery as under the English law. (See *R.* v. *Kenny*, L. R. 2 Q. B. D. 307), and the Indian Penal Code § 378, illus. (o) assumes that her authority is limited by the extent of delegation from her husband. Comp. *R.* v *Hanmanta*, I. L. R. 1 Bom. at p. 622. As to household expenses *see* Âpast., Tr. p. 135.

(*b*) *Reg.* v *Náthá Kalyán et al*, 8 Bom. H. C. R. 11 Cr. Ca.; *Tukárám* v. *Gunájee*, *Ibid.* 129 A. C J ; Vyav. May , Ch. IV., Sec. 10, pl. 8 and 10 ; Coleb. Dig., B. II , Ch IV., T. 55 ; Bk. V , T. 478 ; Víramitrodaya, quoted below ; Manu II., 199 ; Smṛiti Chandrikâ, Ch. IX., Sec. 2, para. 12 ; 2 Macn H. L. 35.

(*c*) Coleb. Dig. B. V. T. 415. *See* also the Smṛiti Chandrikâ, Ch. IX., Sec. 2, para. 14.

(*d*) Vîramit., Transl. 165.

(*e*) *See* Manu IX., 199, as construed by the Mayûkha and Vîramitrodaya.

(*f*) *See* also *D. Ráyapparáz* v. *Mallapudi Ráyudu et al.*, 2 M. H. C. R. 360.

(*g*) *Nathubhái* v. *Javher Ráiji et al.*, In. L. R. 1 Bom. 121.

her husband's sacred fire, (*a*) her exequial ceremonies, according to the Mitâksharâ and the Nirṇayasindu, are to be performed by her husband, and in his absence by the members of his family, not by those of her own family of birth. Surviving her husband, and thus in a manner continuing his existence, (*b*) she procures benefits for his manes and those of his ancestors. (*c*) It is on her competence in this respect that according to the Smṛiti Chandrikâ (Trans. p. 151) her right to inherit depends. Devâṇḍa Bhaṭṭ therefore restricts the right to the "patnî," refusing it to the wives of an inferior order, (*d*) and in the Vîramitrodaya (*e*) it is said that "a wife espoused in the ásura or the like form has no right to the property when there is another espoused in an approved form," because "a woman purchased is not to be deemed a patnî, since she cannot take part in a sacrifice to the gods or the manes; she is regarded as a slave," and "a sonless wife other than a patnî is entitled only to maintenance even where the husband was separated."(*f*)

The Mitâksharâ also, Chap. II., Sec. 1, pl. 29, 6, (*g*) restricts the heritable right to the "patnî," the "wedded wife who is chaste." Vijñâneśvara allows this right to operate in favour of the widow only of a divided coparcener

(*a*) Vîramit, Transl 133.

(*b*) P. C. in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279, 312. *Moniram Kolita* v. *Kerry Kolitany*, In. L. R. 5 Calc. 776.

(*c*) Manu IX., 28. Vîramit, Tr. p. 133. Kâtyâyana quoted in M. Williams In. Wis. p. 169 Manu and Bṛihaspati, quoted in Smṛiti Chandrikâ, Ch. XI., Sec I, paras. 14, 15.

(*d*) So Varadrâja (Burnell's Trans. p. 55) says, inheritance is prescribed by the texts in which "patnî" is used; maintenance only by those in which words of inferior dignity are employed. *See* Dâya Bhâga, Ch. XI., Sec. 1, p. 49 (Stokes, H. L. B. 318); Vyav. May., Ch. IV., Sec. 8, p. 2.

(*e*) Trans. p. 132.

(*f*) Trans. p. 193.

(*g*) Coleb. Dig. B. V., T. 399; and *see* Smṛiti Chandrikâ, Ch. XI., Sec. 1, para. 4.

(*Ibid.* pl. 30), but thus inheriting she obtains an ownership of the property (*Ibid.* Ch. I., Sec. 1, pl. 12), notwithstanding her general dependence (Ch. II., Sec. 1, pl. 25), (*a*) extending even to a reversion vested in her husband (*b*) which enables her, as contended in the Vyav. May., above quoted, to deal with the estate for some purposes by way of alienation or incumbrance. (*c*) She has an estate in her late husband's property, not a mere usufruct, (*d*) and not the less by reason of her being authorized to adopt. (*e*) Her husband's estate

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(*a*) *See* also Vîramitr., Trans. p. 136, and Smṛiti Chandrikâ, Ch. XI., Sec. 1, paras. 19, 28.

(*b*) See *Hurrosoondery Debea* v. *Rajessuri Debea*, 2 C. W. R. 321.

(*c*) Steele's Law of Caste, 174, ss. Vîramitr. loc. cit.

(*d*) "Assuming her (the widow) to be entitled to the zamindâri at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest; and until her death it would not be ascertained who would be entitled to succeed," P. C. in *Katama Natchiar* v. *Rajah of Shivaganga*, 9 M. I. A. at p. 604.

In *Moniram Kolita* v. *Keri Kolitani* (I. L. R. 5 Cal. 776, S C. L. R 7 I. A. 115) the Privy Council say at p 789: "According to the Hindû law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the Shivaganga case (9 M. I. A. 604) does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband." (*Ibid.* 604.) The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death." The case was one under the Bengal law.

(*e*) *Umasunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. 288.

completely vests in her by way of inheritance, (*a*) not as a trust. (*b*) Her position has been assimilated to that of a tenant-in-tail; (*c*) though for the purposes of alienation it has been said that she "has only a life interest in immoveable property whether ancestral or no."(*d*) She represents the estate so that under a decree against her for arrears of rent due by her husband (*e*) and a sale in execution the whole interest passes, though, as is afterwards said, (*f*) the widow was in the particular case sued as representative of her son, and it was intended that the son's interest should be sold.(*g*) "In a suit brought by a third person, the object of which

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(*a*) *Bhala Nahana* v. *Parbhu Hari*, In L. R. 2. Bom. 67. Vîramitr., Trans. p. 134; *Lálchand Rámdayál* v. *Gumtibái*, 8 Bom. H. C. R, 156, O. C. J.

(*b*) *Bhaiji Girdhur et al.* v. *Bai Khushal*, S. A. No. 334 of 1872 (Bom. H. C. P. J F. for 1873, No. 63); *Hurrydoss Dutt* v. *Shreemutty Uppoornah Dossee et al.*, 6 M. I. A. 433.

(*c*) *Katama Natchiar* v. *The Rajah of Shivaganga*, 9 M. I. A. 569. See *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. at p. 550. A widow retains without security proceeds of land taken by a Railway Company, *Bindoo Bassinee* v. *Bolie Chund*, 1 C. W. R. 125 C. R. She may claim a definition of her share (*Jhunna Kuar* v. *Chain Sukh*, I. L. R. 3 All. 400) when her husband has been separate. but not when she has been assigned his portion by way of maintenance in an undivided family. *Bhoop Singh* v. *Phool Kooer*, N. W. P. H. C. R. for 1867, p. 368.

(*d*) *Vishnu Ganesh* v. *Náráyan Pándurang*, (Bom. H. C. P. J. F. for 1875, p. 212); *Bamundoss Mookerjea et al.*, v. *Musst. Tarinee*, (7 M. I A. 169). *See* also, however, *Lakshmibái* v. *Gunpat Moroba*, 5 Bom. H. C. R. 128 O. C J.; and *Doe Dem Goluckmoney Dabee* v. *Digambar Day*, 2 Bouln. 193; *Girdharee Singh* v. *Kolahut*, 2 M. I. A. 397.

(*e*) *Kámávadhani Venkata Subbaiya* v. *Joysa Narasingappa*, 3 M. H. C. R. 116; *Náthá Hari* v. *Jamni*, 8 Bom. H. C. R. 37 A. C. J. But *see* L. R. 2 I. A. 281 below. (*g*)

(*f*) *The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaputsing*, 14 M. I. A. 605.

(*g*) *Baijun Doobey et al.* v. *Brij Bhookun Lall*, L. R. 2 In. A. 281. The extent of the interest of the widow sold in execution thus depends on the nature of the action. *Jotendro Mohun Tagore* v. *Jogul Kishore*, I. L. R. 7 Cal. 357.

is to recover or to charge an estate of which a Hindû widow is proprietress, she will as defendant represent and protect the estate as well in respect of her own as of the reversionary interest." (*a*) "She would," as said in another case, "completely represent the estate, and under certain circumstances, the statute of limitations might run against the heirs to the estate, whoever they might be." (*b*) Those "heirs," as pointed out in *Musst. Bhagbutti Dall* v. *Chowdry Bholanath Thakoor et al.*, (*c*) have not, during the widow's life, "a vested remainder" according to the language of the English law, "but merely a contingent one." The "reversioner," therefore, as he is in some places called, cannot, during a widow's life, obtain a declaration that he is entitled next in succession. (*d*) Nor can his contingent right be sold in execution. But the widow may, with the consent of first reversioners, relinquish her right in favour of

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(*a*) *Seetul Pershad* v. *Musst. Doolhin Badam Konwur et al.*, 11 M. I. A. 268. "The rule that a decree against a widow binds the reversioner is subject to this qualification that there has been a fair trial in the former suit." Markby, J., in *Brammoye Dossee* v. *Kristo Mohun Mookerjee*, I. L. R. 2 Cal. at p. 224. The widow must protect the estate as well as represent it. *Nogender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M. I. A. 241; cf. *Jenkins* v. *Robertson*, L. R. 1 Sc. App. at 122.

(*b*) *Tarinee Churn Gangooly et al.* v. *Watson & Co.*, 12 C. W. R. 413; *Nobinchunder et al.* v. *Guru Persad Doss*, B L. R 1008 F. B.: *Nand Kumar et al* v. *Radha Kuari*, In. L R. 1 All 282. *Raj Bullubhsen* v. *Oomesh Chunder*, I. L. R. 5 Cal. 44; *Noferdos Roy* v. *Modhusoondari*, I. L. R. 5 Cal. 732 referring to *Shama Soonduri* v. *Surut Chunder Dutt*, 8 C. W. R. 500, and *Gunga Pershad Kur* v. *Shumbhoo Nath Burmon*, 22 C. W. R. 393.

(*c*) L. R. 2 In. A. 261: *see* also *Amritolal Bhose* v. *Rajonee Kant Mitter*, Ibid. 113; and *Doe Dem Goluckmoney Dabee* v. *Diggumber Day*, 2 Bouln. 193; *Rooder Chunder* v. *Sumbhoo Chunder*, 3 C. S. D. A. R. 106; *Musst. Jymunee Dibiah* v. *Ramjoy Chowdree*, Ibid. 289; 2 Tayl. and Bell 279.

(*d*) *Pranputty Kooer* v. *Lalla Futteh Bahadur Singh*, 2 Hay, 608; *Shama Soonduree et al.* v. *Jumoona*, 24 C. W. R. 86.

second. (*a*) He may however protect the estate against an improper alienation or waste. (*b*) That the widow and the "immediate reversionary heir" together may deal as they please with the property, is a proposition (*c*) that must now be read as qualified by the language of the Privy Council, "a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such a case must be understood to be all those who are likely to be interested in disputing the transaction." (*d*) A suit against the widow is not open indiscriminately to every one in the line of succession. The nearest heir is the proper person to sue; remoter heirs must assign a sufficient reason for their claim to sue. (*e*)

The Hindû law does not, it would seem, recognize vested or contingent remainders or executory devises (*f*) in the

(*a*) *Protap Chunder Roy* v *S Joymonee Dabee Chowdhrain et al.*, 1 C. W. R. 98.

(*b*) *Bhikáji Apáji* v. *Jagannáth Vithal*, 10 Bom. H. C. R. 351. *Chottoo Misser* v. *Jemah Misser*, I. L. R. 6 Cal. 198; *Rani Anund Kunwar* v. *The Court of Wards*, I. L. R. 6 Cal. 764, 772. "The mere concurrence of a female relation," it was said, "albeit the nearest in succession, cannot be regarded as affording the slightest presumption that the alienation was a proper one." *Varjivan* v. *Ghelji Gokaldas*, I. L. R. 5 Bom. 563. The concurrence was that of the daughter, who, failing the widow, would take absolutely whether as heir to her mother or to her father. *Infra* Bk. I, Ch. II., § 14, I. A. 1 A. 3. *See* article on Strîdhan. In *Sia Dasi* v. *Gur Sahai*, I. L. R. 3 All. 362 it was held that a remoter reversioner who had assented to a particular disposal by a widow and the heir next interested could not afterwards question the transaction. *See* also *Raj Bullubh Sen* v. *Oomesh Chunder Rooz*, I. L. R. 5 Cal. 44.

(*c*) *S. Jadomoney Dabee* v *Saroda Prosono Mookerjee et al*, 1 Bouln. 120; *Mohunt Kishen Geer* v *Busgeet Roy and others*, 14 C. W R. 379.

(*d*) *Raj Lukhee Debia* v *Gokool Chandra Chowdhry*, 13 M. I. A. 228. *See* also *Koover Goolab Sing* v. *Rao Kuran Singh*, 14 M. I. A. 176 S. C. I. L. R. 2 All. 141.

(*e*) *Rani Anand Koer* v *The Court of Wards*, L. R. 8 I. A. 14.

(*f*) See *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharjee Chowdhry*, 10 M. I. A. 279.

exact sense of the English law. (a) It assigns to the widow either an ownership of the property merely for use, as in Bengal, (b) with a special power in case of absolute necessity to mortgage or sell it for her subsistence or other approved purposes; (c) or else, as under the Mitâksharâ law, an ownership fully vested subject only to restrictions on alienation, (d) at least of immoveables, (e) arising from her dependence or the recognition of interests that the estate must provide for.

(a) *See* Col. Dig. B. v. T. 76. Com. *ad fin.* A devise to several sons with cross remainders in favour of the survivors is good under Hindû law, but the testamentary power as to "contingent remainders and executory devises is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindûs in India" Willes, J., in the Tagore case, L R. S. I. A. at p. 70, quoting *Bhoobun Moyee Debia* v *Ram Kishore Chowdry*, 10 M. I. A. 279. In the case in question the interest of the heir expectant is a mere contingency not saleable *Ramchandra Tantra Dás* v. *Dharma Náráyan Chuckerbutty*, 7 Beng. L. R 34.

(b) Dâya Bhâga, Ch. XI., Sec. 1, pl. 56. Thus it is, perhaps, that in Bengal the limited character of her right being emphasized a surrender by a widow to the then next heirs immediately vests the property in them in possession as if she had then died. *Noferdoss Roy* v. *Modhu Soonduri Burmonia*, I. L. R. 5 Cal. 732.

(c) Dâya Bhâga, Ch. XI., Sec. 1, pl 62; *Chundrabulee Debia* v. *Brody*, 9 C W. R. 584; *Lakshman Rámchandra Joshi and another* v. *Satyabhámábái*, I. L. R. 2 Bom , at p 563 et ss *See* the opinion of Sir W. Macnaghten in *Doe Dem Gunganarain* v. *Bulram Bonnerjee*, East's Notes No. 85, 2 Morley's Digest at p. 155, but also the judgment of East, C. J., in *Cossinaut Bysack et al.* v *Hurroosoondry Dossee et al.*, No. 124, at p. 198 of the same volume, with which may be compared the remarks of H. H Wilson in vol. V. of his works, pp. 1 ss.

(d) *See* the judgment of Sir M. Westropp, C J., in *Bhálá Naháná* v. *Parbhu Hari*, above quoted; Vyav. May. Ch. IV., Sec. 10, pl. 8; Mit. Ch. II., Sec. 1, pl. 31, 32; Colebrooke, in 2 Str. H. L. 272, 407; and Ellis, *ibid.*, 208.

(e) Vîramit., Transl. p. 138 ss. *Bhaiji Girdhur et al.* v. *Bái Khushal*, Bom. H. C. P. J. F. 1873 No. 63; *Ram Kishen Singh* v. *Cheet Bannoo*, C. W. R. Sp. No. 101; *Doorga Dayee* v. *Poorun Dayee*, 5 C. W. R. 141; *Mussamut Thakoor Dayhee* v. *Rai Baluck Ram*, 10 C. W. R. 3 P. C.

The analogy of the law of partition is applied by the Mitâksharâ, Ch. II., Sec. 1, and by the Subodhini, to the determination of her estate. (a) She may sell or incumber the property principally, besides payment of her husband's debts and her own necessary subsistence, (b) for two objects, the fulfilment of religious duties and the grant of charitable donations. (c) Gifts in Kṛishṇârpaṇ have been looked on with much favour by the Bombay Śâstris, who say that the property may be disposed of for necessaries, for charity, and for the maintenance of the husband's business. (d) A pilgrimage may be undertaken at the cost of the estate, (e) and a daughter may be portioned out of it. (f) The gift of one-half of the property in "Kṛishṇârpaṇ" (g) would now hardly be sanctioned, and the right assumed in some instances by a mother to fulfil in this way a supposed duty to the deceased, would certainly be disallowed. (h) Nor can the mother strip the

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(a) *See* below Partition; Colcb. Dig. B. v. T. 87, Comm.; 2 Str. H. L. 383.

(b) *Sakhárám* v. *Jánkibái*, Bom. H. C P. J. File for 1878, p. 139.

(c) Nârada, Pt. I., Ch III, Ślokas 29, 30, 36, 44; *Raj Lukhee Debia* v *Gokool Chandra Chowdhry*, 13 M. I. A. 209; Vyav. May. Ch. IV., Sec. 8, p. 14.

The separation of the estates of spouses contemplated by the Teutonic Codes was sometimes prevented by mutual donation which they allowed, and by which the survivor took the usufruct of the whole for life. This was accompanied by a right to alienate for an urgent necessity or for pious uses according to the Ripuarian Laws Tit. 48, 49.

(d) *See* below, Ch. II., S. 14, I. A 4, Q. 10; and *Kupoor Bhuwanee* v. *Sevukram Seoshunker*, 1 Borr. 448.

(e) *Mutteeram Kowar* v. *Gopaul Sahoo*, 11 B. L. R. 416.

(f) Nort L. C. 638; Steele L. C. 176.

(g) As in Ch II., Sec. 14, I. A. 4, Q. 10; *see* Ellis in 2 Str. H. L. 408, 410; *Kartick Chunder* v. *Gour Mohun Roy*, 1 C. W. R. 48 (a Bengal case).

(h) Q. 726, 727 MSS. Surat, A. D. 1847. Custom seems in many instances to have assigned to the surviving mother a position superior to that of her son's widow. Examples are to be found in Borradaile's Caste Rules, and *seq* Steele L. C. 175. Nârada, Transl·

widow of the estate by an adoption to the deceased's father.(*a*) In Bengal the Courts have given effect to a widow's resignation of the succession in exchange for an annuity,(*b*) and to her relinquishment with consent of first "reversioner" in favour of second. (*c*)

A widow may borrow money on the estate for its effectual cultivation.(*d*) But she has no authority to waste the property. "Although according to law of the Western Schools(*e*) the widow may have a power of disposing of moveable property inherited from her husband, (*f*) which she has not under the law of Bengal, she is by the one law as by the other restricted from alienating any immoveable property

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p. 19. The very early age at which a Hindû wife joins her husband enables the mother-in-law to assert a supremacy which in many cases is retained for life, even after the husband's death. Inheritance by the mother does not under such circumstances appear unreasonable, especially when the widow is still very young. "Sharpe remarks of ancient Egypt that 'here as in Persia and Judaca the king's mother often held rank above his wife.' In China.........there exists the supremacy of the female parent second only to that of the male parent, and the same thing occurs in Japan." H. Spencer in *Fortnightly Review* No. 172 N. S., p. 528.

(*a*) *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279. If a widow and a mother adopt different boys, the one adopted by the widow takes the estate, Q. 1761, MSS. *See* below Ch. II., Sec. 6 A , Q. 22

(*b*) *Shama Sooonduree et al* v. *Shurut Chunder Dutt et al*, 8 C. W. R. 500; *Lalla Koondu Lall et al.* v. *Lalla Kalee Pershad et al.*, 22 *Ibid.* 307; *Gunga Pershad Kur* v. *Shumbhoonath Burmun et al.*, 22 *Ibid.* 393.

(*c*) *Protap Chunder Roy* v. *S Joymonee Dabee Chowdhrain et al.*, 1 C. W. R. 98.

(*d*) *Koor Oodey Singh* v. *Phool Chund et al*, 5 N. W. P. R. 197.

(*e*) *Munsookrám* v. *Pránjeevandás et al.*, 9 Harr. 396; *Oojulmoney Dossee et al.* v. *Sagormoney Dossee*, 1 Taylor and Bell, 370; *Hurrydoss Dutt* v. *Rungunmoney Dossee et al.*, 2 *Ibid.* 279; *Goluckmoney Dabee* v. *Diggumber Day*, 2 Bouln. 201; *Bhálá Náhánú* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*f*) *See* Nârada I., III., 30; *Pránjeevandás et al.* v. *Dewcoorbái et al.*, 1 Bom. H. C. R. 130.

which she has so inherited,"(*a*) alienating, that is, without a special justification. Thus she cannot, as against the collateral heirs, alienate by a mere deed of gift. (*b*) A sale made by her without authority may, according to several decisions, endure for her own life, but any one proposing to take a greater interest is bound to prove a necessity for the sale, or at least a *primâ facie* case of necessity. (*c*) If however the purchaser acts in good faith, the transaction is not wholly vitiated by some excess of the widow's powers as rigorously construed, and he is not bound to see to the application of the purchase-money. (*d*)

(*a*) *Musst. Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M I. A. 176, cited in *Brij Indar Bahadur Singh* v. *Ráni Janki Koer*, L. R. 5 I. A. 15. Colebrooke and Ellis in 2 Str. H. L. 407 ss.; and *Bái Ambá* v. *Dámodar Lálbhái et al.*, S. A. No. 217 of 1871, decided 11th August 1871 (*see* Bom H. C. P. J. F. for 1871). Steele L. C. 175. *Bhugwandeen Doobey* v *Myna Bái*, 11 M I. A 487.

(*b*) *Keerut Sing* v. *Koolukul Sing et al.*, 2 M. I. A. 331.

(*c*) *Gorya Halya* v. *Undri et al.*, S. A. No 455 of 1873 (Bom. H. C. P. J. F. for 1874, p. 125); *Bháu Venkobá* v. *Govind Yeswant*, Bom H. C. P. J. for 1878, p 60; *Kamesvar Prasad* v. *Run Bahadur Singh*, I. L. R. 6 Cal. 843 (P. C.); *Mayárám* v. *Motárám*, 2 Bom. H. C. R. 313; *Melgirappa* v *Shiváppa*, 6 Bom. H. C. R. 270, A. C J.; *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.*, L R. 2 In. A. 261; *Govind Monee Dossee* v. *Sham Lal Bysack et al.*, C. W. R, F. B. R. 165; *The Collector of Masulipatam* v *Cavaly Vencata Narrainappah*, 8 M. I. A. 529; *Cavaly Vencata Narrainappah* v. *The Collector of Masulipatam*, 11 M. I. A. 619; *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry*, 13 M. I A. 209; *Kooer Goolab Singh et al.* v *Rao Kurun Sing*, 14 M. I. A. 176; *Bhaiji Girdhur et al* v. *Bái Khushal*, Bom. H. C. P. J. F, 1873 No 63. A widow can dispose only of her widow's estate in her deceased husband's property, "and that estate would determine either upon her death or upon her second marriage," per *Westropp*, C. J., in *Gurunáth Nilkanth* v. *Krishnáji Govind*, I. L. R. 4 Bom. 462, 464, S. C. Bom. H. C. P. J. for 1880, p. 59.

(*d*) *Phoolchund Lall* v *Rughoobun Subaye*, 9 C. W R. 108. Compare *Hunoomanpersaud Panday* v. *Musst Baboyee Munraj Koonweree*, 6 M. I. A. 393. *See* also *Kamikhaprasad et al.* v. *Srimati Jagadamba Dasi et al.*, 5 B. L. R 508. The creditor must enquire as to the purpose and must explain the instrument to the widow. *Baboo Kameswar Prasad* v. *Run Bahadur Singh*, L. R. 8 I. A. at pp. 10, 11.

One of the causes justifying an alienation of the estate is payment of the husband's debts. The widow is bound to discharge them. (*a*) Not, however, if barred by limitation, according to a *dictum* of the Bombay High Court, (*b*) though she is not bound to avail herself of that plea, (*c*) any more than is a managing member in the case of an ancestral debt. Yet *his* acknowledgment would not, it has been said, revive the barred debt, except as against himself. (*d*) A restriction of the power to pay debts out of the estate might however be regarded perhaps as trenching in some degree upon the religious law of the Hindûs. How strong the obligation is which that imposes may be seen from Bk. I., Ch. II., Sec. 6 A., Q. 7, and Nârada, Pt. I., Ch. III., 18. The mere recital in a widow's deed of sale of the object is not enough to prove it. There should be a concurrence of the relatives interested. (*e*) For her own debts the estate after her death is not answerable. (*f*)

The widow's powers of alienation are not enlarged by there being no heirs to take on her death. The State then succeeds; and the restrictions are inseparable from her estate. (*g*) The rule applies to the widow of a collateral

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(*a*) *Gopeymohun* v *Sebun Cower et al.*, East's Notes, case No 64.

(*b*) *Melgiráppá* v. *Shiváppá*, 6 Bom. H C R. 270 A C. J., *supra*.

(*c*) *Bhálá Náháná* v. *Parbhu Hari*, I L. R. 2 Bom. 67 *supra*.

(*d*) *Gopalnarain Mozoomdar* v. *Muddomutty Guptee*, 14 B. L. R. 49.

(*e*) *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry*, 3 B. L. R. 57 P. C.

(*f*) *Chundrabulee Debia* v *Brody*, 9 C. W. R. 584; *Chottoo Misser* v. *Jeniah Misser*, I. L. R. 6 Cal. 198

(*g*) *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. 500 For the grounds which have been deemed to justify a widow's alienation of property see *Umrootram* v. *Narayandas*, 2 Borr. R. 223; *Gopal Chunder* v. *Gour Monee Dossee et al.*, 6 C. W. R. 52; *Raj Chunder Deb* v. *Sheeshoo Ram Deb et al.*, 7 *Ibid.* 146; *Runjeet Ram* v. *Mohamed Waris*, 21 *Ibid.* 49; as to the burden of proof, *Munsookrám Munkisordás* v. *Pránjeevandás et al.*, 9 Harr. R. 396. Ratification of a lease by a widow, *Mohesh Chunder Bose et al.* v. *Ugrakant Banerjee et al.*, 24 C. W. R. 127 C. R.

succeeding in default of nearer heirs. (a) It will be seen below, Bk. I., Chap. II., Sec. 9, Q. 7, that the restriction is applied to a mother inheriting from a son, though such property is commonly reckoned as strîdhan. (b) On this point see further in the Chapter on Strîdhan.

Two or more Hindû widows of the same man, according to the general doctrine, inherit from him a joint estate; (c) and though they enjoy separately, the estate still remains joint according to the later decisions, (d) so that grandsons, through a daughter of one widow, who had been awarded a separate enjoyment of a moiety, were excluded by the co-widow. (e) A right to partition as between two widows does not, it has been said, exist in ordinary cases, (f) but the Vyavahâra Mayûkha (Ch. IV., Sec. 8., pl. 9,) says, "If more than one, they are to divide." (g) So too the Vîramitrodaya, Transl. p. 153: "Wives of the same class with the husband shall take the estate dividing it amongst them." This, which is the doctrine of the Mitâksharâ also, Ch. II., Sec. 1, para. 5, though omitted by Colebrooke, seems to have been recognized as the law in Bombay, (h) and the

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(a) *Bharmangavdá* v. *Rudrapgavdá*, I. L. R. 4 Bom. 181.

(b) *Vináyek Anandráo et al* v. *Lukshmibái et al.*, 1 Bom. H.C.R. 117.

(c) *Bhugwandeen Doobey* v. *Myna Bái*, 11 M. I. A. 487; each an equal share according to *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer and another*, L. R. 9 I. A. 41

(d) *Shri Gajapathi Nila Mani Patta Mahadevi Garu* v. *Shri Gajapathi Radhamani Patta Maha Devi Garu*, L. R. 4 I. A. 212; S. C. I. L. R. 1 Mad. 290.

(e) *Rindamma* v *Venkataramappa et al.*, 3 M. H. C. R. 268; *see* Bk. I., Ch. II., Sec. 6 A., Q 39, 40.

(f) *Jijoyiamba Bayi et al* v. *Kamakshi Bayi et al.*, 3 M. H. C. R. 424; *Kathuperamul* v. *Venkabai*, I. L R 2 Mad. 194.

(g) *See* Stokes' H. L. B. 86, 52 and note (a). To the same effect is the Smṛiti Chandrikâ, Ch. XI, Sec. 1, pl. 57. So 2 Str. H. L. 90.

(h) *Rumea* (applicant) v. *Bhagee* (caveatrix), 1 Bom. H. C. R. 66, where cases are cited from Bengal and the N. W. Provinces. *See* below, Bk. I., Ch. II., Sec. 14, I., A. 1, Q. 3, where the answer

right by survivorship of one of two widows was not apparently recognized in the case of *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry*; (*a*)*see* Bk. I., Ch. II., Sec. 6 A., Q. 35, 36.

On the death of a widow the Bengal law gives the inherited property to the then existing next heir of the last male owner. In Bombay the succession varies, as it is governed by the law of the Mitâksharâ or of the Vyavahâra Mayûkha. These authorities agree to a certain point and then diverge widely. *See* below, Bk. I., Ch. IV., and the chapter on Strîdhan. The widow of the nearest male sapiṇḍa of a pre-deceased husband, there being no male lineal descendant in the nearest collateral line, was, in *Bái Ambá* v. *Dámodar Lálbhái*,(*b*) pronounced on that ground to be the heiress of a Hindû widow deceased.

§ 3 *B*. (5) DAUGHTERS.—*On failure of the first three descendants in the male line, of adopted sons, and of a widow, a daughter inherits the estate of a separate householder, and the separate property of a united coparcener. An unmarried daughter has the preference over a married one, and a poor married one over a rich married one.*

See Book I., Chap. II., Sec. 7; and for authorities, *see* Book I., Chap. I., Sec. 2, Q. 4; Chap. II., Sec. 7, Q. 19. Mit. Chap. II., Sec. 2, pp. 1 to 4; Sec. XI. para. 13.; and Vyav. May., Chap. IV., Sec. 8, p. 10 ss.

If there are several daughters living in the same condition, *i. e.* being all unmarried, or all married and poor, or all

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implies a succession to separate interests by the two widows, and above p. 89. The equal widows not having an independent joint ownership along with their husbands as in the case of undivided sons would not be subjects of unobstructed inheritance according to Vijñâneśvara's idea, but rather of an ownership descending on each as to her own portion, which implies at least a mental partition.

(*a*) 13 M. I. A. 209.

(*b*) *See* Bom. H. C. P. J. F. 1871, S. A. No. 217 of 1871.

married and rich, they share the estate of their father equally. *See* Book I., Chap. II., Sec. 7, Q. 19. The circumstance of having or not having a son is in Bombay indifferent. (*a*)

In *Srimati Uma Devi* v. *Gokulanand Das Mahapatra* (*b*) the Judicial Committee adopted the statement of the Benares law given in 1 Macn. H. L. 22, "that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren or a childless widow."

The preference of the unmarried daughters over the married ones seems to be founded on the principle that, before all, a suitable provision for the marriage of daughters must be made. For the historical origin of the daughter's right of succession see *Bhâu Nânâji Utpât* v. *Sundrâbâi*,(*c*) *Simmani Ammâl* v. *Muttammâl*, (*d*) and above p. 84. (*e*)

Regarding the case where a Śûdra leaves a daughter and an illegitimate son, *see* § 3 *B.* (3), above p. 81 ss.

In the case of *Amritolal Bose* v. *Rajoneekant Mitter*,(*f*) the Privy Council say, "There is a great analogy between the case of widows and that of daughters, though the pretension of daughters is inferior to that of widows." Daughters in

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(*a*) *Bákubái* v. *Manchábái*, 2 Bom. H. C. R. 5; *Poli* v. *Narotum Bapu et al*, 6 Bom. H. C. R. 183, A. C. J.

(*b*) 9 M. I. A at p. 542.

(*c*) 11 Bom. H. C. R. 249, 273.

(*d*) I. L. R. 3 Mad. 265, 267.

(*e*) The very gradual establishment of daughter's rights of succession in Ireland and other countries in Europe is shown in O'Curry's Lectures, Introd. by Dr. Sullivan, p. 170 ss.

(*f*) L. R. 2 In. A. 113.

Bombay, however, occupy a position superior to widows, according to the prevailing doctrine as to the restrictions on a widow's estate, as they may freely dispose of the property of their fathers, which they have taken by inheritance, their estate being regarded as absolute.(a) They take, moreover, in the Bombay Presidency, separate interests excluding the right of survivorship (b) contrary to the rule applied in Bengal (c) and Madras. (d) Nor have they in Bombay been regarded hitherto as mere life-tenants,(e) as to some extent they appear to be in Madras (f) and Bengal. (g)

(a) See *Haribhat* v. *Dámodarbhat*, I. L. R. 3 Bom. 171, and the cases there cited, and *Bábáji* v. *Báláji*, I L. R. 5 Bo. 660 ; *Strimuttu Muttu Vizia Ragunada Rani* v. *Dorasinga Tevar*, 6 Mad. H. C R. p. 310. *See*, however, *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, L. R. 8 I. A. 99, 108, a Madras case.

(b) *Bulákidás* v. *Keshavlál*, I. L. R. 6 Bom. 85, referring to I. L. R. 3 Bom. 171 *supra*.

(c) *Amritolal Bose* v. *Rajoneekant Mitter*, L. R. 2 I. A. 113.

(d) 6 Mad. H. C. R. 310 *supra* (a).

(e) *See* I. L. R. 3 Bom. 171, and the cases there cited.

(f) *Simmani Ammál* v. *Muttammál*, I. L. R. 3 Mad. at p. 268.

(g) *Dev Pershad* v. *Lujoo Roy*, 20 C. W. R. 102 ; *Dowlut Kooer* v. *Burma Deo Sahoy*, 22 C W. R. 55, C. R. quoting *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. 551, and *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. 172. But in 1 Str. H. L 139, 2nd ed., (pp. 160-161, 1st ed.) it is said : "According to one opinion, not only the sons of daughters, but the daughters of daughters also inherit, in default of sons, but this does not appear to have been sustained ; on the other hand, where there are sons, their right of succession is postponed to that of other daughters of the deceased ; and, where such sons are numerous, when they do take, they take *per stirpes* and not *per capita*. Authorities postponing still further their right have been denied ; but the succession in the descending line from the daughter proceeds no further, the funeral cake stopping with the son ; which is an answer to the claim of the son's son, grounded on the property having belonged to his father. Neither, according to Jîmûta Vâhana, on failure of issue, does the inheritance, so descending on the daughter, go, like her strîdhana, to her husband surviving her, but to those who would have

Barrenness is not as in Bengal a cause of exclusion, (*a*) the theory on which the daughter is admitted in Bombay being essentially different.

§ 3 *B*. (6) DAUGHTER'S SONS.—*On failure of the three first descendants in the male line, of adopted sons, of widows, and of daughters, a daughter's son inherits the estate of a separate gṛihastha, and the separate property of a united coparcener.*

See Book I., Chap. II., Sec. 8; and for Authorities, *see* Book I., Chap. II., Sec. 8, Q. 1 and 5.

Regarding the case where a Śûdra leaves an illegitimate son, and a daughter's son, *see* above § 3 *B*. (3), pp. 85, 86.

If a separate householder leaves two daughters, one of whom dies after her father, but before the division of his estate has been effected, leaving at the same time a son, this son, according to the doctrine of the Bombay Śâstris, will inherit the share which would have fallen to her. *See* Remarks to Book I., Chap. II., Sec. 7, Q. 1 and 3. This view is supported by the analogous case of the "brother and the brother's sons," regarding which the Mitâksharâ, Chap. II., Sec. 4, para. 8, states expressly as follows:—

"In case of competition between brothers and nephews, the nephews have no title to the succession, for their right

succeeded, had it never vested in such daughter; but by the Southern authorities, it classes as strîdhana, and descends accordingly. And, upon the same principle, the husband is precluded during her life from appropriating it, unless for the performance of some indispensable duty, or under circumstances of extreme distress. Whereas the daughter's own power over it is greater than that of the widow of the deceased, whose condition is essentially one of considerable restraint." And the Privy Council recognize a possible difference in favour of the daughter,* though this is now superseded by what is said in Muttu Vaduganadha Tevar's case† against women's transmitting to their own heirs property which they take by inheritance.

(*a*) *Simmani Ammál* v. *Muttammál*, I. L. R. 3 Mad. 265.

* *Hurrydoss Dutt* v. *Sreemutty Uppoornah Dossee*, 6 M. I. A. 445.

† L. R. 8 I. A. 99, 109.

of inheritance is declared to be on failure of brothers (*see* Sec. 1, p. 2.) However, when a brother has died leaving no male issue (nor other nearer heir), and the estate has consequently devolved on his brothers indifferently, if any of them die before a partition of their brother's estate takes place, his sons do in that case acquire a title through their father."(*a*)

That the principle laid down in this passage is applicable also to the case of the daughters and daughters' sons follows from the maxim of interpretation, according to which a rule given for a special case is applicable to all analogous cases, though no indication to that effect may have been given. For, the Hindû law-books often give, as the Sâstris express it, only the "dikpradarśana," the indication of the direction, not exhaustive rules. Examples showing that the authors of the Mitâksharâ and Mayûkha and other works interpreted the ancient Smṛitis in this manner are frequently met with. Thus, the rule that unmarried daughters inherit before married ones [*see* above § 3 *B*. (5)] is given by Gautama with respect to the succession to their mothers' strîdhana, (*see* Gautama 28, Sû. 21). But both Vijñâneśvara and Nîlakaṇṭha apply it also to the daughters' succession to their father's property. From the analogy of the case of "brothers and brothers' sons," it follows also that in no other case, than the one just considered, do daughters' sons share the inheritance with daughters.

Such is the doctrine prevailing in Bombay where each daughter, taking a present right by inheritance, is thought on her death to transmit it to her own proper heirs subject in this case to the qualification founded on special texts.(*b*) *See* Bk. I., Ch. IV., B. § 1, § 4; Ch. II., Sec. 8, Q. 1. Where daughters are regarded as taking as a class, with survivorship as in Madras [*see* above § 3 *B*. (5)] a different rule prevails. The son is not such a co-owner with his mother according

(*a*) See *Ramprasad Tewarry* v. *Sheochurn Doss*, 10 M. I. A. 504.

(*b*) *See* Mit. Ch. II. Sec. II. para. 6; Ch. I. Sec. XII.

to that doctrine as to replace her in the group of successors to her father. It is consistent with this that daughter's sons take *per capita* not *per stirpes* as they would by identification in rights with their mothers. *See* Bk. I., Ch. II., Sec. 8, Q. 1, 2; but a brother's sons too are excluded by brothers, yet succeed to an interest, which, to use an English expression, had become vested in possession in their father before his death.

The text of Yâjñavalkya on which the different doctrines are based is not in itself sufficiently explicit to make either of them untenable. The former is the one more consonant to Vijñâneśvara's general principle of a woman's capacity to take and transmit complete ownership by inheritance: the variation from the general scheme of succession to females by bringing in the daughter's sons in this particular case before the daughter's daughters gives a liberal, though not indisputable, effect to the text instead of reducing the daughter's right to a mere life estate interpolated in the regular series of successions. The succession of the daughter's son to the interest inherited by his mother but not entered on by her in actual separate enjoyment agrees exactly with the rule given by Nîlakaṇṭha in the Vyav. Mayûkha for the further succession to property which has passed to a female by inheritance. It goes, he says, to heirs according to such relations as if she were a man, (*a*) and the first in this series is the son or group of sons of the last owner. Daughters according to him take separate interests (*b*) separately heritable.

§ 3 *B*. (7) THE MOTHER.—*On failure of daughters' sons, the mother (except in Gujarât) inherits the estate of a separate householder, the separate estate of a united coparcener, as also the estate of a paying student (upakurvâṇa Brahmachârî.)*

(*a*) Vyav. Mayûkha Ch IV. Sec. X. para. 26

(*b*) Vyav. Mayûkha Ch. IV. Sec. VIII. para. 10.

See Book I., Chap. II., Sec. 9; and for Authorities *see* Book I., Chap. I., Sec. 2, Q. 4; and Chap. II., Sec. 9, Q. 1.

A mother who remarries loses, it would seem, her right to the succession to the estate of the son by her first husband under Sec. 2 of Act XV. of 1856, as she certainly would under the strict Hindû law by forming a connexion inconsistent with her retaining a place in the family of her first husband or even in the caste. But in the case of *Akorah Sooth* v. *Boreeanee* (*a*) it was ruled that a widow remarrying forfeits only the right she has then actually inherited, not her right of inheritance to her son then living.

Stepmothers are not included in the term "mother." Regarding the rights of a stepmother, *see* Book I., Chap. II., Sec. 14, I. A. 2, Remark to Q. 1.

The Vyav. May. Chap. IV., Sec. 8, para. 15, places the father first, and next the mother, and the High Court pronounced in favour of this order of succession for Gujarât in *Khodabhai Mahiji* v. *Bahdhur Dalu et al.* (*b*)

The estate taken by a mother succeeding to her son is said to be like that taken by a widow from her husband. (*c*)

§ 3 *B.* (8) THE FATHER.— *On failure of the mother, the father inherits the estate of a separate householder, of a paying student, and the separate estate of a united coparcener. In Gujarât the father has precedence of the mother as heir to their sons.*

See Book I., Chap. II., Sec. 10; and for authorities *see* Book I., Chap. II., Sec. 9, Q. 1; and Chap. 1, Sec. 2, Q. 4.

(*a*) 10 C. W. R. 35, II. *Id* 82.

(*b*) Bom. H. C. P. J. for 1882, p. 122.

(*c*) *Narsáppá Lingáppá* v. *Sakhárám*, 6 B. H. C. R. 215; *Tuljárám Morárji* v. *Mathurádás et al.*, I. L. R. 5 Bom. 662. *See* also the chapter on Strîdhana, and the references given above, p. 94.

§ 3 B. (9) BROTHER OF THE WHOLE BLOOD.—*On failure of the father, full brothers succeed to the estate of a separate Gṛihasta, &c.*

See Book I., Chap. II., Sec. II., and for Authorities *see* Book I., Chap. I., Sec. 2, Q. 4; and Chap. II., Sec. 11, Q. 4; Vyav. May. Chap. IV., Sec. 8, p. 16.

In case a brother dies leaving more than one brother, and one of these also dies after him but before the partition of the estate of the first deceased brother has taken place, and if this second brother leaves a son, then this son will take the share of the estate which should have fallen to his father. *See* above § 3 *B.* (6) Mit. Chap. II., Sec. 4, p. 9; Vîramit., Transl. p. 195.(*a*)

Representation is not recognized in the case of a pre-deceased brother who has left sons. These nephews are excluded by their surviving uncles. It is only on the complete failure of brothers of the deceased that brothers' sons succeed to him. Mit. Ch. II., Sec. 4., paras. 1, 5, 7. Vîramit. Tr. p. 195. *See* below Bk. I., Ch. II., Sec. 11, Q. 6, and Bk. I. Chap. II., Sec. 13, Q. 4, 5. The doctrine may indeed be confined to those who by birth become, actually or potentially, sharers with their fathers forthwith, or immediately on the fathers becoming owners of property, and those who by analogy take through a mother from the maternal grandfather,(*b*) when their mother has died between the decease of their grandfather and the actual partition of his property.

(*a*) Some surprise may be felt that this rule should have seemed necessary. But according to Hindû notions as possession is generally necessary to the completion of ownership, so separate possession is essential in theory to the completion of a separate ownership of a share derived from a prior joint ownership of the aggregate. The father, however, having once become a coparcener, his son has acquired a concurrent interest which is but expanded by the father's death.

(*b*) *See* Vyav. May. Ch. IV. Sec. 2, para. 1; Sec. X. para. 26; above § 3 *B.* (6); Sarasvati Vilâsa § 7, 21, 335.

§ 3 *B.* (10) HALF BROTHERS.—*On failure of brothers of the full-blood, half-brothers inherit the estate of a separate householder, &c.*

See Book I., Chap. II., Sec. 12; and for Authority, *see* Book I., Chap. II., Sec. 11, Q. 4.

The Vyav. May. includes the half-brother among the Gotraja Sapiṇḍas, and places him after the son of the brother of the full blood. This may be taken as the prevailing law in the town of Bombay according to the preference accorded to the Mayûkha by the High Court for cases arising within its Original Jurisdiction. The full sister, too, takes precedence of the half-brother according to the same authority, on the construction of the word "brethren," which makes it extend to females. (*a*) But beyond these limits the Mitâksharâ is generally preferred and regulates the succession as here indicated. (*b*) In this construction the Vîramitrodaya, Transl. p. 194 and the Dâya Bhâga agree, *see* Dâya Bhâga, Chap. XI. Sec. 5, pl. 10-12. So also the Smṛiti Chandrika, Transl. p. 183.

§ 3 *B.* (11) SONS OF BROTHERS OF THE FULL BLOOD.—*On failure of half-brothers, sons of brothers of the full blood inherit the estate of a separate householder, &c.*

See Book I., Chap. II, Sec. 13; and for Authorities, *see* Book I., Chap. I., Sec. 2, Q. 5; and Chap. II., Sec. 11, Q. 4.

§ 3 *B.* (12) SONS OF HALF BROTHERS.—*On failure of sons of full brothers, sons of half-brothers inherit the estate of a separate householder, &c.*

AUTHORITIES.

See Book I., Chap. II., Sec 11, Q. 4.

Regarding the case in which brothers' sons inherit together with brothers, *see* above, Remark to § 3 *B.* (9). The

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(*a*) *Sakhárám Sadáshiv* v. *Sitábái*, I. L. R. 3 Bom. 353, referring to *Vináyak Anandrao* v. *Lukshmibái*, 9 M. I. A. 516.

(*b*) See *Krishnáji* v. *Pándurang*, 12 Bom. H. C. R. 65.

deceased brother is represented by his son, his right having become vested in possession, to use the English phrase, before his death.

The Vyav. May. places half-brothers' sons amongst the Sapindas.

§ 3 *B* (13) THE PATERNAL GRANDMOTHER.—*On failure of sons of half-brothers, the paternal grandmother inherits the estate of a separate householder, &c.*

AUTHORITIES.

See Book I., Chap. II., Sec. 13, Q. 7; Mit. Chap. II., Sec. 5, p. 2.

The place assigned to the paternal grandmother is a special one, due partly to her entrance into the family and moral unity with the grandfather, but partly also to the particular mention of her as an heir by Manu (*a*) next after the mother.(*b*) The Mitâksharâ does not follow Manu in this, but uses the text to support the place assigned to her as the first of the jnâtis or gentiles. The postponement of her to the father, brother and nephew is grounded on the principle that these are specified in Yâjñavalkya's text, while she is not. The fact is that the two Smritis as they stand are inconsistent. The passage in Manu was probably uttered originally with some context (such as in case there should be none but female claimants), which has now been lost, and the isolated fragment preserved has thus become misleading, (*c*) but the mention of the grandmother shows a capacity on her part to inherit which Vijñâneśvara makes specific in his comment on Yâjñavalkya's text, which does not itself mention her as an heir. (*d*)

(*a*) Ch. IX. 217 (*b*) Mit. Ch. II., Sec. 1, p. 7.

(*c*) This has occurred in the Roman law as Savigny shows, System, Vol. III. App. VIII. § VIII., and Text § 115.

(*d*) See *Lallubhái* v. *Mánkuvarbái*, I. L. R. 2 Bom. at p. 438 ss. Vijñâneśvara in commenting on Yâjñavalkya was constrained to give his own Rishi precedence and to construe other smritis in accordance with it. *See* above pp. 11 and 14 notes.

§ 3 *B.* (14) GOTRAJA SAPIṆḌAS.—*On failure of the paternal grandmother, the Gotraja Sapiṇḍas, i. e. all the males of the deceased's family (gotra) related to him within six degrees downwards and upwards, together with their respective wives, are entitled to inherit the estate of a separate householder. It would seem that the Gotraja Sapiṇḍas inherit according to the nearness of their line to the deceased, i. e. that the fourth, fifth, and sixth descendants in the deceased's own line (santâna) should be placed first, next the father's line, viz. the deceased's brother's second, third, fourth, fifth, and sixth descendants, next the grandfather and his descendants to the sixth degree, and so on. In Gujarât the sister is placed at the head of the Gotraja Sapiṇḍas.*

AUTHORITIES.

See Book I., Chap. I., Sec. 2, Q. 4; Chap. II., Sec. 14, I. A.3, Q. 1; Chap. II., Sec. 14, I. A. 1, Q. 1; Chap. II., Sec. 14, I. B. b. 1, Q. 1; Vasishṭha IV. 17.

The collateral succession to property on failure of the heirs individually specified has given rise to many controversies amongst the Hindû lawyers. The rule that a jnâti succeeds, or that a gotraja sapiṇḍa succeeds, gives no information as to who and who only are to be regarded as jnâtis (paternal kinsmen) or as gotrajas (of the family or born in the family), and the kind of connexion intended by these terms has been differently understood by different commentators. The nearer relatives of the propositus, as his son, his father and his brother, are obviously jnâtis and gotraja sapiṇḍas, but being expressly named in the Smṛiti they have not to rely on their inclusion under any more general term for their right of succession. When we come to such a relative as the sister, the fact of her passing into another family gives her in one sense a new "gotrajatva," or family connexion, and in the same sense deprives her of connexion with her family of birth. Vijñâneśvara accordingly passes her

by in favour of the male gotraja sapiṇḍas. Nîlakaṇṭha, on the other hand, influenced no doubt by the growing strength of natural affections, as opposed to a strictly logical development of the religious agnatic system, (a) gives her a place next to the grandmother as having a gotrajatva (= family connexion) through birth, even though she has since passed out of the gotra. The extent to which each collateral line is to be followed before the right passes to the one next entitled, the interpolation of the "bandhus" or cognates between the nearer and remoter lines of agnates; (b) the possibility and the extent of the transmission of hereditary right through daughters of collaterals; the rights of such daughters; and the rights of widows of collaterals to succeed in place of their husbands in preference to a remoter line, possibly even in preference to lower descendants in the same line; all these are questions to which various writers have given inconsistent though almost equally ingenious answers. The Vyavahâra Mayûkha's scheme differs essentially from that propounded in the Mitâksharâ and followed by the Vîramitrodya, (c) which however has itself been understood in different ways by subsequent authors and by the Śâstris. The nicer points of the subject have been treated in the principal authorities, not only on discordant principles, but in a fragmentary way, which leaves room for much doubt. Under these circumstances it is hardly to be expected that any system, however

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(a) A similar exception in favour of sisters occurred under the Roman law while women generally were thought unfit for inheritance.

(b) In Bengal the Bandhus come next after the nearer Sapiṇḍas, *i.e.*, before descendants from ascendants beyond the great-grandfather. *Roopchurn Mohapater* v. *Anundlal Khan*, 2 C. S. D. A. R 35; *Deyanath Roy et al.* v *Muthoor Nath*, 6 C. S. D. A. R. 27. In Madras, according to the Smṛiti Chandrikâ Chap. XI, the male gotrajas only come in next after brothers' sons, and after them the samânodakas limited to two descendants from each ascendant above the propositus.

(c) *See* also the Sarasvatî Vilâsa, § 581, 586 ss.

carefully deduced from the authorities, will gain universal assent. We will, however, state the principles which seem the most in harmony with those involved in the authoritative text, so far as these go, and which have been generally followed by the Śâstris of the Bombay Presidency. These have in some instances received judicial confirmation since the first edition of this work was published, and the decisions of the High Courts and of the Judicial Committee have thus established fixed points by reference to which the correctness of the views set forth on other cognate questions can readily be tested.

In dealing with the materials now embraced under Book I., Chap. II., Sec. 14, it became necessary to determine on what principles the several questions and answers should be arranged, and this opened up the whole question of the sapiṇḍa and gotraja relationship as conceived by Vijñâneśvara and by Nîlakaṇṭha. We propose to state their views in connexion with the distribution of the answers referrible to the one and to the other authority.

The term "Gotraja" designates, according to the Mitâksharâ, Mayûkha, and Manu IX. 217,—1, the paternal grandmother; 2, the Gotraja-Sapiṇḍas; and 3, the Gotraja-Samânodakas. As there were no cases referring to the paternal grandmother, (*a*) the Gotraja-Sapiṇḍas have been given the first place. Amongst these have been placed, first (A), those whose right to inherit is expressly mentioned in the Mitâksharâ, the Vîramitrodaya, and the Mayûkha. The Mitâksharâ (with which the Vîramitrodaya agrees perfectly) names the following Gotrajas as entitled to inherit, after the paternal grandmother, the property of a separated male. (Colebrooke, Mit. p. 350; Stokes, H. L. B. 446.)

1. The paternal grandfather; 2, the father's brothers; 3, the father's brothers' sons; 4, the paternal great-grandmother; 5, the paternal great-grandfather; 6, the paternal

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(*a*) *See* Bk. I. Ch. II, Section 13, Q. 7.

grandfather's brothers; 7, the paternal grandfather's brother's sons; and this order of heirs is to be repeated up to the seventh ancestor.

The Mayûkha lays down the following order:—

1. The uterine sister; 2, the paternal grandfather and the half-brothers, as joint heirs; 3, the paternal great-grandfather, the father's brother, and the sons of half-brothers, as joint heirs; and so on, all the Gotrajas up to the seventh ancestor, according to the nearness of their relationship. But as Mr. Colebrooke remarks (Mit. p. 350, Note), it is by no means clear how the remoter heirs are to follow one another. (a)

Though in general the Mitâksharâ possesses the greatest authority in this Presidency, and it would therefore seem necessary to follow its order, it was impossible altogether to neglect the Mayûkha, since in Gujarât and in the island of Bombay the Mayûkha partially prevails over the Mitâksharâ, (b) and the sister is there allowed to inherit immediately after the paternal grandmother. (c) Consequently the first place has been generally assigned to her by the Śâstris. They have in several cases even from the Deccan and Konkan decided in her favour, and in Book I., Chap. II.,

(a) Nîlakaṇtha probably aimed at governing succession subject to the express provisions of the Śâstras in favour of specified relatives by a principle of proximity of degree, counting as in the Roman law every step up and down, and making all at an equal distance equal sharers in the estate of the propositus. See *Lalubhái* v. *Mankoovarbái*, I. L. R. 2 Bom. 388. The other authorities follow the principle of the Teutonic and the English laws in going up to the nearest point of the ascendant stock that will afford an heir, and then following the line of descendants springing from it and choosing the nearest in that line.

(b) See *Lalloobhoy* v. *Cássibái*, L. R. 7 I. A. 212; and, above, Introduction.

(c) *Vináyekráo Anandráo* v. *Lakshmibái*, &c., 1 Bom. H. C. R. 117, S. C. 9 M. I. A. 517.

Section 14, these have been subjoined to those from Gujarât, though, according to the Mitâksharâ, they would more properly be included in Section 15.

The cases which refer to the right of the Gotrajas, not mentioned in the Mitâksharâ and Mayûkha, form the second division (B), and have been classed under two headings; *a*, males; *b*, females; because the rights of the latter depend on principles less generally accepted than those recognized as applicable to the former.

The questions whether the Gotraja-Sapiṇḍas who are not expressly mentioned in the Law books, have any right to inherit, and if they have, in what order they succeed, are not easy to decide. As regards the males, the Sâstris have confidently asserted their rights (*see* Bk. I., Ch. II., Sec. 14, I., B. *a*. 1 and 2) and quoted as authority for their opinions the passage of the Mitâksharâ (Vyav. *f*. 55, p. 2, l. 1., *see* Chap. I., Sec. 2, Q. 4, and Stokes, H. L. B. 427), which names the *Gotrajas* as heirs. It appears therefore that they considered the series of Gotraja-Sapiṇḍa heirs, given by Vijñâneśvara (Colebrooke, Mit. *l. c.*) as not exhaustive, nor intended to exclude others than those named, but only as an exemplification of the general doctrine. The same opinion has also been advocated by the Śâstris in other parts of India, where the Mitâksharâ is the ruling authority, (*a*) as well as by Mr. Vinâyak Śâstri, the late Law Officer of the High Court of Bombay. Moreover, this view was adopted by Mr. Harrington in the case of *Dutt Zabho Lannauth Tha and others* v. *Rajunder Narain Rae and Coower Mohinder Narain Rae*, (*b*) and the Privy Council, on appeal, confirmed his judgment.

(*a*) See *R. Sreekaunth Deybee* v. *Sahib Perlhad Sein*, Morley, Digest, New Series, p. 187, No. 14; *Rutcheputty Dutt et al.* v. *Rajunder Narain Rae et al.*, 2 M. I. A. 132, 168.

(*b*) Moore, Indian Appeals, *l. c.* This view is confirmed in *Bhyah Rama Singh* v. *Bhyah Ugur Singh*, 13 M. I A. 373. So in *Thakur Jibnath Singh* v. *The Court of Wards*, 5 Beng. L R. 442, and *Parasara Bhattar* v. *Rangarâya Bhattar*, I. L. R. 2 Mad. 202.

Mr. Harrington, after having proved that the word putra, 'son,' is used in the Mitâksharâ and Subodhini as a general term for descendant or male issue, says in his review of the opinions of the Śâstris (p. 157) :—

"The same construction must, I think, be put on the words 'sons' and 'issue' (putra and sunavah) in the fourth and fifth paragraphs of the fifth Section and second Chapter of the Mitâksharâ, (*a*) and this interpretation is indeed indicated by other expressions of the same paragraphs, viz., on failure of the father's and on failure of the paternal grandfather's *line* (Santâna). To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory the provisions in the Mitâksharâ, (*b*) as well as other books of law, which expressly state the succession of kindred belonging to the same family, as far as the limits of knowledge as to birth and name extend."(*c*)

But the opinion that Vijñâneśvara's series of heirs is not intended to be exhaustive, may be strengthened by some further arguments. Firstly, if it were intended to be exhaustive, not only would the provision that the Gotraja-Samânodakas may inherit as far as name and knowledge of birth extend, as Mr. Harrington observes be rendered nugatory, but virtually all the Samânodakas and one line of the

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(*a*) Colebrooke, Mit. p 350 ; Stokes, H. L B 446-7 :—

"4. Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family, and connected by funeral oblations."

(*b*) Colebrooke, Mit. p. 351 ; Stokes, H. L B. 447.

(*c*) Compare also *Shoodyan* v. *Mohun Pandey et al.* Reports of S. D. A., N. W. P. 1863, II. p. 134 ; and *Duroo Singh* v. *Rai Singh et ibid.* 1864, p. 523.

Sapiṇḍas would be excluded from the succession. For it is hardly possible that the seventh ancestor and his sons and grandsons could be alive at the time of the death of the seventh descendant; and this improbability increases with every grade among the Samânodakas, who extend to the fourteenth ancestor and are to inherit in the same order as the Gotraja-Sapiṇḍas, *i. e.*, 1, female ancestor; 2, male ancestor; 3, their sons; 4, and grandsons. But, secondly, the definition of the word Sapiṇḍa, which Vijñâneśvara gives in the first chapter of the Mitâksharâ, clearly shows that all the unmentioned descendants of the lines of the various ancestors, down to the seventh degree, as well as the descendants of the deceased person down to the seventh, inherit. For Vijñâneśvara says (Âchârakâṇḍa *f.* 6, p. 1, l. 15), (*a*) when he explains the verse I. 52, of Yâjñavalkya, in which it is declared that a man shall marry a girl who is not his Sapiṇḍa:—

"He should marry a girl, who is non-Sapiṇḍa (with himself). She is called his Sapiṇḍa who has (particles of) the body (of some ancestor, &c.) in common (with him). Non-Sapiṇḍa means not his Sapiṇḍa. Such a one (he should marry). Sapiṇḍa-relationship arises between two people through their being connected by particles of one body. Thus the son stands in Sapiṇḍa-relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in Sapiṇḍa-relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son a Sapiṇḍa-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in Sapiṇḍa-relationship) to his maternal grandfather and the rest

(*a*) The Saṁskâramayûkha adopts this theory. The Dharmasindhu states merely the two theories, leaf 63 (Bombay Edition), Part I. (p. 353, Marâṭhi, Samvat 1931). It is glanced at in Vyav. May. Ch. IV. Sec. 5, p. 22, and supported in the Datt. Mim. Sec. 6, para. 9, by a reference to Manu.

through his mother. So also (is the nephew) a Sapiṇḍa-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in Sapiṇḍa-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband (are Sapiṇḍa-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (Sapiṇḍa-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i. e.* because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore one ought to know that wherever the word Sapiṇḍa is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."(a)

After refuting some objections which might be raised against this definition, and after discussing the latter part of Yâjñ. I. 52, and the first half of Yâjñ. I. 53, Vijñâneśvara again recurs to the question, who the Gotraja-Sapiṇḍas are. Mitâksharâ, *f.* 7, p. 1, l. 7:—

"In the explanation of the word 'asapiṇḍâm' (non-Sapiṇḍa, verse 52), it has been said that Sapiṇḍa-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yâjñavalkya) says:—

Vs. 53: "After the fifth ancestor on the mother's and after the seventh on the father's side."—On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the Sapiṇḍa-rela-

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(a) In *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 33, is a passage to the same effect from Parâśara Mâdhava, at page 34.

tionship ceases; these latter two words must be understood; and therefore the word Sapiṇḍa, which on account of its (etymological) import, '(connected by having in common) particles (of one body)' would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means "growing in the mud," and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six ascendants, beginning with the father, and the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are Sapiṇḍa-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins, (*e. g.* two collaterals, *A* and *B* are Sapiṇḍas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (Sapiṇḍa-relationship) be made in every case." *See* Dattakamîmaṁsa, Sec. VI. pl. 27, 28 and notes; Stokes H. L. B. 605-6, and *Bhyah Ram Sing* v. *Bhyah Ugur Sing*. (*a*)

From this passage the following conclusions may be drawn: (*b*)

1. Vijñâneśvara supposes the Sapiṇḍa-relationship to be based, not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor.

2. That all blood relations within six degrees, together

(*a*) 13 M. I. A p. 380.

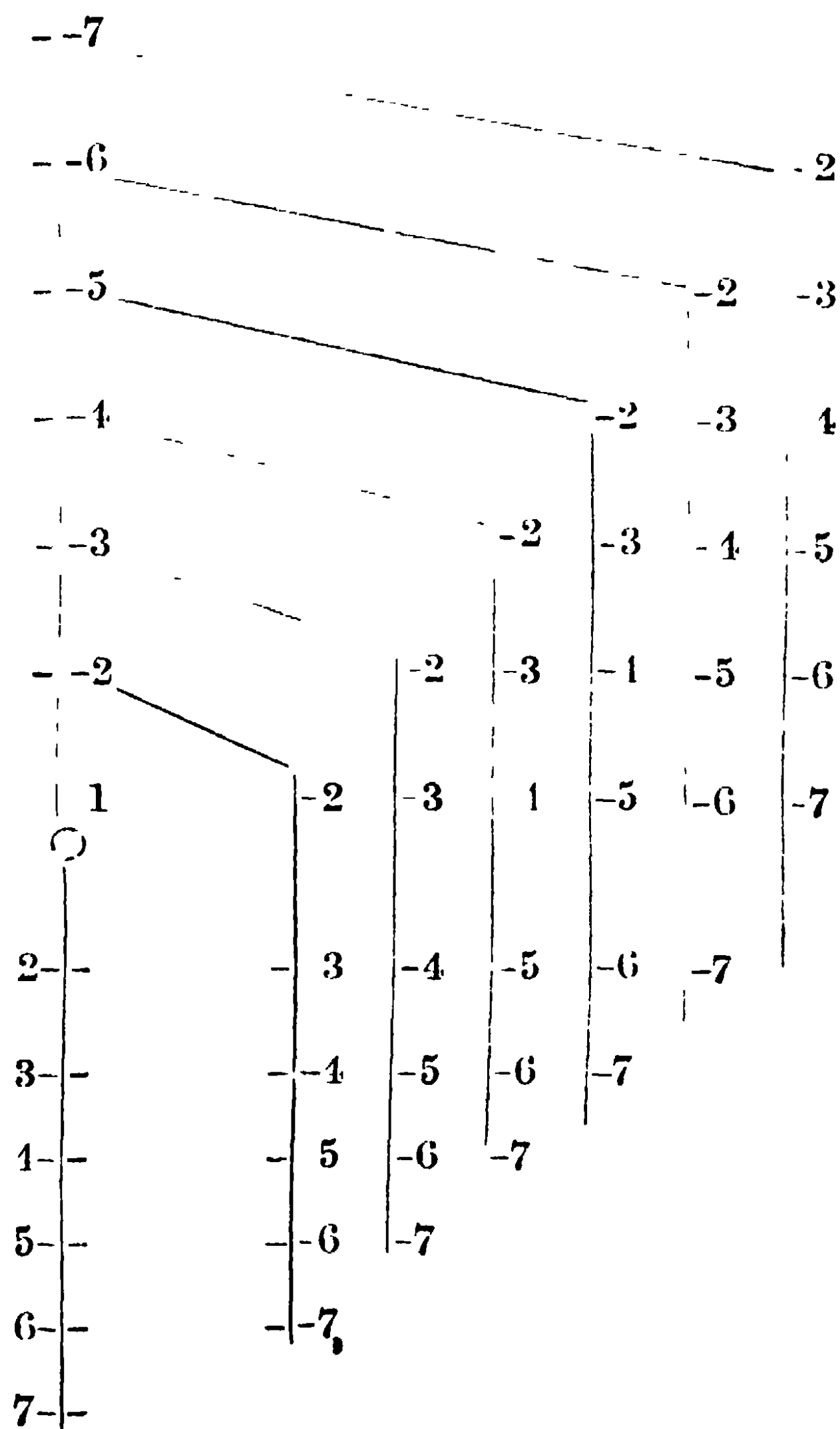
(*b*) See *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 33 F. B. R. *See* also Coulanges La Cité Antique, 64. Mitramisra says the capacity to present oblations is not the sole source of a right to inherit, otherwise younger sons would be excluded by the eldest. It gives only a preference, he says, to those who have the right amongst the Gotrajas. Vîram., Tr. p. 91. At p. 196 ff. he adopts Vijñâneśvara's order of succession amongst the Gotrajas though he admits a difficulty as arising from the Vedic text referred to below. As to impurity arising from the death of Sapiṇḍas, and the extent of the Sapiṇḍa connexion, *see* Baudhâyana, Pr. 1, Adhy. 5, **Kâṇḍ. 11, Sûtra 1-27.**

with the wives of the males amongst them, are Sapiṇḍa-relations to each other. (*a*)

The bearing of these points on the definition of the "Gotraja-Sapiṇḍas," as well as on the interpretation of the passage referring to their rights of inheritance, is obvious. It appears that the series of heirs given there is not exhaustive, and that the term "Gotraja-Sapiṇḍas" designates, if applied to males only, all those who are blood relations within the sixth degree, and who belong to one family, *i. e.* bear one name. If this inference is accepted, all these persons are entitled to inherit according to the passage of the Mitâksharâ given above. (*b*)

(*a*) See *Lakshmibái* v. *Jayaram Hari et al*, 6 Bom H. C. R. 152 A. C. J; and *Lallubhái* v. *Mánkuverbái*, I. L. R. 2 Bom. 388.

(*b*) The following table will serve to show the extent of the Gotraja-Sapinda relationship, as far as the males are concerned:—

	--7						
	--6						2
	--5					-2	-3
	--4				-2	-3	4
	--3			-2	-3	-4	-5
	--2		-2	-3	-1	-5	-6
	1	-2	-3	1	-5	-6	-7
	O						
2-	-	- 3	-4	-5	-6	-7	
3-	-	-4	-5	-6	-7		
4-	-	- 5	-6	-7			
5-	-	-6	-7				
6-	-	-7					
7-	-						

The only remaining question is, in which order the Gotraja-Sapiṇḍas, who are not mentioned in the Mitâksharâ, are to be placed. The principle suggested by Mr. Harrington, namely, to continue each line of heirs down to the seventh person, and thus to allow, first the brother's descendants to inherit, next the paternal uncle's descendants, and so on, can easily be carried out in the case of the paternal uncle's line and those descended from the sons of remoter ancestors. But it is impossible to allow the brother's grandsons, great-grandsons, and remoter descendants to inherit before the paternal grandmother, since the right of the latter to succeed immediately after the brother's sons is clearly settled, not only in the Mitâksharâ, but in all the law books of the Benares Schools and in the Mayûkha. (*a*) Besides, under this arrangement, the remoter descendants of the deceased himself, as great-great-grandsons, who possibly might be in existence at the great-great-grandfather's death, would be lost sight of altogether. In order to provide for the rights of these persons, who undeniably have a right to inherit, they might either be considered as co-heirs with the descendants of the paternal uncle, who are equally distant from the deceased, according to the principle apparently approved by the Vyavahâra Mayûkha, or placed after the paternal grandmother, and before the paternal grandfather, viz., 1, paternal grandmother; 2, deceased's great-great-grandsons, or

(*a*) *See* Colebrooke, Mit p 349; Stokes, H. L. Books, p 446; Vyav. May p 106; Stokes, H L B 88 So also Viśveśvara in the Subodhini adds to the words "on failure of the father's line," the following comment, "the line of the father (must be understood to) end with the brothers and their sons." In Madras the collateral succession of Gotrajas stops with the grandson, in Bengal with the great-grandson of the ascendant *See* Nort. L C. 581. But the doctrine above set forth is recognized as that of the Mitâksharâ, *T. Jibnath Sing* v. *The Court of Wards*, 5 B L R. 443; *Bhyah Ramsing* v *Bhyah Ugur Singh et al*, 13 M. I. A. 373. The Smṛiti Chandrikâ, Ch. XI. Sec. 5, para. 9 ss, limits the succession to the (collateral) descendants, excluding the ascendants, except as themselves descendants, from those still higher in the line.

remoter descendants to No. 7, if living; 3, brother's grandsons, brother's great-grandsons, brother's great-great-grandsons and their sons; 4, paternal grandfather. The second arrangement seems to be the more satisfactory, as it follows the principle indicated by the Mitâksharâ, that the succession is to go to the direct and the several collateral lines, after providing for the grandmother conformably to Manu's text in her favour, in the order in which they branch from the common stem. That the ascending line should thus be resorted to in the person of the grandmother, then immediately abandoned for remote lineal descendants of the propositus and his brothers, and afterwards recurred to in the person of the grandfather, may seem a rather arbitrary arrangement. It arises from Vijñâneśvara's endeavour, consistently with the recognized principle of the Mimañsa philosophy of giving some effect, if possible, to every sacred text, to work the rule of Manu into the scheme of Yâjñavalkya, if not according to its obvious sense, yet in some sense though an entirely forced one. (*a*)

The distinction between the whole-blood and the half-blood observed in the case of brothers and their sons does not extend to the descendants of the grandfather and remoter ascendants. The fifth in descent from a common ancestor but of the half-blood succeed in preference to the sixth in descent though of the whole-blood. (*b*)

As regards the female Gotraja-Sapiṇḍas, who occupy the next division (I. B. b.), their right to inherit is still less generally recognized than that of the males.

a. According to the doctrines of the Bengal and the Madras school of lawyers, as represented by Jîmûtavâ-

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(*a*) *See* Index, Interpretation; Muir's Saus T. III.; 98, Weber's Hist. In. Lit. 239; M. Müller's Sans. Lit. 78; Burnell's Varadrâja, Pref. p. xiv.; Manu II. 10, 14; IV 30; and XII. 108. The scriptures were to be literally accepted and yet to be construed by learned Brahmans according to the philosophy in vogue at the time of the compilation of the last named work.

(*b*) *Sámat* v. *Amrá*, I. L. R. 6 Bom. 394.

hana (*a*) and the Smṛiti Chandrikâ, females are in general incapable of inheriting, and this disability can be removed only by special texts of the Dharmaśâstras. The authority for this view is Baudhâyana, the reputed founder of one of the schools of the Black Yajurveda, who, in his turn, quotes a passage of his Veda to support his opinion. He says, Praśna II. k. 2:—

"A woman is not entitled to inherit; for thus says the Veda, females and persons deficient in an organ of sense (or a member) are deemed incompetent to inherit."

The meaning assigned by Baudhâyana to the Veda passage is by no means the only one in which it can be taken. Vidyâraṇya, in his commentary on the Taittirîyaveda, explained it, as Mitramisra (Viram. *f.* 209, p. 1, l. 10, p. 671, Calc. Edn. of 1875) says, in a different way, so that it would have no reference to inheritance. (*b*)

(*a*) Colebrooke, Dâya Bhâga, p. 215; Stokes, H L. Books, pp. 345, 346.

(*b*) It may be translated thus:—"Women are considered disqualified to drink the Soma juice, and receive no portion (of it at the sacrifice)." *See* the Mâdhavya, p 33, Burnell's Translation; Vîram. Tr. pp. 174, 175. Jagannâtha says (Coleb. Dig. B. V. T 397, Comm.) that "dâya" = oblation and "dâyâda" = a sharer of an oblation offered to him in common with others. He points out also that Kulluka's Commentary on Manu IX 186, 187, shows that the latter text would be inoperative, if restricted to males, and with reference to the text of Baudhâyana, that "a wife must be considered a Sapiṇḍa, because she assisted her husband in the performance of religious duties." Jagannâtha admits the paternal great-grandmother by analogy notwithstanding Baudhâyana's excluding text Coleb. Dig. Bk. V. T. 434, Comm. "According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Baudhâyana, which declares that 'women are devoid of the senses, and incompetent to inherit.' The same doctrine prevails in Benares; the author of the Vîramitrodaya yields, though apparently with reluctance, to this text. (Chap. III., part 7.) The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in

But whatever may be the respective philological value of these different comments, Baudhâyana's explanation has long ago become law in the East and South of India, and there accordingly those females only inherit who are specially mentioned in the texts of the law books. (*a*)

b. The question is, however, whether this doctrine prevails also in this Presidency, where the Mitâksharâ and the Mayûkha are the ruling authorities. The following considerations seem to furnish an answer to it:—

Firstly, the text of Baudhâyana, or the principle that women are in general incapable of inheriting, is adopted neither in the Mitâksharâ nor in the Mayûkha.

Secondly, the Mitâksharâ mentions the great-grandmother's right to inherit, and indicates that the wives of the other ancestors in the direct line, up to the seventh degree, likewise succeed to the estate of their descendants, though *none* of them is provided for by special texts. (*b*) They

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Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case." Privy Council in *Lalloobhoy Bappoobhoy* v. *Kassibai*, L. R. 7 I. A. at p. 231

(*a*) The Vîramitrodaya, after showing that the objections raised to Vijñânesvara's doctrine by the Smriti Chandrikâ (Chap. XI. Sec 5) are unsustainable upon the grounds taken by Devânda Bhatta, and charging Jimûtavâhâna with inconsistency in contending that Yâjñavalkya's text is meant to exclude female Sapindas (as wives or daughters-in-law of ascendants and collaterals sprung from them), while he employs it to determine the right of the paternal grandmother (Dâya Bhâga, Chap. XI, S. 4. paras. 4-6, compared with S. 6, para. 10), finally itself pronounces Vidyâranya's explanation of the Vedic text an insufficient basis for female inheritance as not affording room for a proper application, by way of disparagement of woman's capacity, of the word "adâyâda," "shareless." *See* the Vîram p. 671, Calc. Edn. of 1875, Transl. p. 198, and as to Jimûta.'s meaning, Coleb. Dig. Bk. V. T. 434, Comm.; Smriti Chandrikâ, Chap. XI. S 5, para. 15.

(*b*) See *Lakshmibái* v. *Jayram Hari et al.*, 6 Bom. H. C. R. 152 A. C. J. *See* also Coleb. Dig. Bk. V. T. 397, Comm. *ad fin.*, and T. 434, 370; also Comm. on T. 434.

inherit therefore merely by virtue of their relationship as Gotraja-Sapiṇḍas. Hence it follows that the Mitâksharâ does not recognise the doctrine of the Bengal and Southern schools, and there is consequently no reason why, according to its doctrine, the female Gotraja-Sapiṇḍas, whom it does not mention, should be excluded from inheriting, if the males, who stand in the same position, are allowed to do so. Moreover, one of the commentators on the Mitâksharâ, Bâlambhaṭṭa, expressly mentions the right of a pre-deceased son's widow, (a) whom he places immediately after the paternal grandmother, and says that the word Sapiṇḍa must be everywhere interpreted as including the males and females. (b) Nîlakaṇṭha likewise adopts in this respect the same view as the Mitâksharâ, as he makes the sister inherit

(a) A case at 2 Borr. 670 (*Roopchund* v. *Phoolchund et al.*) places a daughter-in-law before a divided brother, but this seems wrong. She is excluded by a daughter, 2 Macn. 43 In *Bái Gangá* v. *Bái Sheokoovur*, Sel. Cases at p 85, the Śâstri, after pronouncing against the validity of the adoption of a daughter's son, prefers the daughter-in-law to the daughter as heir, with a restriction on the power of alienation during the daughter's life This opinion was acted on by the Zilla Judge and the Saddar Court. It is questioned in *Lulloobhoy* v. *Kássibái*, L. R. 7 I. A. at p. 220.

(b) Viśveśvara, in his discussion on the rights of the paternal grandmother, says that there is no objection to understand the word 'Gotrajas' in the sense of 'male and female Gotrajas' The Vaijayanti also, a Commentary on Vishnu, referred to by Colebrooke, 2 Str. H. L. 234, recognizes a right of representation in the son's widow. In *Rany Pudmavati* v. *Baboo Doolar Sing*, 4 M. I. A. 259, grandsons of a common ancestor were held, under the Mithila law, entitled to succeed before the widow of deceased's brother, his nieces, or their sons, but this would not be so in Bombay where the widow being the last representative of a line takes before a remoter line is resorted to. *See* below and comp. Tupper's Panj. Cust. Law, vol. II. p. 148, where the widow of a collateral ending a branch or sub-branch takes the share that would have fallen to her husband had he been alive. The widow of a pre-deceased grandson takes before the daughter of a predeceased son, *Musst. Brijimalee* v. *Musst. Pran Piaree et al.*, 7 C. S. D. A. R. 59.

as *the first and nearest amongst the Gotraja-Sapiṇḍas* unaided by special texts. (*a*)

c. But though both the principal authorities thus repudiate the doctrine of Baudhâyana, and allow females to inherit as Gotraja-Sapiṇḍas, they differ as to the question what females fall under this designation.

The Mitâksharâ and its followers seem to interpret the term "Gotraja" (="of" or "born in the family") as "belonging to the family." For we read, Mitâksharâ Vyav. *f.* 58, p. 2, l. 13:—

"The kinsmen sprung from the same family as the deceased (Gotraja-Sapiṇḍas), namely, the grandfather and the rest inherit the estate. For the Bhinnagotra-Sapiṇḍas are included by the term (Bandhus)."(*b*)

The word samânagotra, 'belonging to the same family,' is substituted for "gotraja." See *infra,* quotation in Bk. I. Ch. II. Sec. 14, I. A. 3, Q. 1.

The substitution of samânagotra for gotraja, as well as the employment of bhinnagotra to designate the opposite of the term, both show that Vijñâneśvara took gotraja in the sense of "belonging to the same family." If the term has this meaning, it would follow that no *married daughters* of ascendants, descendants, or collaterals can inherit under the text which prescribes the succession of the Gotrajas. For the daughters by their marriage pass into another family, or, as the Hindû lawyers say in their expressive language, "are born again in the family of their husbands." But it seems improbable that even unmarried daughters of Gotraja-

(*a*) Vyav May. Chap. IV. Sec. 8, p. 20; Borradaile, p. 106; Stokes, H L. B. 89. In a Madras case the Privy Council say, "His sisters, if they had a remote right to succeed as Baudhus.........could only so succeed after the Sapiṇḍas.........had been exhausted." See *V. Venkata Krishna Rao* v. *Venkatrama Lakshmi et al.,* In. L. R. 1 Mad. 185; S. C. L. R. 4 I. A. at p. 8.

(*b*) Stokes, H. L. B. 446; and Mit. *ibid.* 1, 15 (Stokes, H. L. B. 447).

Sapiṇḍas can inherit under the text mentioned. (*a*) For, though they belong to their father's gotra up to the time of marriage, they *must* leave it, under the Hindû law, before the age of puberty; and consequently by their succeeding to the estate of Sapiṇḍas belonging to their fathers' families, the object of the law, in placing Sagotra-Sapiṇḍas before the Bhinnagotra-Sapiṇḍas, namely, the protection of the family property, would be defeated, since such property, through them, would pass into their husbands' families. The quitting of the paternal family by a girl is looked on as so inevitable that it is made a ground for exempting her from sharing her father's loss of caste with her brothers, because she goes to another family. (*b*) It seems therefore more in harmony with the principles on which the doctrines of the Mitâksharâ are based, to exclude even unmarried daughters of Gotrajas. (*c*) The only females, who can be understood

(*a*) Compare Manu II. 67, 68. Compare also Coulanges La Cité Antique, 51. Colebrooke, Dig. Bk. V. T. 183, speaks of a second birth by investiture and other ceremonies.

(*b*) Vîramit., Transl. p. 254.

(*c*) Bâlambhaṭṭa admits the rights of inheritance of sisters, sisters' daughters, and daughter's daughters. But he does not consider them to be included by the term Gotraja-Sapiṇḍa, but by the words "bhrâtarah," "brother," and "dauhitra," "daughter's son," and "tatputra," his (her) sons, in Yâjñavalkya's text. Stokes, H. L. B. 443. *Thakoorain Sahiba et al.* v. *Mohun Lall et al.*, 11 M. I. A. 402. Sisters' inheritance does not follow the analogy of daughters'. If any analogy is to be recognized it is to the case of brothers, *Bhágirthibái* v. *Báyá*, I. L. R. 5 Bom. 264. *See* however the Chapter on Strîdhana. The Smṛiti Chandrikâ excludes the daughter of the grandfather and of other ascendants from amongst Gotrajas on the ground that the form of the word, as derived from a combination of masculine terms, must primarily be taken to indicate only males. Smṛiti Chandrikâ, Ch. XI. S. 5, p. 2. On a similar construction sisters and their sons are excluded. *See* Smṛiti Chandrikâ, p. 191. Devâṇḍa takes *Gotrajah* as meaning sprung from the family, p. 192, and hence as a reason for excluding the grandmother from succession after nephews, except under the special texts in her favour, p. 184 ss.

by the term Gotraja-Sapiṇḍa, are the wives and widows of the male Gotraja-Sapiṇḍas.

Nîlakaṇṭha, on the other hand, takes 'gotraja' in the sense of 'born in the family,' and declares expressly that the 'sister' inherits for this reason. (*a*) He does not mention the paternal great-grandmother, nor the widows of other Gotrajas in his list of heirs. But it is not clear whether he intends to exclude them, as, according to Hindû ideas, a wife may be said to have been born again in the family of her husband, and he, as we have seen, admits the theory of a sapiṇḍa connexion by particles. He would, consistently with the principle on which he assigns her place to the sister place the daughters of male Gotraja-Sapiṇḍas amongst the heirs bearing this name; but this logical extension of his doctrine does not seem to have been generally accepted into the local law. Except for sisters it may be taken that the Mitâksharâ law prevails. (*b*)

The Śâstris have in their answers, except in the Gujarât cases relating to the sister, generally followed the Mitâksharâ. They prefer the sister-in-law to the sister's son (Bhinnagotra-Sapiṇḍa) and to a male cousin and more distant male Sagotra-Sapiṇḍas, (*c*) the paternal uncle's widow to the

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See Introductory Remarks to Bk I. Chap. II. Section 15. At 2 Str. H. L. 243, Colebrooke says that commentators on the Mitâksharâ admit sisters, but that this view is controverted. Sutherland says that he inclines to the view that the sister is excluded. Remarking on Manu IX 185, Collett, J., says, in a Madras case, that the plural *bhrâtara* is used, and that Prof. Wilson allows the plural masculine to include only males, though the dual *bhrâtarau* may include females.

(*a*) *See* Vyav. May., Borradaile, p. 106; Stokes, H. L. Books, p. 88.

(*b*) See *Lallubhái* v. *Mánkuvarbái* above, p. 2 (*g*), *Daya Bechur et al.* v. *Bái Ladoo*, S. A. No. 158 of 1870, decided on 27th March 1871, Bom. H. C. P. J. F. for 1871; also Sec. 15, B. II. (2) below. In S. A. No. 158 of 1870, it was held that the paternal aunt could not, even in Gujarât, be recognized as a Gotraja-Sapiṇḍa, though she was entitled to a place as a Bandhu.

(*c*) *See* Sec. 14, I. B. *b*. 2.

sister, the maternal uncle, and the paternal grand-father's brother; and they allow a daughter-in-law (*see* Chap. IV. B., Sec. 6, II. *f*.) and a distant Gotraja-Sapiṇḍa's widow to inherit. It is, however, sometimes impossible to bring the authorities which they quote into harmony with their answers.

From their answers as well as on account of the general principle that "the nearest Sapiṇḍa inherits," (*a*) it would appear that the place of the widows of descendants and collaterals in the order of heirs is immediately after their husbands, (*b*) at least where the particular branch to which they belong is not lineally represented by a surviving male. (*c*)

It is on this analogy probably that the Śâstri has grounded his erroneous answer to Chap. II., Sec. 7, Q. 16.

Regarding the Samânodakas, who occupy the next division, it may suffice to remark that according to the principles of interpretation adopted by Vijñâneśvara in regard to the passage on Sapiṇḍa-relationship, they must be understood to comprise the male ascendants, descendants, and collaterals, beyond the sixth and within the thirteenth degrees, together with their wives or widows, or all those persons who can furnish a satisfactory proof of their descent from a common ancestor. The order of their succession also must be regulated by the same principles as that of the Sapiṇḍas.

(*a*) *See* Vyav. May. p 106. See *Lakshmibái* v. *Jayrám Hari et al.* 6 Bom. H. C. R. 152 A. C J.

(*b*) *See* Bk. I. Chap II. Sec. 8, Q 2. The widow of a brother's son was preferred to another brother's great-grandson in succession to a widow as to property inherited by her from her husband. *Dhoolubh Bhaee et al.* v. *Jeevee*, 1 Borr. 75.

(*c*) See *Lallubhái* v. *Mánkuvarbái*, above p. 2 (*g*).

§ 3 *B*. (15) GOTRAJA-SAMÂNODAKAS.—*On failure of Gotraja-Sapiṇḍas, the Gotraja-Samânodakas inherit the estate of a separate householder. Gotraja-Samânodakas are all the male descendants, ascendants, and collaterals, within 13 degrees, together with their respective wives; or according to some, all persons descended from a common male ancestor, and bearing the same family name. The Samânodakas inherit, like the Sapiṇḍas, according to the nearness of their line to the deceased.*

AUTHORITIES.

See Book I., Chap. II., Sec. 14, II., Q. 1.

"Samânodaka" means literally participating in the same oblation of water. Another form of the name for these kinsmen is "*Sodaka*."

§ 3 *B*. (16) BANDHUS.—*On failure of Samânodakas, the estate of a separate householder descends to the Bandhus or Bhinnagotra-Sapiṇḍas (Sapiṇḍa-relations, not belonging to the same family as the deceased). The latter term includes—*

1. *The father's sister's sons,*
2. *The mother's sister's sons,*
3. *The maternal uncle's sons,*
4. *The father's paternal aunt's sons,*
5. *The father's maternal aunt's sons,*
6. *The father's maternal uncle's sons,*
7. *The mother's paternal aunt's sons,*
8. *The mother's maternal aunt's sons,*
9. *The mother's maternal uncle's sons,*
10. *All other Sapiṇḍa relations who are not Gotrajas, according to the definition given above. These take in the order of their nearness to the deceased.*

AUTHORITIES.

See Book I., Chap. II., Sec. 15, A. 1, Q. 1, and B. 2, Q. 1; Vasiṣṭha IV, 18.

The rule as to the nine specified bandhus may be expressed thus:—A man's own bandhus are the sons of his paternal aunt and of his maternal aunt and uncle. The same relatives of his father are *his* bandhus. The same relatives of his mother are *her* bandhus. (*a*) They succeed in the order in which they have been enumerated. *See* Vyav. May. Chap. IV., Sec. VII., pl. 22.

The chief reason for which we hold that all the Bhinnagotra-Sapiṇḍas inherit under the law of the Mitâksharâ, is that Vijñâneśvara declares "the Bhinnagotra-Sapiṇḍas (or Sapiṇḍas who are not Gotrajas, *i. e.* who do not bear the same family name) *to be understood by the term Bandhu* (bhinnagotrâṇâṁ sapiṇḍânâṁ bandhuśabdagrahaṇât). Against this it must not be urged that the opinion stands in contradiction to the enumeration given in Mit. Chap. II., Sec. 6 (Colebrooke), as this enumeration most likely is only intended to secure a preference for the nine Bandhus named there. (*b*) For Hindû lawyers are by no means so accurate that they would hesitate to divide an explanation which ought to stand in one particular place, and to give it in two passages.

But a further proof that it is correct to combine the two passages, Mit. Chap. II., Sec. 5, paras. 3 and 6, is contained in the circumstance that Vijñâneśvara takes the words "bandhu" and "bandhava" in all the passages of Yâjñavalkya, where they occur, in a general sense, viz. of relations in general, or relations on the mother's and father's side, or relations on the mother's side only.

Finally, Vijñâneśvara himself states, in the passage *on the succession to a deceased partner in business*, that the Bân-

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(*a*) It will be observed that "aunt" and "uncle" in the list mean aunt and uncle by blood, not merely an uncle or aunt by marriage.

(*b*) It was perhaps originally, by counting five steps, intended to mark the extreme limits of the bandhu relationship, confining rights of inheritance. *See* note (*b*) next page.

dhavas include the *maternal uncle*, one of those Bhinnagotra-Sapiṇḍas who had not been named by him in Chapter II., Sec. 6. As this passage is of great importance for other questions also, connected with the law of inheritance, we give it here in full:—

Yâjñ.—If (a partner in business) proceeded to a foreign country and died (there), his (nearest) heirs (sons, &c.) his relations on his mother's side (bândhavâh), or his Sapiṇḍa relations, or those (partners of his) who have returned (from their journey) shall take his estate; on failure of (all) these the king.

Mitâksharâ—

When amongst partners one proceeded to a foreign country and died, then near heirs (*a*) (dâyâda), the sons and other descendants; the cognates (bândhavâh) the relations of his mother, the *maternal uncle* and the rest; or the gentiles (jñâtayah) the blood relations (sapiṇḍah) not included among the descendants (*b*) or those who have come (âgatâh), the partners in business who have returned from the foreign country; or also these may take his property.

On failure of them, *i.e.* on failure of the near heirs and the rest (dâyâdâdi), the king shall take it.

And by the word "or" he (Yâjñ.) indicates that the right of the near heirs and the rest is contingent (*i.e.* that not all inherit together). The rule however regarding the order of succession, which has been given above (Chapter II., Sec. 1, para. 2) in the text, as to the wife, daughters, &c., applies also here. The object for which this rule (regarding the

(*a*) Regarding the use of dâyâda in the sense of son and nearest relations, *see* the Petersburg Dictionary, s. v.

(*b*) Here, as in other passages, Vijñâneśvara uses the word Sapiṇḍa in the sense of Sagotra-Sapiṇḍa, blood relations bearing the same family name. As to the order of succession amongst the Bandhus *see* Book I. Ch. II. § 15, Introductory Remarks 5, and notes.

succession to a deceased partner in business) has been given, is to forbid (the succession) of pupils, of fellow-students, and of the Brâhmin community, and to establish (in their stead the succession of) merchants (partners). Amongst the merchants, he who is able to perform the funeral oblations, to pay the debts (of the deceased), &c., shall take (the estate). But if all are equally able (to fulfil the conditions mentioned), all the merchants who are partners shall have it. On failure of them the king himself shall take it, after having waited ten years for the arrival of the (near) heirs and the rest. Just this has been distinctly declared by Nârada (Sambhûyasamutthâna), vs.:—

"15*b*. But on failure of such (partners), the king shall protect it well for ten years."

"16. After it has remained without owner for ten years and if no heir has appeared (within that time), the king shall take it for himself. By acting thus the law is not violated."

"7. If (among partners) one die, an heir (dâyâda) shall take his (estate), or some other (partner) on failure of heirs, if he be able (to perform the funeral oblations, &c), (or) all of them (shall share it)."

According to Vijñâneśvara, the meaning of this verse of Yâjñavalkya is, that the sons, sons' sons, and the rest of the heirs, specially enumerated in Mit. Chap. II., Sec. 1, para. 2, the Gotraja-Sapiṇḍas, the Bândhavas or Bandhus, partners in business, or, on failure of all these the king, shall inherit the estate of a partner in business deceased in a foreign country, and *he states distinctly, that* the *maternal uncle* who had *not been named in Section* 6, *inherits as Bandhu.* The irresistible conclusion to be drawn from this statement, as well as from the words quoted above from Mit. Chap. II. Sec. 5, para. 3, is that the enumeration of the Bandhus given in Section 6 is not intended to be exhaustive, any more than in the case of the Gotraja-Sapiṇḍas. But if this enumeration is not exhaustive, then clearly all those Sapiṇḍas must be

§ 3 *B.* (18) THE BRÂHMAN COMMUNITY.—*On failure of a fellow-student, learned Brâhmans (Śrotriyas), on failure of them other Brâhmans, take the estate of a separate householder of the Brâhman caste.*

AUTHORITIES.

Mit. Chap. II., Sec. 7, paras. 4 and 5; Vyav. May. Chap. IV., Sec. 8, paras. 25 and 26.

For the point that this succession is restricted to the property of a Brâhman, *see* the passage from Vijñâneśvara, translated above p. 135, where no mention is made of the Brâhman community by Yâjñavalkya, and the Mitâksharâ expressly excludes it from succession to a trader.

This succession has been disallowed by the English Courts. *See* Stokes, Hindû Law Books, p. 449, note *a*, and *The Collector of Masulipatam* v. *Cavaly Vencata Narainappa.* (*a*)

§ 3 *B.* (19) THE PARTNERS IN BUSINESS OF A BANYA.—*On failure of Bandhus, partners in business take the estate of a Banya.*

(*a*) 8 M. I. A. 520. The succession of the caste on failure of other heirs is not provided for except in the case of Brâhmans. In their case it rests perhaps on an idea of dedication in grants to a Brâhman, so that resumption would be a kind of sacrilege, and property once given must in case of need pass *çy près* to other Brâhmans who have moreover a kind of spiritual title to the world and all that it contains (Col. Di. Bk. II. Ch. II. T. 24; Manu VIII. 37, VII. 33). But tribal succession is found in many districts on the Northern frontier of India where any tribal organization has been preserved, and was probably at one time general amongst the indigenous tribes (*see* Panj. Cust. Law, vol. II. p. 240, etc.) It may be traced to tribal distribution of the whole or of part of the tribal lands to individual members, of which many instances occur; *ib.* pp. 254, 214, and vol. I. pp. 93, 94. *See* also Mr. Chaplin's Report on the Dekkhan, Rev. and Jud. Sel. vol. IV. pp. 474, 475; and comp. Arist. Pol. IV. (VII.) Ch. X, and Bolland and Lang's Edn. Introd. Chs. IV. and XIII.

AUTHORITY.

Mitâksharâ quoted above p. 135.

§ 3 *B.* (20) THE KING.—*On failure of a fellow-student, the king takes the estate of a separate householder or temporary student of the non-Brâhminical castes, with the exception of that of a merchant, which escheats on failure of partners only, and after a lapse of ten years.*

AUTHORITIES.

Mit. Chap. II., Sec. 7, p. 6, and Mit. quoted above.

Failing other heirs the State takes the property even of a Brâhman by escheat, subject to the existing trusts and charges. (*a*)

The Crown desiring to take an estate by escheat must show an entire failure of heirs. (*b*)

As only his own offspring become joint-owners with a man by their birth, the title of a remote heir cannot prevail against his bequest of his separate property (*c*) though acquired by a partition, and so held as under the former title, contrary to 1 Strange, H. L. 26, 2 *ib.* 12, 13, but agreeing with Colebrooke, *ib.* 15; *see* Book II., Ch. I., Sec. 2, Q. 8.; *infra* Bk. II., Ch. I., S. 2, Q. 8.

(*a*) *The Collector of Masulipatam* v. *C. Vencata Narrainappah*, 8 M. I. A 500.

(*b*) *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. at pp. 454, 469

(*c*) *Bhika* v *Bhana*, 9 Harr. R. 446; *Narottam* v. *Narsanddás*, 3 Bom. H. C. R. 6 A. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1; *Tuljarám Morárji* v. *Mathurádás and others*, I. L. R. 5 Bom. at p. 668.

§ 3 *C.*—SUCCESSION TO A SAṀSṚISHṬÎ.

(I.) SONS, SONS' SONS, &c.—*Sons, sons' sons, and their sons inherit the estate of a Saṁsṛishṭî or reunited coparcener,* per stirpes, *provided they live united with their fathers, or have been born during the time that their fathers were reunited. The rules regarding adopted sons (p. 71) and a Śûdra's illegitimate son (p. 72) apply likewise in the case of a united coparcener. Posthumous sons also inherit.*

AUTHORITIES.

Mit. Chap. II., Sec. 9, paras. 1 and 4; Stokes H. L. B. 452.

Reunion may take place, according to the Mitâksharâ, with a father, a brother, and a paternal uncle (Chap. II., Sec. 9, para. 2), by their again mixing up their effects after a division between them has taken place. The Vyav. May. allows reunion between all such persons as at some time or other have been coparceners (avibhakta). (Vyav. May. Chap. IV., Sec. 9, para 1.) *See* also the Vîramitrodaya, Transl. p. 205.

As the Mitâksharâ states that the Rules of Sec. 9 form exceptions to those given in Chap. II., Sec. 1, regarding the succession of the wife, &c., it follows that all the rules on the apratibandhadâya, the unobstructed inheritance, remain in force, and that consequently reunited sons, sons' sons, sons' sons' sons, adopted sons, and the Śûdra's illegitimate son, inherit the estate of their ancestors, if they are united or reunited with them. A new family, in a general sense, is set on foot, and the rules applicable to a joint family apply amongst its members, though with some exceptions, arising from the consanguinity of those excluded from the reunion, which will be presently noticed.

According to the Subodhini, sons who are not reunited with their fathers, nevertheless receive a share of the estates of the latter. (Mit. Chap. II., Sec. 9, para. 9, *note.*)

According to the Mayûkha also, unreunited sons take the estates of their father, except in the case where some sons are reunited with him. Then the latter have the preference. (Vyav. May. Chap. IV, Sec. 9, para. 16.)

§ 3 C. (2.) REUNITED COPARCENERS.—*On failure of his issue, the reunited coparceners inherit the estate of their coparcener. But if amongst those thus reunited there be brothers born from different mothers the reunited brothers of the whole blood take the whole of their reunited full brother's estate. If among full brothers one is reunited with a half brother and another not, on the death of the reunited brother the reunited half-brother and the unreunited full-brother share his estate equally.*

AUTHORITIES.

Mit. Chap. II., Sec. 9, paras. 2, 5, seq. and 11.

According to the Subodhinì, a father, whether reunited or not, shares the estate of his son (*see* Mit. l. c. para. 9, *note*), and a son, though not reunited, shares the estate of the father with a son united or reunited, but this seems inconsistent with Mit. Chap. I., Sec. 6, p. 4.

According to the Vyav. May.:—

1. The parents have a preference before other reunited coparceners, excepting sons (Vyav. May. Chap. IV., Sec. 9, paras. 17, 18).

2. Other coparceners standing in an equal relation share the estate of a childless coparcener equally (Vyav. May. l. c. para. 19); but the whole-brother takes in preference to the half-brother. (*Ibid.* para. 8.)

3. Unreunited full brothers share the estate of a full brother who was reunited with half-brothers or remoter relations, together with the reunited relations. (Vyav. May. l. c. para. 20.)

4. In case of the reunion of a wife alone—there being no other coparceners—she takes the inheritance of her reunited husband; on failure of her, a daughter and a sister, on failure of them, the nearest Sapiṇḍa. (Vyav. May. l. c. paras. 21–25.)

It is difficult to understand how a reunion with a wife can take place, since according to Âpastamba II., 6, 14, 16 seq. no division can take place between a husband and wife. No such partition is known in actual practice at the present day, and Nîlakaṇṭha's rule may be regarded as merely speculative, resting perhaps on an analogy to the passage of Âpastamba (*a*) which calls a woman's own property her share in an inheritance. The rules as to inheritance after partial or complete reunion are complicated through the endeavours of the commentators to give effect to two rules, one in favour of reunited brethren and one in favour of whole-brothers, which, in some cases, clash or overlap. (*b*) The favour shown in a reunited family to the brother of the whole blood rests on rather artificial reasoning, but it may perhaps be traced back to the institution of marriage with wives of different castes and of a patnibhâg or a division in which the shares of each group of sons varied according to the mother's class. The general rule of equal rights on a second partition would deprive the favoured sons of their larger portions, unless thus qualified. But the rule of unequal inheritance does not seem really reconcilable with that of equal partition amongst whole and half-brothers reunited, unless the inherited shares taken by the former are to be regarded as separately acquired property; for which in a united family there seems to be no authority. The contradiction would be most easily avoided by regarding the qualification by whole blood as one not extended in its operation by its happening to coincide in the same person with

(*a*) Transl. p. 134. Comp. Coleb. Dig. B. V. T. 515, Comm.

(*b*) *See* Vîramit. Transl. p. 209.

the capacity arising from reunion. Otherwise Manu's text, IX. 210, might be taken, as proposed by some, only to limit the eldest brother to equality, as opposed to any special right arising from his eldership, while the general rule of partition, instead of absolute equality, would be that of shares proportional to those brought in by the several coparceners at the time of their reunion. (*See* Vyav. May. Chap. IV., S. 9, pl. 2, 3. Vîramitrodaya, Transl. p. 205.) Regard being thus had to the comparative value of the different elements of the reunited estate, it might be extended to supervening inequalities, arising from inheritance *inter se* or acquisitions from without, in the shares of the several members. (*a*)

The practical difficulties in the way of thus dealing with reunited property may be the reason why the people in this part of India (*b*) have been content in practice to abide by the rule in a reunited, as in an unseparated family, of partition giving equal shares to the descendants of each son of the former owner in whom the different lines of ascent coincide, and of survivorship rather than of inheritance, in the English sense, amongst the members of the reunited family down to the moment of defining their rights according to the several branches in making a partition. (*c*)

The Privy Council say that "a member who has separated from a Hindû family and subsequently rejoins it, is remitted to his former status."(*d*) And so too where a

(*a*) In the Multan District a member of a united family even, who has joined his separate acquisition to the common stock, is allowed to withdraw it before partition. *See* Panj Cust. Law, vol. II. p. 275.

(*b*) *See* too *Huro Doss Dostedar* v. *Sreemutty Huro Pria*, 21 C. W. R. 30.

(*c*) *See* Chap. II Sec 11, Q. 5; *Mohabeer Parshad* v. *Ramyad Singh et al.*, 20 C. W R. 192, 194; *Gavuri Devamma Gâru* v. *Raman Dora Gâru*, 6 M.H. C R. 93; and below Book II. Introd. '*The family living in union*,' and *Moro Vishavanath* v. *Ganesh Vithal*, 10 Bom. H. C. R. at p. 461.

(*d*) *Prankishen Paul Chowdry* v. *Mothooromohun Paul Chowdry*, 10 M. I. A. 403.

brother had brought his separate gains into the common stock. (*a*)

According to Bṛihaspaṭi the acquirer in a reunited family of what in a united family would be his separate property obtains only a double share as compared with the other members. *See* Vîramit., Transl. 205. This exaltation of the common right in a reunited family is not recognized in practice.

The Vîramitrodya (*b*) quotes the Dâyatattwa to the effect that in the case of the reunion of coheirs the extinction of rights over portions and the production of rights over the entire estate are acknowledged; and says of a coparcener that "if reunited, then although his share had been specified, it was lost by the accrual of a common right over again." (*c*)

The widow of a reunited coparcener deceased must be maintained while chaste by the survivors, and also his daughter until provided for in marriage. (*d*)

§ 3 *D.*—HEIRS TO MALES WHO HAVE ENTERED A RELIGIOUS ORDER.

(1.) To a Yati or Sannyâsî.—*The virtuous pupil (and not the relative by blood) of a Sannyâsî is his heir.*

See Book I., Chap. III., Sec. 1, and for Authorities Book I., *loc. cit.* Q. 1, and Sec. 2, Q. 1; Vyav. May. Chap. IV., Sec. 8, para. 28.

Regarding the question—what is meant by the estate of a Yati? *see* Mit. Chap. II., Sec. 8, paras. 7 and 8.

(2.) To a Naishṭhika Brahmacharî.—*The preceptor (Achârya) inherits the property of a Naishṭhika-Brahmacharî.*

See Book I., Chap. III., Sec. 2, and for Authorities *see* Q. 1.

(*a*) *Rampershad Tewarree* v. *Sheochurn Doss,* 10 M. I A. at p. 506.

(*b*) Trans. p. 40. (*c*) *Op. cit.* p. 164. (*d*) *Op. cit.* p. 205.

HEIRS TO FEMALES.

§ 4 *A*.—To Unmarried Females.

Brothers, and on failure of them, the mother, on failure of her the father, and on failure of him the nearest Sapiṇḍas, inherit the property of a girl who died before the completion of her marriage.

See Book I., Chap. IV. A, Secs. 1, 2, 3, and for Authorities *loc. cit.* Sec. 1, Q. 1, and Sec. 3, Q. 1.

Regarding the question—what constitutes the property of an unmarried female, *see* Mit. Chap. II., Sec. 11, para. 30. The inherited property of the betrothed damsel to which as well as to gifts from her own family her brothers are heirs can but rarely be of great value. But the rule given by Vijñâneśvara coupled with the text on which he bases it is important, as it shows that he ranked a heritage in a maiden's strîdhana.

§ 4 *B*.—Heirs to Married Females leaving Issue.

(1) Daughters.—*Daughters inherit the separate property, Strîdhana, of their mothers. Unmarried daughters inherit before married ones, and poor married ones before rich married ones.*

See Book I., Chap. IV. B, Sec. 1, and for Authorities *loc. cit.*, Q. 1 and Q. 13.

The question—what constitutes Strîdhana, the separate property of a married female, as well as its descent, are topics regarding which, as Kamalâkara in the Vivâdatâṇḍava despairingly exclaims, "the lawyers fight tooth and nail," (yatra yuddham kachâkachi). It is impossible to reconcile with each other even the views of those lawyers whose works are the authorities in this Presidency. As pointed out in the Introductory Remarks to Book I., Chapter IV. B, Sec. 6, Nîlakaṇṭha makes a distinction between the pâribhâshika, the sixfold strîdhana proper,

as defined by the law-books, and other acquisitions over which a woman may have proprietary rights. This is the distinction which Nîlakaṇṭha keeps in view when fixing the succession to the estate of a childless married female. But in the case of a married female leaving issue, there is yet a third distinction to be observed. In this case, the following three categories of strîdhana are to be taken into account, and descend each in a different manner:—

a. The Anvâdheya, the gift subsequent to the marriage, and the Prîtidatta, the affectionate gift of the husband, are shared by the sons and the unmarried daughters, small tokens of respect only being due to married daughters, and some trifle to daughters' daughters. (Vyav. May. Chap. IV., Sec. 10, paras. 13–16.)

b. The rest of the pâribhâshika strîdhana, the strîdhana proper, as defined by the law-books (*see* Vyav. May. *loc. cit.* para. 5) descends to the daughters, &c., in the manner described by the Mitâksharâ. (*See* Vyav. May. *loc. cit.* paras. 17–24 especially, regarding the limitations, paras. 18 and 24.)

c. Other acquisitions, as property acquired by inheritance, go to *the sons and the rest.*

The Mitâksharâ, on the other hand, knows of no distinction between pâribhâshika and other strîdhana. Everything acquired by a married female, by any of the recognized modes of acquisition, descends in the same manner to her daughters, daughters' daughters, &c. The views of the High Courts have varied on this subject like those of the commentators. In the judgment of the Bombay High Court, in the case of *Jamiyatrâm and Uttamrâm* v. *Bâi Jamna* (*a*) the following passage occurs:—

"The notion that according to the Mitâksharâ such (immoveable) property (inherited from a sonless husband) forms

(*a*) 2 Bom. H. C. R. 11.

part of the widow's strîdhana, and as such goes on her death to her heirs, not to her husband, was founded on a passage of Sir T. Strange (p. 248, 4th ed.), which was itself based on a mistaken reference to the Mitâksharâ. The Mit. Chap. II., Sec. 11, cl. 2, undoubtedly classes property acquired by inheritance under the widow's strîdhana; but (as pointed out in Devacooverbai's case) clause 4 of the same chapter and section conclusively shows that the words 'acquired by inheritance,' as used in clause 2, relate only to what has been received by the widow from her brother, her mother, or her father, *i.e.* from her own family."

According to this passage, it would seem that, in the opinion of the Court, clause 4 is to be read with clause 2, and intended to restrict the sense of the latter. Though this interpretation of Mr. Colebrooke's version of the Mitâksharâ might be possible, still no Sanskritist, who reads the original of the Mitâksharâ, will be able to allow, or has allowed, that this was the intention of Vijñâneśvara. Unfortunately Mr. Colebrooke has left untranslated (*a*) two words of the Sanskrit text which head the 4th clause. These are "*yatpunaḥ*," 'but as to (what is said by Manu. . . . . that is intended,' &c.). It is the custom of Hindû scientific writers to indicate by these two words, or others of similar import, that the passage which follows is intended to ward off a possible objection to some statement made by them previously. Now, in this case, Vijñâneśvara had stated, in clause 3, that the term "strîdhana" was to be understood according to its etymology, and had no technical (pâribhâshika) meaning. The words "yatpunaḥ" (*lit.* "again what") indicate therefore that clause 4 removes a possible objection to clause 3.

The same conclusion indeed follows from a consideration of the general course of the argument. "Strîdhana,"

(*a*) Regarding another slight inaccuracy in Colebrooke's translation of Clause 2 of Mit Ch. II., Sec. XI., *see* below, Book I., Chap. II., Sec. 2, Q. 10.

Vijñâneśvara says, "includes property acquired by inheritance," &c. Such is the real purport (mistaken by some lawyers) of Manu and the rest, for "strîdhana" etymologically means (all) a woman's acquisitions, and this sense being an admissible one, is preferable to a merely technical interpretation. *It is true no doubt* that six sorts of strîdhana are expressly enumerated by Manu, but that is meant not as a restriction to those six, but as a denial only that any of those six are not "strîdhana." He is commenting on the passage of Yâjñavalkya (II., 143, Mit. Chap. II., Section 11, para. 1) which says that a gift, or *any other* separate acquisition, of a woman is termed "strîdhana"; and he contends, in tacit opposition to the Eastern lawyers, that strîdhana is to be taken in the widest sense. It would therefore be a self-contradiction if he wound up this contention by admitting restrictions which it was his very object to combat. "What has been received" in paragraph 4 does not mean "what has been *inherited.*" It means, like the passage in Yâjñavalkya, "what was given by the father," &c., and to apply it to the limitation of the phrase "acquired by inheritance" in paragraph 2 involves a serious misconception both of the sense of the Sanskrit text, and of the author's logical method. Take the several paragraphs 2, 3, 4, however, (1) as developing the sense of the Smriti, (2) as supporting this development by a special argument, and (3) as meeting a possible objection to that argument, and all becomes explicable and consistent. The process of reasoning is precisely that which argumentative writers amongst the Hindûs usually take. The passage is in its proper place, and involves neither contradiction nor restriction of the preceding statements.

Its meaning consequently is—"But in case you (the imaginary opponent) should say that my statement stands in contradiction to the verse of Manu IX., 194, then I answer that this verse does not contain a complete enumeration of the various kinds of strîdhana, but only gives some of the most important." It appears therefore that clause 4 is to be

read in connexion with clause 3. For this reason we must still adhere to Sir T. Strange's opinion, that the property inherited from the husband becomes, according to Vijñâneśvara, strîdhana. The most recent decision of the Judicial Committee to be presently cited puts a narrower limitation on the rule than that adopted by the High Court of Bombay in Jamiyatrám's case. (*a*) That case allowed property inherited from a woman's own family to rank as strîdhana, but the gifts particularly specified as forming part of the strîdhana were clearly not meant to include inheritance, and the technical restriction of strîdhana being accepted at all, necessarily leads to the result of excluding inheritance altogether, which is the one arrived at by the Privy Council. The Vîramitrodaya (Transl. p. 136 ss.) assigns to the widow complete ownership of her separated husband's estate on his death with a right to dispose of the property if necessary. But from an injunction of Kátyáyana to the widow only to enjoy the property with moderation, Mitramiśra deduces a limitation in her case on the power of alienation usually accompanying ownership, except for necessary religious and secular purposes. And another part of the same passage: " After her let the heirs, (dáyádas) take," he construes as meaning the husband's heirs because of the previous reference to the husband and the honour of his bed, not the widow's own heirs—her daughters, etc. This passage is not quoted by Vijñâneśvara. He merely makes property taken by a woman as heir part of her strîdhana, and says that her strîdhana as thus defined is to be taken by her kinsmen.(*b*) So Colebrooke has understood the doctrine, which he contrasts with the different views taken by the lawyers of the Eastern School.(*c*) In *Bhagwandeen Doobey* v. *Myna Baee,*(*d*) the Privy Council were of opinion that no pro-

(*a*) 2 Bom. H. C. R. 11.

(*b*) Mitâksharâ Chap. II., Sec. XI., paras 2, 9.

(*c*) *See* his notes 2-13 to para. 2 of Mitâksharâ Chap. II., Sec. XI.

(*d*) 11 M. I. A. 487.

perty, inherited by a woman from her husband, formed part of her strîdhana in the narrower sense involving a special mode of devolution. Property inherited from a father or a brother has, on the other hand, been held in Bombay to be strîdhana, and a widow has been held to succeed to her son's property on the same terms as to her husband's. The question then arose, whether all property inherited by a woman was under the Mitâksharâ to be deemed strîdhana, or whether none was so. In the case of *Vijiârangam* v. *Lakshman*,(a) strîdhana is said, according to the Mitâksharâ, to include all a woman's acquisitions of property, the descent of which is governed by the form of her marriage. According to the Vyavahâra Mayûkha, it is said, strîdhana in the narrower sense descends according to special rules, while strîdhana such as property inherited descends as if the female owner had been a male. (b) The latest ruling of the Judicial Committee on this subject which seems intended to shut out all further controversy is, that regard being had to the authority of other commentators and to other parts of the Mitâksharâ, the passage declaring property inherited by a woman to be strîdhana does not in the case of "inheritance from a male" confer upon her "a strîdhana estate transmissible to her own heirs." (c) It is on her death to pass to "the heirs" of the last male owner, the woman's estate being regarded as a mere interruption. This may not, unfortunately, settle the matter. The decisions in Bombay have not been placed on so extremely general a construction as that adopted by the Privy Council. (d) The local usage

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(a) 8 Bom. H. C. R. 244, O. C. J.

(b) *See* below on Strîdhana, and *Jaikisondas* v. *Harkisondas*, In. L. R. 2 Bom. 9.

(c) *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, L. R. 8 I. A. 99, 109.

(d) See *Tuljárám Morarji* v. *Mathurádás*, I. L. R. 5 Bom. 662; *Vináyak Anundráo* v. *Lakshmibái*, 1 Bom. H. C. R. at pp. 121, 124; *Bái Benkor* v. *Jeshankar Motiram*, Bom. H. C. P. J. F. for 1881 p. 271.

may perhaps not admit it, (*a*) and the "other commentators" accepted as having authority in Madras have little or no weight in Bombay against the Mitâksharâ itself. (*b*) There is an exception in the case of the Vyavahâra Mayûkha, but this work does not give back the heritage after the death of a female successor to the original heir: it makes the female the source of a new line of descent as if she were a male. (*c*) Such at least is the literal sense of its rule: how it is to be worked out in detail is not laid down.

In Madras it would seem that the daughter's estate is wholly assimilated to the widow's (*d*) as to succession on her death.

From the rule given in § 4 *B* (1), the "fee or gratuity" of a woman is excepted, which goes to her brothers (Mit. Chap. II., Sec. 11, para. 14), *see* also Gautama XXVIII. 23, 24.

§ 4 *B.* (2) GRAND-DAUGHTERS.—*On failure of daughters, daughters' daughters inherit the estate of a married female.*

See Book I., Chap. IV. B, Sec. 2, and for Authority *loc. cit.* Q. 1.

Grand-daughters, descended from different daughters, share according to their mothers. (Mit. Chap. II., Sec. 11, para. 16.)

On concurrence of daughters and grand-daughters, the latter receive a trifle. (Mit. Chap. II., Sec. 11, para. 17.)

(*a*) See *The Collector of Madura* v *Moottoo Ramalinga Sathupathy*, 12 M. I A. at p. 436; Steele L. C. pp. 63-65

(*b*) *Náráyan Bábáji* v. *Náná Manohar*, 7 Bom H. C R. 167, 169; *Krishnaji Vyanktesh* v. *Pandurang*, 12 Bom. H C. R. 65; *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, at pp. 438, 439; *Lallubhái Bápubhái* v. *Mánkuverbái*, I L. R. 2 Bom. at p. 418; *Ráhi* v. *Govind valad Tejá*, I. L. R. 1 Bom. at p. 106; *Sakárám Sadáshiv* v. *Sitábái*, I. L. R 3 Bo. at pp. 367, 368.

(*c*) *See* Vyav. May. Ch. IV. § X. para. 26, Steele L. C. pp. 63, 64.

(*d*) See *Muttayan Chetti* v. *Sivagiri Zamindár*, I. L. R. 3 Mad. at p. 374; *Simmani Ammál* v. *Muttamál*, *Ib.*, 268.

§ 4 *B.* (3) DAUGHTERS' SONS.—*On failure of daughters' daughters, daughters' sons inherit the estate of a married female.*

See Book I., Chap. IV. B, Sec. 3, and for Authority *loc. cit.* Q. 1.

§ 4 *B.* (4) SONS.—*On failure of daughter's sons, sons inherit the estate of a married female.*

See Book I., Chap. II. B, Sec. 4, and for Authority *loc. cit.* Q. 1.

§ 4 *B.* (5) SONS' SONS.—*On failure of sons, sons' sons inherit the estate of a married female.*

AUTHORITY.

Mit. Chap. II., Sec. 11, para. 24.

§ 4 *C.*—HEIRS TO A MARRIED FEMALE LEAVING NO ISSUE.

(1) THE HUSBAND.—*On failure of sons' sons, the husband inherits his wife's estate, if she was married according to one of the laudable rites. [If she was married according to one of the blamed rites, her property devolves on her parents.]*

See Book I., Chap. IV. B, Sec. 5, and for Authority *loc. cit.* Q. 1.

There are no opinions of the Sâstris in the Digest illustrating the parts of this and the following paragraph enclosed between brackets [ ]. *See* the cases of *Vijiârangam* v. *Lakshaman,* (*a*) and *Jaikisondas* v. *Harkisondas.* (*b*)

2. Regarding the question, which rites of marriage are laudable and which blamed, *see* Book I., Chap. IV. B, Sec. 5, Q. 1, and Remark.

(*a*) 8 Bom H C R. 244, O C. J.
(*b*) In. L. R 2 Bom. 9.

§ 4 C. (2) THE HUSBAND'S SAPIṆḌAS.—*On failure of the husband, the husband's Sapiṇḍas, or blood relations within six degrees on the father's side, and within four degrees on the mother's side, together with the wives of such male blood relations, inherit the estate of a female leaving no issue, if she was married according to one of the laudable rites. [If married according to the blamed rites, the estate devolves on her parents' Sapiṇḍas.]*

See Book I., Chap. IV. B, Sec. 6, and for Authority *loc. cit.* Introductory Remarks.

§ 4 C. (3) WIDOW'S SAPINDAS.—*On failure of the husband's Sapiṇḍas, the widow's own Sapiṇḍas inherit her Strîdhana even though she was married according to the laudable rites.*

See Book I., Chap. IV. B, Sec. 7, and for Authorities *see* the Introductory Remarks to that Section.

§ 5.—PERSONS DISQUALIFIED TO INHERIT.

Persons disabled from inheriting are—

1. *Persons diseased, or infirm in body or mind, who are—*

    a. *Impotent.*

    b. *Blind.*

    c. *Lame.*

    d. *Deaf.*

    e. *Dumb.*

    f. *Wanting any organ.*

    g. *Idiots.*

    h. *Madmen.*

i. *Sufferers from a loathsome and incurable disease such as ulcerous leprosy. See Ch. VI., Sec.* 1, Q. 5 (*a*).

2. *Illegitimate children of Brâhmans, Kshatriyas, and Vaiśyas.*

3. *Persons labouring under moral deficiencies*—

a. Enemies of their father.

b. Outcastes and their children. (*b*)

c. Persons addicted to vice. (*c*)

d. Adulteresses and incontinent widows.

See Book I., Chap. VI., and for Authorities *see* Book I., Chap. VI., Sec. 1, Q. 1, 5; *ibid.* Sec. 3 *a*, Q. 1 *b*, Q. 1, and *c*, Q. 1.

REMARKS.

Regarding the question—whether diseases, infirmities, or moral taints contracted after the property has vested, disable a person for holding it any longer, *see* Remark to Book I., Chap. VI., Sec. 3 *c*, Q. 6.

(*a*) See *Ananta* v. *Ramábái*, I. L R. 1 Bom. 554; *Janárdhan Pándurang* v. *Gopál et al.*, 5 Bom. H. C. R 145, A C. J.; and as to wife's society, *Bái Premkúvar* v. *Bhiká Kallianji*, 5 Bom. H. C. R. 209, A. C. J.

(*b*) *See* above p. 58 (*a*). The sons of outcastes born before their father's expulsion are not outcastes but take their father's place. Sons born after expulsion are outcastes, but Mitramisra says a daughter is not, for "she goes to another family." Vîramitrodaya, Tr. p. 254, Steele L. C. p. 34. The doctrine of outcastes' heritable incapacity does not apply to families sprung from outcastes, *Syed Ali Saib* v. *Sri R. S. Peddabali Yara Simhulu*, 3 M. H. C. R. 5. Act 21 of 1850 has removed any disqualification occasioned by exclusion from caste.

(*c*) In a case at 2 Macn. H. L. 133 it is said that an unchaste daughter cannot succeed to her parents. Compare B. I. Ch. VI., Sec. 3 *c*, Q. 6, and *Mussamut Ganga Jati* v. *Ghasita*, I. L. R. 1 All. 46.

It is only congenital blindness that excludes from inheritance according to *Umabai* v. *Bhavu Padmanji,* (*a*) following *Murárji Gokuldás* v. *Pârvatibâi,* (*b*) *see* also *Bákubái* v. *Munchábái* (*c*) for the different views held by the Śâstris. The same condition as to dumbness is laid down in *Vallabhram* v. *Bai Hariganga.*(*d*) As to mental incapacity, it is said, in *Tirumamagal* v. *Ramasvami,* (*e*) that only congenital idiotcy excludes. In 2 Macn. H. L. 133, the disqualifications are discussed at considerable length. In Steele's Law of Castes a general rule of exclusion for persons labouring under the specified defects is laid down at page 61, but this has been largely qualified by custom. At page 224 it is said that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons, and that in eighty-three castes, blind persons, married and having families, might inherit. In such cases the management of the property would devolve on the owner's relations. See *Bhikaji Ramachandra* v. *Lakshmibai,* (*f*) as to management of a suit. There is a case in which a boy bordering on idiocy was allowed to transmit a heritable right to his widow. (*g*)

§ 6.—SPECIAL RULES OF INHERITANCE ACCORDING TO CUSTOM. SACRED PROPERTY.

The Hindû Law is largely influenced by custom, as already pointed out. But as even those castes and classes which have adopted special customs still recognize the general supre-

(*a*) I. L. R. 1 Bom. 557.

(*b*) I. L. R. 1 Bom. 177.

(*c*) 2 Bom. H. C. R. 5.

(*d*) 4 Bom. H. C. R. 135 A. C. J.; *see* also *Mohesh Chunder Roy et al.* v. *Chunder Mohun Roy et al.*, 23 C. W. R. 78 S. C. 14 Beng. L. R. 273.

(*e*) 1 M. H. C. R. 214.

(*f*) Special Appeal No. 62 of 1875 (Bom. H. C. P. J. F. for 1875, p. 231).

(*g*) *Bái Amrit* v. *Bái Manik et al.*, 12 Bom. H. C. R. 79.

macy of the sacred writings, any divergence of custom from the ordinary law of succession must be established by satisfactory evidence, (*a*) unless it has already been recognized as law binding on the class or family to which the parties belong, whom it is proposed to subject to the custom. A custom of male in preference to female inheritance to Bhágdári lands in Gujarât was recognized in *Pránjiwan* v. *Bái Revá* (*b*) as it had previously been in *Bháu Nánáji Utpát* v. *Sundrábai* (*c*) to temple emoluments.

A family custom thus established binds the individual holder of a ráj or zamindári so as to prevent his dividing it equally amongst his sons. (*d*)

(*a*) An Ikrarnama, signed by four brothers, was received as evidence sufficient to establish the adoption of a family custom of excluding childless widows from inheritance, differing from the general custom of the country, *Russik Lal Bhunj* v. *Purush Munnee*, 3 Morl. Dig. 188, Note 2.

In *Rajah Nugendur Narain* v. *Raghonath Narain Dey* (C. W. R. for 1864, p. 20) it was held that a family custom as to intermarriages might be proved by declarations made by members of the family. But still the course of devolution prescribed by law cannot be altered by a mere private arrangement. *Bálcrishna Trimbak Tendulkar* v. *Sávitribái*, I. L. R. 3 Bom 54.

In the case of an English copyhold an exclusion of females from succession and dower was held an admissible modification by custom of a customary rule of inheritance, though in Ireland it had been, in the case of Tanistry, pronounced void. *See* Elton's Tenures of Kent, 55.

(*b*) I. L. R. 5 Bom. 482.

(*c*) 11 Bo. H. C. R. 249. *See* Colebrooke in 2 Strange's H. L. 181; 1 Macn. H. L. 17, as to a Kuláchár or family custom; and on the same subject, the Judicial Committee in *Chowdhry Chintamon* v. *Mussamut Nowlukho*, L. R. 2 In. A. at p. 269; *Rámalakshmi Ammal* v. *Sivanantha Perumal*, 14 M. I. A. 576, 585, S. C. L. R. S. I. A. 1; *Náráyan Bábáji et al.* v. *Náná Manohar et al.*, 7 B H. C. R. 153, A. C. J.; *Bhagvándás* v. *Rájmál*, 10 B. H. C. R. 260-261.

(*d*) *Rawut Urjun Singh* v. *Rawut Ghanasiam Singh*, 5 M. I. A., 169, 180.

The cases of *The Court of Wards* v. *Rajcoomar Deo Nundun Sing*;(a) *Rajkishen Singh* v. *Ramjoy Surma et al.*;(b) *Chowdhry Chintamon Singh* v. *Musst. Nowlukho Konwari*, (c) and the remarks of the Privy Council in *Soorendronath* v. *Mussamut Heeramonee*(d) show that a family custom of inheritance may be abandoned.

The ordinary rules of Hindû law are applicable to Jains, no special custom being proved. (e) Hence in the absence of custom or usage to the contrary, an alienation by gift by a widow of her husband's property is invalid according to the Mitâksharâ which governs the Bindala Jains.(f) The Khojas —a class of Mahomedans converted from Hinduism—are governed by the Hindû law of inheritance except so far as this has been modified by special custom. Being of Gujarâthi origin the Khojas allow a precedence to the mother over the widow, which is common to many castes in Gujarât, but the mother is not allowed to dispose of the estate, and after her death it goes to her son's heir, usually his widow. (g)

Succession to a Râj was held to be governed by custom in *Arjun Manic et al.* v. *Ram Ganga Deo*, (h) by nomination in *Ramgunga Deo* v. *Doorga Munee Jobraj* (i) and *Beer Chunder*

(a) 16 C. W. R. 143

(b) I. L. R. 1 Calc. 186.

(c) L. R. 2 In. Ap. 269, 273.

(d) 12 M. I. A. at p. 91

(e) *Lalla Mohabeer Pershad et al.* v. *Musst. Kundun Koowar*, 8 C. W. R. 116; *M. Govindnath Roy* v. *Gulal Chand et al.*, 5 C. S. D. A. R. 276; *Sheo Singh Rai* v. *Musst. Dakho et al.*, 6 N. W. P. H. C. R. 382; S. C. L. R. 5 I. A. 87; *Bhagvándás Tejmal* v. *Rájmál*, 10 Bom. H. C. R. 241; *Hasan Ali* v. *Naga Mul*, I. L. R. 1 All. 288, where a special custom of adoption prevailed.

(f) *Bachebi* v. *Makhan Lal*, I. L. R. 3 All. 55.

(g) *Shivji Hasam* v. *Datu Mávji Khoja*, 12 Bom. H. C. R. 281; *Hirbái* v. *Gorbái*, 12 Bom. H. C. R. 294; *Rahimatbái* v. *Hirbái*, I. L. R. 3 Bom. 34.

(h) 2 Calc. Sel. S. D. A. R. 139.

(i) 1 Calc. S. D. A. R. 270.

Joobraj v. *Neel Kishen Thakoor et al.*(a) An illegitimate son was excluded in *Bulbhudda Bhourbhur* v. *R. Juggernath Sree Chundun.* (b) As to a quasi-Râj see *Chowdhry Chintamon Singh* v. *Musst. Nowlukho Konwari,* (c) and the decision of the Judicial Committee in *Periasámi et al.* v. *The Representatives of Salugai Taver.* (d)

A Kuláchár, allotting certain portions of zamindáris to junior members, (e) does not render the savings and accumulations made by those members joint property. (*f*)

A family custom of inheritance is not destroyed by a re-settlement of the terms of the holding from the Government, even though this should destroy many incidents of the previous tenure, (*g*) and when after a confiscation for 20 years, a grant of a " ráj " was made to the brother of the former holder, the intention of the Government, it was held, was to restore the tenure as it had previously existed, with the special qualities of succession according to the family law. (*h*)

When by family custom an estate is impartible, the ordinary Hindû law is suspended just so far as is necessary to

(a) 1 C. W. R. 177.

(b) 6 Calc. Sel. S. D. A. R. 296.

(c) L. R. 2 I. A. 269, 273. *See* Maine, Ancient Law, Ch. VII. p. 233.

(d) L. R. 5 I. A. 61.

(e) This custom of providing an appanage for each junior branch is widely spread, and probably sprung from political conditions. *See* Col. Dig. Bk. II., Ch. IV., T. 15 Comm. : Panj. Cust. Law, II., 183 ; St. L. C. 229. Comp. Hallam Mid. Ag., vol. I. p. 88 (Ch. I , Pt. II).

(*f*) *Chowdry Hureehur Pershad* v. *Gocoolanand Doss,* 17 C. W. R. 129.

(*g*) *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar,* I. L. R. 1 Calc. 186.

(*h*) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee,* 12 M. I. A. 1.

give effect to the particular custom, but the general law still regulates all that lies beyond its sphere.(*a*)

The impartibility of an estate does not necessarily imply that it is inalienable. (*b*) The inalienable quality is a question of family custom requiring proof. (*c*) Yet as a point of customary law impartibility may be expected to be accompanied generally by limitations on alienability, having the same object in view, the preservation of the estate to support the political, official, or social rank of the head of the family. In *Rajah Nilmony Singh* v. *Bikram Singh* (*d*) the Judicial Committee say:—" The same principle which precludes a division of a tenure upon death must apply also to a division by alienation." (*e*)

A bad custom will not be allowed.(*f*) Nor is a custom depending on instances to be extended beyond them.(*g*) If opposed to recognized morality or the public interest it is to be disallowed. (*h*)

(*a*) *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523; *Timangavda* v. *Rangangavda*, Bom H. C. P. J. F. for 1878 p 242; *Muttayan Chetti* v. *Sivagiri*, I. L. R. 3 Mad p. 374.

(*b*) *Naraen Khootia* v. *Lokenath Khootia*, I. L. R. 7 Cal. 461; *Anund Lal Singh Deo* v. *Maharajah Dheraj Gooroo Narayan Deo*, 5 M. I. A. 82.

(*c*) *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*, L. R. 8 I. A. 248; *Naarin Khootia* v. *Lokenath ut supra.*

(*d*) Decided 10th March 1882.

(*e*) Comp. *Rajah Venkata Narasimha Appa Row* v. *Rajah Narraya Appa Row*, L. R. 7 I. A. pp. 47, 48.

(*f*) *Náráyan Bhárthi* v. *Laving Bhárthi*, I. L. R. 2 Bom. 140; *Reg.* v. *Sambhu*, I L. R. 1 Bom. at p. 352. *See* Yâjñ. by Janárdhan Máhádeo Slo. 186 p. 358. Nârada quoted in Col. Dig. Bk. III., Ch. II., Sec. 28 and Comm. show that customs opposed to morality or public policy are to be refused recognition.

(*g*) *Rahimatbai* v. *Hirbái*, I. L. R. 3 Bom. 34; compare *In re Smart*, L. R. W. N. for 1881, p. 111.

(*h*) *See* Nârada Pt. II., Ch. X., Jolly's Transl. p. 75. *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. 545, 556.

As to property dedicated to an idol see *Juggut Mohini Dossee et al.* v. *Musst. Sokheemony Dossee et al.* (*a*) and *Maharanee Brojosoondery Debia* v. *Ranee Luckhmee Koonwaree et al.*(*b*)

Property dedicated to the service even of a family idol is impressed with a trust in favour of it, dissoluble only by the consensus of the whole family, which itself cannot put an end to a dedication to a public temple.(*c*) In a case of alienation by one of four Sebaits aliening debuttar, the other three suing to recover the property must join the fourth as defendant with his vendees or those deriving from them.(*d*)

§ 7.—BURDENS ON INHERITANCE.

Some of the principal burdens on inheritance have already been noticed as in § 3 *A* (5), § 3 *B* (1), in connexion with the rights, to which they are most commonly annexed. The powers of an owner in relation to his property form the subject of the following Section, but it seems useful to collect, in this place, some of the more general rules applying to charges on property which passes to successors as deduced from the recognized Hindû authorities, and the cases decided in recent years.

There is a general obligation resting on the heir (or other person) taking property of one deceased to pay the debts of the late owner. But in a united family this does not extend

(*a*) 14 M. I. A 289.

(*b*) 20 C. W R. 95.

(*c*) *Dictum* of Sir M. E Smith in *Konwar Doorga Nath Roy* v. *Ram Chunder Sen*, L. R. 4 I. A. at p. 58.

(*d*) *Rajendronath Dutt* v. *Shekh Mahomed Lal*, L. R. 8 I. A. 135. *See* also *Prosunno Koomari Debya* v. *Golab Chund Baboo*, L. R. 2 I. A. 145; *Konwur Doorganath Roy* v. *Ram Chunder Sen*, L. R. 4 I. A. at p. 57; *Khusálchand* v. *Máhádevgiri*, 12 Bom. H. C. R. 214; *Manohar Ganesh* v. *Keshovram Jebbai*, Bom. H. C. P. J. F. for 1878, p. 252.

to the debts of a member deceased incurred for his purely personal purposes, or even for the family if there was no necessity, (*a*) except in the case of a deceased father's obligations (*b*) lawfully contracted.

Promises deliberately made by the father are by the Hindû law regarded as equally binding on his sons, especially if made to his wife. (*c*)

If property descends as hereditary, the income (of a zamindári) is liable to pay the debts of the deceased zamindár. Such seems to be the principle involved in the judgment of the Privy Council in *Oolgappa Chetty* v. *Arbuthnot.* (*d*) But in Bombay the estate is not, without a specific lien, so hypothecated for the father's debt as to prevent the heir disposing of it and giving a good title; (*e*) though "it descends incumbered with the debts or accompanied by an obligation to pay the debts of the ancestor."(*f*) In the case of *Sangili Virapandia Chinnathambiar* v. *Alwar Ayyangar* (*g*) it was held that though an attachment against the lands, impartible by family custom, of a zamindár for his debts might, if made during his life, continue after his death, yet as at his death the entire interest in the zamindári passed to his son, there was nothing in the estate

(*a*) See *Saravan Tevan* v. *Muttayi Ammal,* 6 Mad. H. C. R 383; *Mágluiri Garudiah* v. *Náráyan Rangiah,* I L. R 3 Mad. at p. 365, and below, Partition, Liabilities on Inheritance

(*b*) Above, p. 80.

(*c*) Vîramit Transl p. 228; Vyav May. Ch IV. Sec. X. para. 4, Sec. IV p. 15; Ch. IX. p 10; *see* Act IX of 1872, Sec. 25.

(*d*) L. R 1 I. A. at p. 315, S. C., 14 Beng L R. at p. 141.

(*e*) *Jamiyatrám* v. *Parbhudás,* 9 Bom. H. C. R 116.

(*f*) *Sakhárám Rámchandra* v. *Madhavrao,* 10 B H C. R. 361, 367. *See* also *Nilkant Chatterjee* v. *Peari Mohan Das et al*, 3 B L R 70 C. J; *Girdharee Lall* v. *Kantoo Lall,* L R. 1 I. A. 321; *Suraj Bansi Koer* v. *Sheo Prasád Singh,* L. R. 6 I. A. 88, 106; *Udárám Sitaram* v. *Ranu,* 10 B. H. C. R 83; *Sadáshiv Dinkar* v *Dinkar Náráyan,* Bom H. C P. J for 1882, p. 139; *Náráyanácharya* v. *Narso Krishná,* I. L. R. 1 Bom. 262.

(*g*) I. L. R. 3 Mad. 42.

itself "which was attachable assets of the late zamindár, or which could be made available in execution of the decree against his representative *quâ* representative." The son seems to have been regarded as taking the estate as a "purchaser" or independently of the father, as under the English Statute De Donis, while other property of which the father could have disposed passed to his representatives as such. The Hindû law, however, identifies the son with his father for all lawful obligations, as completely as the Roman law or as the English law under which *haeres est pars antecessoris.*(a) It was by an analogous identification of persons that the executors as in their sphere "universal" successors became representatives of a testator. The impartibility of an estate may, to a considerable extent, prevent its being incumbered, as was the case also with feudal estates; but supposing the estate to be absolutely inalienable as well as impartible it would seem that no charge at all would attach to it after the ownership proceeded against had ended by the death of the debtor,(b) while so far as it was alienable or subject to incumbrance, the heir should be identified with his ancestor for all purposes, as well for the execution of a decree rightly obtained, as for the establishment of a claim. He becomes a representative, and takes as a representative through this identification. What he takes is the aggregate familia as a "universitas" in the character of "heres suus" equally when the property is impartible as when it is partible, and this "universitas" or aggregate includes all obligations properly attaching to the headship of the family equally with the property and rights annexed to it. (c) The rules of partition show that the obligation to

(a) Co Lit. 22, *b*.

(b) See *Goor Pershad* v. *Sheodeen*, 4 N. W. P. R. 137, referred to in *Udárám Sitárám* v. *Ránu*, 11 Bom. H. C. R. at p. 78; and *Sura Bunsi Koer* v. *Sheo Proshad*, L. R. 6 I. A. at p. 104.

(c) See Gaius, Inst. II. 157; Di. Lib. 28 Ti. 2, Fr. 11; Co. Di. B. II. Ch. IV. T. 15 Comm.; Vyav. May. V. Sec. IV. 14 ss ; *ib.* Ch. IV. Sec. IV. 33; Manu IX. 130; Co. Di. Bk. V. Ch. IV. T. 210.

pay a father's debt is a part of the inheritance or familia as much as the property to be divided, (a) and it is not less so when the property is impartible, save in so far as it might defeat the purpose of the grantor, or the law of the principality. To the extent, therefore, to which the deceased could have charged the property or disposed of it, and so enjoyed a complete ownership, it would seem that the heir is a representative liable to execution under sec. 234 of the Code of Civil Procedure on account of such property of the deceased having "come to his hands." The distinction grounded in *Muttayan Chetti* v. *Sivagiri Zamindár* (b) on a son's not being able to obtain a partition of an impartible estate does not rest on the Hindû law which makes the son responsible and bids him postpone his own interests to the payment of just debts of his father. (c) He cannot obtain a partition of an ordinary estate in Bengal as of right, but this does not exempt the estate from liability. For the case of a Polygar in Madras see *Kotta Ramásámi Chetti* v. *Bangari Seshama Nayanivaru.* (d)

As to the maintenance of a widow *see* the Section on Maintenance, and *Baijun Doobey et al.* v. *Brij Bhookun Lall*, (e) *Musst. Lalti Kuar* v. *Ganga Bishan et al.*, (f) *Visalatchi Ammal* v. *Annasamy Sastry*, (g) *Baboo Goluck Chunder Bose* v. *Ranee Ohilla Dayee*, (h) *Lakshman Ramchandra et*

(a) Vyav. May. Ch. IV. Sec VI.

(b) I. L R 3 Mad. at p. 381

(c) Col. Di. Bk. I Ch V. T. 188; Vyav. May. Ch. V. Sec IV 16, 17; and the judgment has since been reversed by the Privy Council in the case of *Muttayan Chettiar* v. *Sivagiri Zamindár.* The Judicial Committee, L R. 9 I. A at p. 144, say. "The fact of the zamindári being impartible could not affect its liability for the payment of the father's debts, when it came into the hands of the son by descent from the father"

(d) I. L R. 3 Mad. 145.

(e) L. R 2 I. A. at p 279.

(f) 7 N. W. P R. 261 (F. B.)

(g) 5 M H C. R. 150.

(h) 25 C. W. R. 100.

al. v. *Sarasvatibai,* (*a*) *Musst. Golab Koonwar et al.* v. *The Collector of Benares et al.,* (*b*) and the cases referred to above pp. 77-79, and under Partition, Book II.

A reasonable charge subsists to provide even for a concubine and her daughters (*c*) and her sons excluded from inheritance (*d*).

The son is not directly responsible for unsecured debts contracted even for the benefit of the family by his father during the life of the latter.(*e*) As to secured debts thus contracted during his minority, or, with his acquiescence, after his attaining his majority, the case is different.(*f*) Nor does it follow that because he is not directly liable to creditors for the family debts, he is not liable for contribution to his father, when his father has had to pay them. A discharge or distribution of the debts by ordinary coparceners making a partition being expressly enjoined, it might seem to follow, *à fortiori,* that a son taking his share of the family estate from his father should take also, if his father desire it, his proportion of the burdens; but this is not prescribed by the law books. After the father's death the son is by Hindû Law responsible for all his debts,(*g*) except those contracted for immoral purposes, (*h*) and this liability, as under the

(*a*) 12 Bom. H. C. R. 69.

(*b*) 4 M. I A. 246.

(*c*) See *Salu* v. *Hari,* Bom. H C. P. J F. for 1877 p 34; *Khemkor* v. *Umidshankar,* 10 Bom. H. C R. 381.

(*d*) *Rahi* v. *Govind,* I. L R 1 Bom. 97.

(*e*) *Amrutrow* v. *Trimbuckrow et al.,* Bom. Sel. Ca. p. 245; *Chennapah* v *Chellamanah,* M S. D A. R. 1851, p. 33; Col. Di Bk. I. Ch. V. T 167, Note

(*f*) See 1 Mit. Ch. I. Sec I paras. 28, 29; *Gangâbâi* v *Vâmanâji,* 2 Bom. H C. R. 318 (2nd Ed. p. 301), a case of ratification

(*g*) Vyav. May. Ch. V. S. 4. pl. 11-14; Stokes, H. L. B. 121, 122; *Keshow Rao Diwakar* v. *Naro Junardhun Patunkur,* 2 Borr. at p. 222.

(*h*) Coleb. Dig. Bk. I. Ch. V. T. 147-149, Comm.; 2 Str. H L. 456.

Roman Law, is independent of inherited assets; (*a*) though where there were assets he who has taken them is primarily answerable, (*b*) but this has been limited by Bombay Act VII. of 1866, Sec. 4, to the amount of the family property taken by the son. In Bengal it has been held (*c*) that the Mit. Chap. I., Sec. 6, para. 10 (Stokes, H. L. B. 395) authorizes the alienation by a father for the payment of joint debts, even *against* the will of his son, so that the father

(*a*) *Narasimharav* v. *Antâji Virupâksh et al.*, 2 Bom. H. C. R. 61; Co. Di. Bk. I. Ch. V. T. 173.

Nîlakantha, in the Vyav. Mayûkha, Ch. IV. Sec IV. p. 17, insists on the character of an inheritance as a "universitas" or inseparable aggregate of rights and obligations. The latter descend only to sons and grandsons in the absence of all property; but he who takes any property, however small, must pay the debts, however large. So, too, must he who takes the widow of the deceased regarded as part of the "familia," see Coleb. Dig Bk. 1 Ch. V. T 220, 221. Similarly *Qui semel aliquid ex parte heres extiterit deficientium partes etiam invitus excipit, id est, deficientium partes etiam invito adcrescunt,* (L. 80 de leg. 3 D. XXXII.) was the rule of the Roman Law when it had allowed the institution by testament of an heir replacing the heir by descent. The whole "familia" or none had to be given to the legatee who accepting the benefit became answerable for all debts and for due celebration of the "sacra privata." The son had no option; in the absence of a will he continuing the person of his father took the inheritance, benefits and burdens as a universitas. The English law has sprung from an entirely different conception, at least so far as the real property is concerned Though at one time the heir was in a sense a universal representative, yet the distinct character of several fees prevented their uniting in a true universitas. The ecclesiastical jurisdiction was introduced over chattels, and the heir then became successor only to the real property accompanied in Bracton's time with a legal duty to pay his father's debts to the extent of his inheritance and a duty of humanity to pay them out of his other property akin to the Hindu rule. See Bract. *f.* 61 b.

(*b*) See *Zemindár of Sivagiri* v. *Alwar Áyyangar*, I. L. R. 3 Mad. at p 44; Vyav. May. Ch. V. Sec. IV. para. 17; Col. Di. Bk. I. Ch. V. T. 172.

(*c*) *Bishambhur Naik* v. *Sudasheeb Mohapatter et al*, 1 C. W. R. 96.

could protect himself in that way. The separated son is not legally liable to the creditors either during his father's life or after it, unless he choose to accept the property left by his father according to the remarks of Colebrooke in the cases at 2 Str. H. L. 274, 277, 456; (a) but with this compare the dicta of the Śâstris at those places, and in the case above-quoted from Bombay Sel. Cases, which correctly express the doctrine formerly prevailing at this side of India, making the son's obligation a legal and not merely a moral one. In another case (No. 997 MS.), the Sâstri answered that an adopted son, like one begotten, is responsible, independently of assets received, for the debts of the adoptive grandfather, though not incurred for the benefit of the family (they not having been contracted for an immoral purpose).

In the case of *Hunooman Persaud Panday* v. *Musst. Babooee Munraj Koonweree*,(b) the Privy Council grounded on the son's obligation as a pious duty to pay his father's debts, a capacity in the father to charge the estate, even though ancestral, for such debts contracted by him as the son could not piously repudiate. The same case, however, as recently construed in *Kameswar Pershad* v. *Run Bahadur Singh* (c) imposes on a creditor the necessity of making due inquiry whether in the particular case the manager (even it would seem the father) is acting for the benefit of the estate. (d) In *Giridharee Lall et al.* v. *Kanto Lall et al.*,(e) a decree having been obtained against a father for a debt, not of an immoral kind but, as appears, not contracted for any benefit to the family, he sold the ancestral property to satisfy it. In a suit by his son to recover the estate, the High Court awarded to him one-half of his father's share, but the Privy Council reversed this decision and held that the deed of sale could not be set

(a) *See* also Coleb. Oblig Ch. II, 51

(b) 6 M. I. A. 421.

(c) I. L R. 6 Calc. 843.

(d) See Bk. II. Introd. § 6 A.; 1 Str. H. L. 202.

(e) L R. 1 In. A. 321, S. C., 14 Beng. L R 187.

aside at the suit of the son. "*Hanooman Persaud's* case," their Lordships say, "is an authority to show that ancestral property, which descends to a father, is not exempted from liability to pay his debts, because a son is born to him." So, in *Oolagappa Chetty* v. *Arbuthnot et al.*, (*a*) the income of an hereditary polliam was pronounced liable for a father's debts. The property in that case, however, was subject to the rules of singular succession applicable generally to a Ràj. In accordance with these cases, it has, in Bombay, been said that "these decisions go to fix the son and his estate, except in cases of wanton extravagance, with the father's debt, whether secured or not on the property," (*b*) and that, "subject to certain limited exceptions (as for instance debts contracted for an immoral or illegal purpose), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grand-father." (*c*) But this liability is exceptional, resting on special texts. (*d*) And whether the sale of the living father's interest binds as against his sons the whole ancestral property, as decided in *Narayanacharya* v. *Narso Krishna*, (*e*) on the authority of *Giridharee* v. *Kanto* (*f*) may perhaps now admit of some doubt. The case of *Luchmi Dai Koori* v. *Asman Sing et al.*, (*g*) follows *Giridharee* v. *Kanto* (*h*) to the same effect; but in the case of *Rungama* v. *Atchama et al.*, (*i*) the Privy Council say of a son in

(*a*) L R. 1 In. A. 268.

(*b*) *Govindram* v. *Vamanrav*, R. A. No. 16 of 1874, Bom. H. C. P. J. F for 1875, p. 118.

(*c*) *Udârâm* v. *Rânu Pânduji et al.*, 11 Bom. H. C. R. 83, citing Coleb Dig Bk I. Ch V. T. 167; cited and approved by the Judicial Committee in *Suraj Bunsi Koer* v *Sheo Proshad Singh*, L. R. 6 I. A. at p. 104. *See* also Nârada, Pt I Ch III Sl 12; 1 Str. H. L. 173; *Keshow Rao* v. *Naro Junardhun*, 2 Borr. 222.

(*d*) 11 Bom. H C. R. 85 (*supra*), citing Coleb. Dig. Bk. I. T. 169, 229.

(*e*) In. L. R. 1 Bom. 262. (*f*) *Supra.*

(*g*) In. L. R. 2 Calc. 213. (*h*) *Supra.*

(*i*) 4 M. I. A. at p. 103.

relation to his father's distribution of property, "If Jagannâtha takes, as we think he is entitled to do, the whole ancestral property *which the father could not dispose of without his consent, &c.*" So in *Pandurang* v. *Naro.*(a) In *Bhugwandeen Doobey* v. *Myna Baee,*(b) it is said, "Between undivided coparceners there can be no alienation by one without the consent of the other," and see *Suraj Bunsi Koer's* case. (c) The High Court of Calcutta adopted this principle in the cases of *Sadabart Prasad Sahu* v. *Foolbash Koer,* (d) and of *Mahabeer Pershad* v. *Ramyad Singh et al.,* (e) which, in *Baboo Deendyal Lall* v. *Baboo Jugdeep Narain Singh,*(f) have not been dissented from "as to voluntary alienations."

Even as to a sale in execution of the "right, title, and interest" of a father in the ancestral property, affected to be mortgaged by him "under legal necessity," as conclusively found by the District Court, their Lordships held, on the one hand, that the whole property would not be made available by a suit, directed against the father alone, and a sale in execution of his "right, title, and interest." To make the other co-sharers answerable, it was necessary to join them as parties according to *Nugender Chunder Ghose et al.* v. *S. Kaminee Dossee et al.,*(g) and *Baijun Doobey et al.* v. *Brij Bhookun Lall* (h) On the other hand, their Lordships ruled that by the purchase of the judgment-debtor's (father's) right in execution, the purchaser had acquired his "share and interest in the property, and is entitled to take proceedings......to have that share and interest ascertained by partition."(i) It may seem rather too broad a statement, therefore, "that under the Mitâksharâ and Mayûkha the son takes a vested interest in ancestral estate at his

(a) Sel. Rep. 186. (b) 11 M. I. A. at p. 516.
(c) L. R. 6 I. A 88, 100, 102. (d) 3 Ben. L. R. 31 F. B.
(e) 12 Ben L. R. 90. (f) L. R 4 In A. p. 247.
(g) 11 M. I. A. 241. (h) L. R. 2 In. A. 275.
(i) So in *Haza Hira* v. *Bhaiji Modan,* S. A. No. 444 of 1874, Bom. H. C. P. J. F. for 1875, p. 97.

birth, but that interest is subject to the liability of that estate for the debts of his father and grandfather." (a) Some inquiry would seem to be necessary, and a reasonable assurance of benefit to the family to warrant a lender in advancing money at the father's instance on the whole family estate. (b) Subject to this the father's authority as manager is to be liberally construed, (c) and a recent ruling of the Judicial Committee makes ancestral estate assets in the hands of the heir for payment of the late owner's debts without distinction apparently of their character. (d)

It does not seem that by the Hindû Law a father can, during his life, directly charge the ancestral estate for his purely personal debts beyond his own interest so as to make the whole immediately available to the incumbrancer. That he could deal with his own undivided share so as to give to his vendee, or mortgagee, a right to call for a partition has become the established law of Bombay and Madras—" a broad and general rule defining the right of the creditor" in the language of the Privy Council. On the father's death a new obligation arises as against his sons, whose first duty it is to pay his debts, who are commanded to provide for their payment in making a partition, and even to alienate their own property to redeem their father from " Put,"(e) apart from " charges," which could operate only on his own share during his own life, though as founded on debts they now seem to bind the whole inheritance after his decease except when they are of profligate origin to the knowledge of the creditor. In the recent case, however, of *Ponnappa Pillai* v. *Pappuváyyangár* (f) it has been held (g) by the

(a) *Náráyanácharya* v. *Narso Khrisna*, I L. R 1 Bom at p 266.

(b) *Saravana Tevan* v. *Muttaya Ammal*, 6 Mad H. C. R 371.

(c) *Bábáji Mahádáji* v. *Krishnáji Devji*, I L. R. 2 Bom. 666; *Ratnam* v *Govindarájulu*, I L R 2 Mad 339 *See* B II. Partition.

(d) *Muttayan Chetiar* v. *Sangili Vira Pandia*, L. R 9 I. A. 128

(e) Nârada, Pt. I. Ch. III Sl. 6

(f) I. L R. 4 Mad. 1. *See* too *Ram Narain's* case, I L. R 3 All. 443.

(g) By a majority against Innes and Muttusámi, J J

High Court of Madras that a son's interest even during his father's life is bound by an execution sale on a decree against the father. This decision, resting on *Giridhari Lall v. Kantoo Lall* and *Muddun Thakoor's* cases (*a*) goes to make the interest of the son in a heritage altogether subordinate to that of the father, and to place it in all ordinary cases entirely at the father's disposal.

§ 8.—LIMITATIONS OF PROPERTY AND RESTRAINTS ON DISPOSAL UNDER THE HINDÛ LAW.

The power which a Hindû proprietor may exercise in disposing of the property he owns (*b*) varies according to his family relations, to the way in which the property has been obtained, as it is ancestral or self-acquired, as it is immoveable or moveable, as it supports or not a public service or object, and according also to the necessities to which the owner is subjected, and to the purposes he has in view. Thus the member of a united family can deal even with his own share only under exceptional rules.(*c*) The father may incumber the ancestral estate only for purposes of a respectable kind, or not distinctly the reverse; for immoral purposes it has been said that he cannot bind even his own share as against his son's survivorship. The managing member has special powers subject to special restrictions.(*d*) The son's right is born, and unless realized by division, dies with him. The daughter, wife, and widow are subject to limitations as to the estates they can confer and the

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(*a*) L. R. 1 I A. 321.

(*b*) Devâṇḍa Bhaṭṭa insists on that being property which in itself is capable of alienation, whether or not in any particular case it can be alienated. Smṛiti Chandrika, Tr. p. 10.

(*c*) *Lakshmishankar* v *Vaijnath*, I L. R 6 Bom 24; *Vrandâvandás Rámdás* v *Yamunábái*, 12 Bom. H C. R. 229; *Gangubái Kom Shidápá* v. *Ramanná bin Bhimanná*, 3 Bom. H C. R. 66, A. C. J. and Note; *Chamaili Kuar* v. *Ram Prasad*, I. L. R. 2 All. 267; *Gangá Bisheshar* v *Pirthi Pal*, *ib.* 635. *See* above, § 7, Introd. Burdens on Inheritance, pp. 167—169.

(*d*) *Kameshwar Pershad* v *Run Bahadur Singh*, I. L. R. 6 Calc. 843.

control under which they act. The general right of dealing with property acquired by oneself does not extend to ancestral estate. In the latter the birth-right of a son enables him, according to the law of the Mitâksharâ, to claim partition at his own will. Again, the absolute necessities of a family may justify any member in selling so much as may be necessary to meet them, and in the case of a manager a family necessity is liberally construed. (a) The testamentary power depends on unity or severance of the family, and on the nature of the property.

The questions arising under these different heads are dealt with in the Introduction to Book II., and at other places where they occur; but it will be convenient to set forth here some of the principal powers and limitations which, according to the Hindû Law, may be regarded as inseparable from the notion of property enjoyed under the law.

As to the acquisition of ownership, this, Vijñâneśvara says, is a matter of secular cognizance. (b) It arises from Occupation, Finding, Purchase, Inheritance, and Partition, (c) as common to all castes and conditions. The peculiar relations of inheritance and partition as understood by the Hindû lawyers are discussed above p. 67*n*, and in the Introduction to Book II. Occupation or appropriation of waste lands is

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(a) *Bábáji Mahádáji* v. *Krushnáji Devji*, I. L. R. 2 Bom. 666.

(b) Mitâksharâ, Ch. I. Sec. I paras. 9, 10. There are many subtile disquisitions in the Hindû commentaries on the specially approved means of acquisition, as Gift for a Brahman, Conquest for a Kshatriya, and Gain for a Vaisya or Sûdra. The general result appears to be that though for sacrificial purpose the property offered should have been acquired in the authorized way, yet a mere deviation from what is specially approved does not deprive an acquisition of the character of property. The Smṛiti Chandrika, Tr. p. 11, seems to hold that the enumeration given in the Smṛitis is rather a statement of facts of experience than a rule in itself determining the essentials of property. *See* the Sarasvati Vilâsa, § 400 ss.

(c) *Ibid.* para. 12; *Bháskaráppá* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at p. 524.

regarded as a natural right, (*a*) but as one concurrent with a right in the sovereign to a rate or tax on the produce. (*b*) Hence naturally possession is the strongest proof. (*c*) The strength of the ownership thus attested is such that the rule has sometimes been recognized that the occupying owner of a field who has absconded may at any time return and recover it on terms equitable to the intermediate occupant, (*d*) as his ownership cannot be really destroyed without his distinct assent, (*e*) that for the same reason execution for debt against a man's land is a notion foreign to the pure Hindû

(*a*) *See* Vîramit. Ch I. Sec 13; Smriti Chandrika, Tr p. 11; Comp. Imp. Gaz. vol. VII. p 520; *Bhaskarâppá* v *The Collector of North Kánará*, I L R 3 Bom at p 518, 563, &c ; *Vyakunta Bapuji* v. *Government of Bombay*, 12 B. H C. R. App. 30 ss ; Comp. Panj Cust Law. vol. II. p 21, 254, which shows in how many various ways, as between individuals, a proprietary right may be acquired in land not completely appropriated

(*b*) *Ibid*, and Col. Dig Bk. II. Ch II T 12, Comm. ; T. 17, T 22, Comm. ; T 24, Comm ; *Vásudev Sadáshiv Modak* v. *Collector of Ratnagiri*, L. R. 4 I A. at p 125.

(*c*) Vyav. May Ch II. Sec II Ch. IV. Sec. 1, para. 8 ; comp. Col. Dig. Bk. II. Ch II. T. 10, Comm ; T 12, Comm ; Steele, L. C. 207; *Vishvanáth* v. *Mahádáji*, I. L. R. 3 Bom 147 The cultivator is regarded as bound to maintain the land he holds in cultivable condition — Manu VIII 243, a duty which is recognized by the Mahomedan law also, and by other systems.

(*d*) Mitâk. in Macn H. L 202, 205, 207 ; *Bháskaráppá* v. *The Collector of North Kánará*, I. L. R 3 Bom at 525-6 *See* Nârada II. XI. 23 ss ; *Piarey Lall* v. *Saliga*, I. L. R. 2 All 394; *Harbhaj* v *Gumani*, *ib.* 493; and comp. *Joti Bhimrav* v *Bálu Bin Bápuji*, I. L. R 1 Bom. 208 ; *ib.* cases referred to at p. 94 ; Co Dig. Bk II Ch. II T. 24 Comm. *sub fin* ; Tod's Rájasthan, vol I. p 526; M. E. Elphinstone in Rev. and Jud. Sel. vol. IV. p. 161 ; General Briggs, *ib.* p. 694.

(*e*) *Parbhudás Ráyaji* v. *Motirám Kalyándás*, I. L. R 1 Bom. 207 ; Co. Dig Bk. II. Ch. II. T. 27, Comm. ; T. 28, Comm. ; T. 27, Comm. The consequences of this on the law of partition are traced in Bk. II. Introd. § 5 B and notes. In the latter references will be found to the rights of communities as still in some places asserted, and to the formerly inalienable character of the patrimony. *See* Mr. Chaplin's Report, Rev. and Jud. Sel. vol. IV. pp 474-477.

law, (*a*) that a royal gift of occupied land is construed to mean only a gift of the revenue, (*b*) and that even a conqueror acquires only the rights of the vanquished ruler. The property in the land is thus rather allodial than feodal. Tenure in the English sense hardly exists (*c*) except in the case of estates granted by the sovereign for the support of particular services to the State, or for the furtherance of purposes recognized as beneficial to the community. Jahágirs for military service come the nearest in character to feudal holdings of the earlier type, the terminable beneficia which were succeeded by hereditary estates held by homage and military service. (*d*) They are usually grants of the revenues of a district as a means of supporting a body of troops, and are resumable at the pleasure of the sovereign power. (*e*) From their nature they are impartible, and so, too, are saranjáms granted either for life or hereditarily for services rendered or for maintaining the dignity of a family. (*f*) Vatans granted for the support of local hereditary offices are subject in a measure to disposal by the State. Subject to the support of the office-holder, they are usually partible and alienable amongst the group of co-sharers, but cannot be sold to strangers or burdened for more than the

(*a*) Col Dig. Bk. II. Ch. II T 28, Comm. ; T. 24, Comm.; comp Hunter's Roman Law, p. 807.

(*b*) Vyav. May. Ch. IV Sec. I. para 8 ; comp. Co. Di Bk. II. Ch. II. T. 10, Comm ; T 12, Comm.; Steele, L. C. 207 ; *Vishvanáth* v. *Mahádáji* ; I. L. R. 3 Bom. 147.

(*c*) Comp Bom. Acts II. and VII of 1863

(*d*) *See* Hallam, Mid. Ages, Ch II. Note IX ; Freeman, Hist. of Norm. Conquest, vol. V pp. 132, 379 ; Maine, Anc. Law, Ch. VII. pp. 230, 233 (3rd Ed.) ; Munro by Arbuthnot, vol I. pp 152, 154 ; vol. II. 307 ; *Rajah Nilmoni Singh* v. *Bakranath Singh*, L. R. 9 I. A. at p. 122 ; *Imperial Gazetteer of India*, vol. VII. p. 519.

(*e*) Bom. Reg. XVII. of 1827 § 38.

(*f*) See *Rámchandra Sakháram Vágh* v. *Sakhárám Gopal Vágh*, I. L. R. 2 Bom. 346 ; Bom. Govt. Selections No. XXXI. *passim* ; Bom. Act. VII. of 1863 § 2; Act. II. of 1863 § 1

life of a sharer as to his own share. The appropriation of these estates to the public service is now secured and the competence of individual sharers is strictly limited by statute. (*a*)

They probably in many cases originated in an exemption, or a partial exemption, from the Government assessed land-tax of lands held as private property; but to these were generally added various haks or dues now abolished. (*b*) Lands held for various other public services, such as the jyotishi vatans of astrologers, and in general all religious endowments (*c*) are subject to restrictions as to the estates held in them, (*d*) and the conditions or accompanying obligations with which they are held by the successive

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(*a*) *See* Index Tit. Vatan; Bom Act. III of 1874.

(*b*) *See* Steele, L. C. 204 ss.

(*c*) The proportion of the land and of the public revenues dedicated to religious services is in some districts very considerable. It would have been much greater but for the indifference with which successive rulers resumed their predecessors' grants (*see* Sir. T. Munro's Minutes, vol I. p. 136 ss.), and the encroachments which, very often by collusion with the mohants or trustees of the dewasthâns, were made upon the sacred estates and secured by prescription or an actual failure of evidence after a longer or shorter time (*see* Steele, L. C. 206). The large number of ancient grants for religious purposes which are from time to time discovered, show that the greater part of the land must thus have been placed *extra commercium*, but for the negligence and the revolutions by which the dedicated estates were restored to common use. The Peshwa used, like the kings of England, sometimes to resume religious endowments while he made up his mind who was best entitled to take them (*ibid.*), but an avowed resumption of such property was virtually unknown. (*The Collector of Thanna* v. *Hari Sitârâm*, Bom. H. C. P. J. F. for 1882, p. 206; I. L. R. 6 Bo. 546.)

(*d*) These interests and all sources of a periodical income ("nibandh") are looked on by the Hindû law as of the character of immoveable property. See Col. Dig. Bk. II. Ch. IV. T. 27 Comm.; Yâjn. II. 122; Mit. Ch. I. Sec. V. para. 3, 4; *Vithal Krishna Joshi v. Anant Râmchundra*, 11 Bom. H. C. R. 6; *Divâkar Vithal* v. *Harbhat*, Bom. H. C. P. J. F. for 1881, p. 106.

tenants which give them a special character. (*a*) The enforcement of the public duties in these cases was formerly secured by forfeiture, in the necessary cases, of the exemption from assessment, (*b*) but in the case of charitable endowments the ownership of the property itself was still recognized, and an opportunity was allowed to those interested to avoid the forfeiture (*i. e.* the imposition of the assessment) by a suit to compel performance of the duty. In the Bombay Presidency charitable endowments are now in an anomalous position. They are mostly of a religious or *quasi* religious kind, and the Government has withdrawn from all connection with religious endowments, (*c*) while the provisions for the security of the property extend in Bombay only to the district of Canará. (*d*) In the southern part of the Presidency it is expressly provided that charitable endowments held free from land-tax shall be inalienable.(*e*) Elsewhere, and as to all property not included in the provision, the statutable safeguard is wanting; but the generally inalienable character of endowments under the Hindû as under the Mahomedan law is recognized by the Courts.(*f*)

The sharers in Bhágdári and Narwadári villages are subject to special restrictions in dealing with their shares, of which custom, now ratified by statute, (*g*) forbids the

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(*a*) See *Ukoor Doss* v. *Chunder Sekhur Doss*, 3 C. W. R. 152; *Prosunno Koomari Debya* v. *Golab Chand Baboo*, L. R. 2 I. A. 145; *Náráyan* v. *Chintáman*, I. L. R. 5 Bom. 393.

(*b*) Bom. Reg. XVII. of 1827 § 38.

(*c*) Act. XX. of 1863 § 22.

(*d*) Bom. Act. VII. of 1865.

(*e*) Bom. Act. II. of 1863 § 8; *Bhikáji Mahádev* v. *Bábushá*, Bom. H. C. P. J. F. for 1877, p. 297.

(*f*) *Khusálchund* v. *Mahádevgiri*, 12 B. H C. R. 214; *Náráyan* v. *Chintáman*, I. L. R. 5 Bom. 393; *The Collector of Thanna* v. *Hari Sitárám*, Bom. H. C. P. J F. for 1882, p. 207. The Indian Trusts Act II. of 1882, § 1, does not apply to Bombay, nor does it anywhere affect charities.

(*g*) Bom. Act V. of 1862.

division. In these estates, too, there are special laws of succession ranking originally perhaps as rules of a family or a class as such. Where their prevalence is proved effect is given to them as customary law.(*a*) The exclusion of a daughter from succession may probably have originated in the fear that the share would in such a case through her marriage pass to heirs who were strangers to the "bhauband" or fraternity (*b*) constituting the village community, and jointly and severally responsible for the contribution of their village to the land-tax. Mirásdars were at one time, it would seem, subject to restrictions in favour of the village community. (*c*) They could reclaim their lands in theory after any lapse of time. (*d*) This was inconsistent with the laws of limitation and even with the prescription recognized by the Hindû law. (*e*) The joint

(*a*) *Pránjivan Dayárám* v. *Bái Revá*, I. L R. 5 Bom 482.

In the Panjâb there are many instances of restrictions imposed in the interest of the clan or group of co-proprietors descended from the original band of occupants of the waste, or conquerors of land already occupied, who held part in common and distributed the rest something after the fashion of the Corinthian Geomori in dealing with the territory of Syracuse. *See* the work quoted below.

(*b*) In the Panjâb women as they marry persons not members of the village community do not transmit a right to the village lands, which are thus preserved to the community. *See* Tupper, Panj. Cust. Law, vol. II. 58, 145, 175, 177. The prevention of similar mischiefs engaged the care of most ancient legislators or of the communities whose customs they embodied. *See* Numbers, Ch. XXVII. XXXVI. The Athenian law compelled the nearest male relation to marry the female *epikleros*, taking the estate with her. Isacus III. 64, Sir W Jones' Works, vol IX. p. 103; Smith's Dic. Antiq. *sub voce.* Comp Ruth, Ch. IV.

(*c*) *See* on mirás generally, Steele, L C. 207; Mr. Chaplin's Rep. para. 114 ss.; Rev. Sel. vol IV ; Madras Mirási papers; *Vyakuntha Bápuji* v. *Government of Bombay*, 12 Bom H C R. App. 68 ss.

(*d*) *Vyakuntha Bápuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 50.

(*e*) See *Bábáji and Nánáji* v. *Naráyan*, I. L. R. 3 Bom. 340; *Tárâchand Pirchand* v. *Lakshman Bhaváni*, I. L. R. 1 Bom 91, and the cases referred to at p. 94.

mirási village community had generally broken up even under the native rule, and the mirásdar is, through the elevation of the class once below him, distinguishable only on Inám estates as a tenant at a quit rent or at a reasonable rent, (*a*) not subject to ejectment so long as he pays it.

Other special customs might be referred to, (*b*) but these not forming a part of the general Hindû law of the Bombay Presidency cannot be here treated in such detail as would be useful. We proceed to the remarks on the capacity of the owner to deal with his property apart from special circumstances which are of general application.

It is not competent to those interested in an estate to alter the course of devolution by any mutual arrangement. (*c*) *Ipso jure heres exsistit* (*d*) and an agreement which attempts to establish a new line of descent unknown to the law is inoperative. (*e*) So far as their own interests are concerned, the parties who share the ownership may generally deal with them at their pleasure,—even to parting with the whole or subjecting their enjoyment to any burdens consistent with public policy. (*f*) This rests on the recognition by the State of individual freedom in dealing with property, while the freedom is coupled with a present interest, and a capacity for varying the management according to

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(*a*) *Pratáprao Gujar* v. *Bayáji Námáji*, I. L. R 3 Bom. 141. The mirási holdings may be compared with the customary tenancies of the North of England; see *Burrell* v. *Dodd*, 3 Bo. and P. 378.

(*b*) As in *Bháu Námáji* v. *Sundrábái*, 11 Bom H. C. R. 249, and the cases there referred to.

(*c*) *Myna Boyee* v *Ootárám*, 8 M. I A. at p. 420; *Bálkrishna Trimbak* v. *Sávitribai*, I. L R. 3 Bom. 54.

(*d*) Comp. Maine's Anc. Law, Ch VI. p 188. (3rd Ed.)

(*e*) *Rajender Dutt* v *Sham Chund Mitter*, I. L. R. 6 Calc. at p. 115. Comp. Clark, Early Rom. Law, pp. 117 ss.

(*f*) But only such. Thus an agreement by which an adopted son resigned the bulk of the family property to his adoptive mother was pronounced void. Q. 15 MS.

circumstances. (*a*) But when these conditions fail it is only to a limited and prescribed extent that the State allows him who is no longer able personally to exercise the power of appropriation and use of the property to impose terms on its enjoyment by others. (*b*) Thus by will the owner may make such dispositions only as the law (*c*) allows as consistent with the general welfare. (*d*) The Hindû law does not tolerate the abeyance of an estate. (*e*) It prescribes a certain mode of devolution, and from him in whom unqualified proprietary right has once become vested, it must, in the absence of a will made by him, not by a predecessor, devolve in that way. (*f*) The owner may make a gift or a will which, as to property fully at his disposal (*g*), will operate according to the analogy of the law of gifts but having thus created rights in the beneficiaries, he cannot, except subject to strict limitations, cut down those rights by further dispositions. (*h*) The immediate beneficiary may be

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(*a*) *See* Col. Di. Bk. II. Ch II T. 12, Comm.; T. 21, Comm.

(*b*) "Quatenus juris ratio patitur." The general subordination of private property and its disposal to the discretion of the sovereign under whose protection it is enjoyed is insisted on by Jagannátha in Col. Di. Bk. II. Ch. IV. T 15, Comm. Comp. Laboulaye, Hist. du Droit de Propriété Foncière, p 62.

(*c*) Including the custom of his province, caste or class. *See* Co. Di. Bk. V. Ch. V. T. 365

(*d*) *Kumara Asima Krishna Deb* v. *Kumara Kumar Krishna Deb*, 2 Beng. L. R. 11 O. C. J.

(*e*) *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R. 7 Calc. 178.

(*f*) "A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy," *per* Turner, L. J., in *Soorjimony Dossee* v. *Deenobundo Mullick*, 6 M. I. A. at p. 555. A mahant has no power to say who shall succeed his own successor, *Greedharee Doss* v. *Nundkishore Dutt*, 1 Marsh 573; S. C 11 M. I. A. 405.

(*g*) See *Lakshman* v. *Rámchandra*, I. L. R. 5 Bom. 49; *Haribhat* v. *Dámodarbhat*, I. L. R. 3 Bom. 171.

(*h*) *Máccundás* v. *Ganpatráo*, Perry's Or. Cases, 143; see *Annantha Tírtha Chariar* v. *Nágamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Mokoondo Lal Shaw* v. *Ganesh Chunder Shaw*, I. L. R. 1 Cal. 104.

limited to a life-interest if the remainder is given to a person in existence at the time of the gift; and a will speaks at the death of the testator, but as by the Hindû law there must be some one in existence to take a gift (*a*) as well as to bestow it, a bounty to persons unborn or who may be born or unborn according to circumstances cannot take effect.(*b*) An attempt to provide for unborn grand-children of the donor by a gift for their benefit to a son-in-law was declared by the Sástri to be void on account of the partial reserve of the ownership which this involved. (*c*)

There is an exception in the case of public grants (*d*) of the nature of jahâgirs (*e*) or of watans for the support of a family or to maintain a public office, (*f*) but not one extending the power of private disposal. To these grants effect must

(*a*) Comp the Transfer of Property Act IV. of 1882, Secs. 122, 129. A distinct change of physical possession, though generally necessary (*see* below, Bk II., Introd., Signs of Separation) is dispensed with in the case of a wife or an infant or other wholly dependent person who is obviously benefited, under circumstances in case of an absent person, and where the exercise of the right does not consist in or require possession. 2 Str. H. L. 26; *ib* 7, 427; *Lalubhái Surchand* v *Bái Amrit*, I. L. R. 2 Bom. 299, 326; *Bai Suraj* v. *Dalpatrám Dayáshankar*, I. L. R. 6 Bom 380, 387. In Bengal, it is said, in *Narain Chunder Chuckerbutty* v. *Dataram Roy*, I. L. R. 8 Calc. at p. 611, that delivery of possession is not "necessary to give full validity and effect to a transfer for valuable consideration." Under the Transf. of Prop. Act IV. of 1882, Sec. 54, the mere concurrence of the will of the contracting parties does not create an interest in the property intended to be sold unless it is manifested by a registered instrument or in petty cases by a change of possession.

(*b*) See *Soorjee Mony Dossee* v *Deenbundo Mullick*, 9 M I A 123; *Tagore* v. *Tagore*, L. R S I. A at pp. 67, 70, 74; *Rajendar Dutt* v. *Sham Chunder Mitter*, I. L R. 6 Calc. 116.

(*c*) *See* Book I Ch II. Sec. 7, Q 17.

(*d*) As to jurisdiction in such cases, *see* Act 23 of 1871 and *Maharaolál Mohansingji Jeysingji* v. *The Government of Bombay*, L. R. 8 I. A. 77.

(*e*) As to these, see *Rámchandraráo Náráyan Mantri* v. *Venkatráo Mádhava Mantri*, Bom. H. C. P. J. F. 1882, p. 234, and the cases cited there.

(*f*) *See* now Act 23 of 1871, Bo Act. III. of 1874.

be given according to the intention of the Sovereign power in making the grant, which itself may make the estate impartible (*a*) and determine the mode of devolution.(*b*)

The same principle has been applied to a village astrologer or priest, and even to cases of private estates where the original grant was, or must be presumed to have been, made for the support of an hereditary line of performers of religious functions for which such succession was necessary or at least proper. The decision against a dealing by the officiating holder of a purohitta in 2 Str. H. L. 12, 13, and similar cases may be referred to this principle.

To ordinary private grants free from a sacred or public connexion a different rule applies; (*c*) they can operate only within the lines prescribed by the general law, as Government grants also do in the absence of special limitations expressed or implied in the nature of the grant. (*d*) This applies to a Todá Girás hak as distinguished from a pension, (*e*) as to all ordinary Inâms. (*f*)

It is thus, apparently, that we must understand and apply the decision of the Judicial Committee in *Surjeemonee Dossee's* case. (*g*) A Hindû may by settlement or by will dispose

(*a*) See *Rájá Lelánund Sing Bahádoor* v. *The Bengal Government*, 6 M. I. A at p. 125.

(*b*) See *Rámchandrarão Náráyan Mantri* v. *Venkatráo Mádhava Mantri*, Bom. H C. P. J. F. 1882 at p. 233; *Gulábdás Jagjivandás* v. *The Collector of Surat*, L R. 6 I A. 51; *Rajá Nilmony Singa* v. *Bakranath Sing*, decided by the P. C. on 16th March 1882; Ellis in 2 Str. H. L. 364, 366. Comp Maine's Anc. Law, p 230

(*c*) *Gulábdás Jagjivandás* v *The Collector of Surat*, L. R 6 I. A. at p. 62

(*d*) 1 Str H L. 209, 210; *Rámchandra Sakhárám Vágh* v *Sakhárám Gopál Vágh*, I. L R 2 Bom 346

(*e*) *Ganeshgiri Gosávi* v *Baba bin Ramapa Náik*, Bom. H. C P J. F. for 1881, p 96

(*f*) *See* below, Bk. I. Ch II. Sec 6 A, Q. 8; Steele, L. C. 206

(*g*) 9 M. I. A 123; see *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L R. 5 I. A. 138; *Rám Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at p. 61.

of "self-acquired property by way of remainder or executory devise upon an event which is to happen at the close of a life in being," (*a*) and for the Bombay Presidency the power of a Hindû to make a testamentary disposition of whatever is his absolute property is now clearly established.(*b*) So also in the North-West Provinces under the Mitâksharâ (*c*) and in Madras.(*d*) But the nature and extent of the power are not to be "governed by any analogy to the law of England."(*e*) "The law of wills has grown up from a law which furnishes no analogy but that of gifts, (*f*) and it is the duty of tribunals dealing with a case new in the instance to be governed by the established principles and analogies that have prevailed in like cases." (*g*) Hence it was that in the *Tagore* case "the final decision, speaking generally, was that the limitation in tail and the subsequent limitations were contrary to the Hindû law, and void, and that upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled as heir to the estate."(*h*) The allowance of wills was not really opposed to the principles

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(*a*) *Supra.* The executory devise is itself limited according to the principles laid down in the *Tagore* case, *see* L. R S I. A. pp. 70, 72, 76

(*b*) *Bhagván Dulabh* v. *Kálá Shankar*, I. L. R 1 Bom 641; *Lakshmibái* v. *Ganpat Morobá*, 5 Bom. H. C. R 135, 138, 139 O. C. J.; *Baboo Beer Pertab Sahee* v *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1, 37.

(*c*) *Nana Narain Rao* v. *Huree Punth Bhao*, 9 M I. A 96; *Adjoodhia Gir* v. *Kashee Gir*, 4 N. W P H C. R. 31

(*d*) *Nagalutchmee Ummal* v *Gopoo Nadaraja Chetty*, 6 M. I A. 309; Colebrooke in 2 Str. H L 435 ss.

(*e*) *Mt. Bhoobun Moyee Debia* v *Ram Kishore Acharj Chowdhry*, 10 M. I. A. 279; per Turner, L. J., in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 M I. A. at p. 85.

(*f*) 2 Str. H. L. *loc. cit.*

(*g*) *Tagore* case, L. R. S. I. A at p. 68.

(*h*) *Ganendro Mohun Tagore* v *Rajah Juttendro Mohun Tagore*, L. R. 1 I. A. at p. 392.

of the Hindû law as will be shown hereafter. (a) It was merely a development of the principles already recognized, quite analogous to that which the English law of devise has undergone in the course of three centuries; but the Hindû law requiring a disposition to be in favour of some definite object existing when it is declared, many arrangements possible under the English law cannot be made.

In *Shoshi Shikhuressur Roy* v. *Tarokessur Roy* (b) it was held that a gift is bad in so far as it is limited to male descendants. The language used in that case relating to the gift over to the testator's surviving nephew or nephews was, however, deemed not inconsistent with an intention of the testator that the whole augmented share should pass to the plaintiff, the surviving nephew. This effect was given to it, but having regard to the doctrine frequently acted upon by courts in India, it was held he was only entitled to a life-estate.

As the law of wills follows the law of gifts, though with some differences, (c) it will be understood that a grant in favour, partly, of persons not in existence at the time of execution so far fails (d) with the estates dependent on it. When it is said "that a man cannot by gift *inter vivos* or by will give property absolutely to another, and yet control his mode of enjoyment in respect of partition or otherwise," (e)

(a) *See* below on the Testamentary Power.

(b) I. L. R. 6 Calc. 421

(c) *Kherode Money Dossee* v. *Doorga Money Dossee*, I. L. R. 4 Calc. at p. 472; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, I. L R. 5 Bom. 48; *Tarachand* v. *Reeb Ram*, 3 Mad. H. C. R. at p 55.

(d) *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L R 2 Calc 262; *Kherodemoney Dossee* v *Doorgamoney Dossee*, I. L R 4 Calc. 455; *Rajender Dutt* v. *Sham Chund Mitter*, I. L R. 6 Calc. at p. 116; *Sir Mangaldas Nathubhoy* v. *Krishnábái*, I. L. R. 6 Bom. 38.

(e) *Rajender Dutt* v *Shamchund Mitter*, I. L. R. 6 Calc. at p. 116. *See* also *Anantha Tírtha Chariar* v. *Nágamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, L. R. 6 I. A. 182.

what is meant is that such estates and interests and such only as the law recognizes can be conferred or created. (*a*) No one really intends to give an estate which shall at the same time be "absolute" and conditional or limited: what people try to do is to mould the interests they dispose of in ways unknown to the law, or which the law to which they are subject does not allow. "Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property." (*b*) The complication of rights that arises even under any existing system with its defined and limited interests is enough to show that an unlimited power of variation would lead to unlimited litigation and make land almost unmarketable; and this conviction arrived at by the rulers would of itself justify them according to the Hindû law in prescribing the necessary restraints (*c*) and refusing to give legal effect to any transaction not falling within the recognized limits. But as the law thus gives effect to only a certain range of intentions (*d*) the instruments creating rights, or having this for their purpose, are construed, if they can be reasonably construed, so as to express something which the law will carry out. (*e*) Thus where a grant to a sister contained the words "no other heirs of yours (than lineal descendants) shall have any right or interest," which it was said went to create an estate tail in the descendants contrary to the Hindû law, the grant was construed as one of the whole interest in the property subject to defeasance should the

(*a*) *See* per Willes, J., in the *Tagore* case, L. R S. I. A. at p. 65.

(*b*) Per Lord Brougham in *Keppell* v. *Bailey*, 2 Myl. and K. 517.

(*c*) *See* Nârada, quoted Macn. H. L. 152; and Col. Dig. Bk. III. Ch. II. T. 28.

(*d*) *Tagore* case, L. R. S. I. A. at p. 64. Domat's C. L. Sec. 2413.

(*e*) See *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M. I. A. 1; *Sreemutty Soorjeemony Dossee* v. *Denobundo Mullick*, *ib*. at p. 550; *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380; *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. at p. 147.

grantee die without children. (*a*) Where a Hindû widow in Bengal takes her husband's share by arrangement with his brethren, the instrument will be construed with reference to the Hindû law in order to determine the estate she has obtained, (*b*) but in the case of *Musst. Bhagbutty Daee* v. *Chowdry Bholanath Thakoor* (*c*) the Judicial Committee construed a will as a family settlement, completed by a document executed by an adopted son, whereby the widow became entitled to use as she pleased and invest as she pleased, as her separate property all that she derived from the estate given to her for life.

The Courts refuse effect to an intended perpetuity in favour of mere private persons even though it is disguised as a religious endowment. (*d*) It is only in such a form

(*a*) *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. 138. See *Krishṇaráv Ganesh* v. *Rangráv*, 4 Bo. H. C R. 1 A. C. J.; and *Bahirji Tannaji* v. *Oodatsing et al.*, Bo H. C. P J. F. 1872, No. 33; *Rajah Nursing Deb* v, *Roy Koylasnath*, 9 M. I. A. 55.

In the case of a grant to a Náḍgávḍá (a headman of a district) by Tippu Sultán, it was contended that the expression "aulád aflád" in the Persian implied and necessitated a descent different from what the Hindû law prescribed in a family subject to a rule of impartibility. It was ruled, however, that the words might be construed as meaning "hereditary not merely personal," and it was said "the precise devolution of the estate would nevertheless be governed by the law to which the grantee was subject so far as this was consistent with keeping the estate together so as to afford a means of support to the office to which it was attached" *Timangávdá* v. *Rangangávdá*, Bom H. C. P. J. F. 1878 p. 240, at p. 242. Comp *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at pp. 61-62; *Rajah Venkata Narasimha Appa Rao* v. *Raja Narayya Appa Row*, L. R. 7 I. A. pp. 38, 48, 49; and as to the preservation of the estate for the intended purpose, see *Raja Nilmoney Sing* v. *Bakranath Sing*, L R. 9 I. A. 104.

(*b*) *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M I. A. 1.

(*c*) L. R. 2 I. A. 256.

(*d*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I L R. 7 Calc. 269. *See Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 Beng. L. R. 11 O. C. J.

According to the Vîramitrodaya (*a*) a conditional gift is invalid (as under the Mitâksharâ law). The instance adduced might be construed as one of conditional defeasance. It is that of ornaments bestowed on a woman subject to a condition against using them except at particular festivals. A gift so conditioned, Mitramiśra says, is void, but it seems rather that the gift is complete but subject to a conditional defeasance (*b*) or else that the condition or conditional revocation is void. It is a recognized principle that a mere licence, however liberal, to a woman and to her exclusively, to use ornaments on particular occasions (*c*) and on those only, does not constitute a gift.(*d*) The ownership remains with the husband or other licensor and forms part of the property to be divided in a partition.(*e*) A conditional gift is not as such reckoned amongst those which are essentially void by Nârada.(*f*) The word *upádhi,* which Mitramiśra construes as "condition," usually implies fraud,(*g*) and every gift, it would seem, is by the strict Hindû law

character of land consecrated to religious purposes has been generally recognized under the Roman, Christian, and Mahomedan systems as well as by the Hindû law, and under all has sometimes been felt as an embarrassment; *see* Ortolan Inst. v. II. p 230 ss; Bowyer, Civ. Law, p. 69; Spelman De non Tem Eccles. Ch. VI. Ham Hed B. XV As to the respect due to sacred property under different circumstances *see* Grotius, De Jur B. et P. Lib. III Cap. V. § 11, compared with Vyav. May. Ch. IV Sec. 1. para 8

(*a*) Transl. p. 221.

(*b*) Comp the Transf of Prop. Act, IV. of 1882, Sec. 126

(*c*) Vishnu VII. 22

(*d*) *Kurnaram Dayaram* v *Hinibhay Vibhan*, Bom. H C. P. J F. 1879, p 8. *See* below on Strîdhana. Under the English law a gift by a husband to his wife of ornaments makes them part of her paraphernalia, of which she cannot dispose without his assent during his life. See *Graham* v. *Londonderry*, 3 Atk. 394.

(*e*) *Infra*, Bk. II. Introd. § 5 B *ad fin.*; Vyav. May Ch. IV. Sec. VII. para. 22; 2 Str H. L. 424, 370.

(*f*) Transl p. 59; Vyav May. Ch. IX 6. Comp. *Lachmi Narain* v. *Wilayti Begam*, I. L. R. 2 All. 433.

(*g*) *See* Col. Dig Bk. II. Ch. IV. Sec. II. T. 54, Comm.

accompanied by a tacit condition of revocation if the intended purpose be not fulfilled.(*a*) Regard being had, then, to the principle that a decision in such cases must be governed by the reason of the law, (*b*) it seems that a condition subsequent does not invalidate a gift, though a condition precedent may do so through preventing any present change of ownership or of possession as owner, (*c*) while a condition subsequent which is repugnant to the estate granted, as recognized by the law, is to be deemed void. (*d*) Now

(*a*) Nârada, Transl. p. 60; Col. Di. Bk. II. Ch. IV. T 53, 56, Comm.; Manu VIII. 212.

(*b*) Col Dig Bk. II Ch. IV. T. 28, Comm. *sub fin.*

(*c*) *See* Book I. Ch. II § 7, Q 17.

(*d*) Under the Roman law there were transactions which did not admit of a condition or a term annexed to the generation of the proposed legal relation, *see* Maine's Anc. Law, Ch. VI p 206 (3rd ed.), Goud. Pand 155, and the chief expressions of will as in marriage, divorce, adoption and partition repel as incongruous the suspensive effect of a postponement of the completion of the intended purpose which leaves the most weighty interests in uncertainty, and clogs intermediate acts of daily necessity with paralysing doubt The principle, though not precisely formulated, is one which operates in the English law in cases not left to the unfettered volition of the parties. It extends even to the acceptance of a bill of exchange (*see* Act 26 of 1881, Secs. 86, 91) Here the promise is absolute, the right immediate, though the fulfilment is deferred

That a condition subsequent could not be annexed to marriage was held in *Seetaram* alias *Kerra Herra* v *Musst Aheeree Heeranee*, 20 C. W. R 49 C. R. Whether a father giving his son in adoption can abandon the son's rights arising from the adoption, as ruled in *Chitko Raghunáth* v. *Jánaki* (11 Bom. H. C R. 199) was questioned by the Privy Council in *Ramasawmi Aiyan* v. *Vencataramaiyan*, L. R. 6 I. A. at p. 208, and the High Court of Madras has declared that the adopted son on attaining his majority may get any such arrangement set aside. See *Lakshamana Ráu* v *Lakshmi Ammál*, I. L. R. 4 Mad., at p. 163. An agreement was pronounced null by the Śástri whereby an adoptive mother obtained from the son she adopted a resignation to her of the bulk of the family property. Such an agreement could not, the Śástri thought, be annexed to sonship, and he assigned to the adopted son the full rights of an heir subject to the obligation of maintaining the adoptive mother. Adoption, Q. 15, MS.

ownership when it subsists singly is recognized as consisting in a right to deal with the object owned at pleasure, (a) and though some kinds of property cannot be freely disposed of by the representative owner either on account of other persons being interested or because of the necessary preservation of the corpus of the property for particular purposes, (b) yet generally the ownership implies a power of alienation (c) as well as of use and abuse, except so far as the public law may be infringed (d) by any proposed dealing with the property. A grant, therefore, of ownership or a will (e) with a condition against alienation or the other common uses of ownership operates while the condition is void as repugnant to the ownership created. (f) It must be assumed that the grantor rather intended his act to be effectual than ineffectual even though he should fail to secure the performance of some condition legally impossible or injurious; and the courts representing the State are not called on to give effect to commands or engagements which would violate their "dharm" or cause mischief to the community. (g) But the grantor may stipulate or provide for

(a) *See* Vîramit., Transl. pp. 34, 138. Nârada, quoted Col. Dig. Bk. II. Ch. IV. T. 6.

(b) *Nárâyan* v. *Chintâmon*, I. L. R. 5 Bom. 393. *See* above, p. 180.

(c) Nârada, *ut supra*; Col. Dig. Bk. II. Ch. IV. T 30, Comm.; Vîramit. Transl. p. 138.

(d) Col. Dig. Bk III. Ch. II. T. 28.

(e) *Cally Nath Naugh Chowdhry* v *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. 378.

(f) In the case of a charitable endowment an opposite principle prevails. Property sold in execution of a decree against a Mahant who had mortgaged it was recovered by the Vairâgis associated with him as incumbered by a patent breach of trust which the Śástri said entitled the Society to set the Mahant and his transactions aside. Q. 86, MS., Surat, 27th Feb 1852.

(g) *See* Manu Ch. VIII. Sec. IV. para. 1; Col. Dig. Bk. III. Ch II. T. 28.

various advantages to himself or to others(*a*) arising out of the property and so far diminish the advantages of the proprietor in it. Co-owners, too, may make similar arrangements *inter se* as to their common property, (*b*) reserving rights for instance to themselves in stated mutual relations during and after a life interest which they join in granting. (*c*) These stipulations the grantee personally must observe, and so must his heirs, as the Hindû law attaches a sacred value to a promise, (*d*) but how far precisely they adhere to the property in the hands of alienees, that is, to use the English phrase, "run with the land," can be determined only by degrees as actual cases arise. (*e*) The Hindû law emphatically bids the judge to prevent the success of a fraud, (*f*) and thus not only the doctrine of enforcing a representation which has been acted on (*g*) but of the obligation passing with the ownership (*h*) where public policy approves of the connexion, to a person who takes with notice of it, would be enforced in as full consistency with the Hindû law as with the English law. (*i*) The law of Registration now enables every one who reserves any part of the ownership in property

(*a*) *Cally Nath Naugh Chowdry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. at p. 388

(*b*) *Nîlkanth Ganesh* v. *Shivrám Nágesh*, Bom. H. C. P. J. F. 1878, p. 237.

(*c*) A stranger to such an arrangement or to an award, though a relative, cannot rely on admissions in it, or relating to it, as a ground for rights to which the law does not entitle him. *Ganga Sahai* v. *Hira Singh*, I. L. R. 2. All. 809.

(*d*) Nârada IV 5, Transl. p. 59; Vyav. May Ch. IX. Sec. II ss.; Col. Dig. Bk II Ch. IV. T. 3, 4, 5.

(*e*) *See* Transf of Prop. Act, IV. of 1882, § 40.

(*f*) Manu VIII. 165; Col. Dig. Bk. IV. T. 184; Vyav. May. IX. 10.

(*g*) *See* per Lord Cottenham in *Hammersley* v. *De Biel*, 12 C. F. 61 n.

(*h*) *Western* v. *MacDermott*, L. R. 2 Ch. Ap. 72; *Leech* v. *Schweder*, L. R. 9 Ch. A. 465, 475.

(*i*) *Juggutmohinee Dossee* v. *Sookhemoney Dossee*, 17 C. W. R. 41 C. R.

of which he is disposing to give virtual notice of this to every future purchaser. (*a*) The omission to register any material stipulation will, in general, except in insignificant cases, deprive it of effect as an interest in the land, and perhaps turn the presumption of apparent fraud against him who has failed to take an obvious precaution. (*b*)

The law of gift has been discussed with great subtlety by the Hindû lawyers on account of its close connexion with the law of sacrifices. The necessary concurrence at the same moment of the will of the donor and donee in passing some definite existing object from one to the other is usually insisted on (*c*) as a means of completing a gift; but Jagannâtha points out that a debtor releases himself by assigning something yet to come into existence, (*d*) and that an assignment of a periodical income operates necessarily through a past volition on each instalment as it falls due. (*e*) Hence, he says, the gift of property is valid though it be

(*a*) *See* Act III. of 1877; Transf. of Prop. Act, IV. of 1882, § 54, 59, 107, 123; *Ichhárám Kálidás* v. *Govindrám Bhowánishankar*, I. L R. 5 Bom. 653; *Sobhágchand* v. *Bhaichand Bhaichand*, I. L. R. 6 Bom. 193; *Bápuji Balál* v. *Satyabhámábái*, I. L R. 6 Bom 490.

(*b*) Comp. *Táráchand* v *Lakshman*, I. L. R. 1 Bom 91

(*c*) *See* Vîramit. Tr. p. 31 ss; Dâyabh. Ch I. paras 21–24; 2 Str. H. L. 427; *Vithalrav Vasudev* v. *Chanaya*, Bom. H C. P J F. 1877, p. 324. Comp. the Transf. of Prop. Act, IV. of 1882, § 122, 124.

(*d*) Col. Dig. Bk. II. Ch IV. T. 43, Comm The right in such a case passes immediately; it is the fruition of the right which is future. Comp. Savigny, Syst. § 385

(*e*) See *Collector of Surat* v *Pestonji Ruttonji*, 2 Morris 291, cited in *Maharaval Mohansingji Jeysingji* v *The Government of Bombay*, L. R. 8 I. A. at p 84. But in the case of *Babu Doolichand* v. *Babu Birj Bhookan* (decided 4th Feb. 1880) the Judicial Committee declined to affirm the principle that a merely expectant interest can be the subject of sale under the Hindû law. It is improbable, their Lordships say, that the principle of the English law which allows a subsequently acquired interest to feed the estoppel can be applied to Hindû conveyances. Where the Transfer of Property Act, IV. of 1882, is in force, its provisions and exceptions must be considered along with this and similar judgments. *See* Secs. 43, 54 of the Act.

accompanied by the donor's retention of a life interest, (*a*) and so in the case of *Muhalukmee* v. *Three grandsons of Kripashookul,* (*b*) it was said that a gift in Krishṇârpan (religious charity) was good though possession was retained by the owner. (*c*) In the case at 2 Macn. H. L. 207 it is said that a gift may be accompanied by the donor's retention for life; but then his subsequent gift accompanied by possession supersedes the deferred one. This would reduce the remainder arising on the donor's death to a mere equitable right, (*d*) but the creation of the deferred right is at any rate not inconsistent with the Hindû law; and now by means of registration having virtually the effect of possession (*e*) great safety may be given to rights which are to be enjoyed only in the future. (*f*) In the case of a near relation a mere gratuitous agreement thus becomes binding, though as between strangers void. (*g*) As to all persons, however, it is said "Nothing in this section shall affect the validity as between the donor and donee of any gift actually made." (*h*) When the "gift is actually made" is left apparently to be governed by the law of the parties, (*i*) and so amongst the Hindûs by principles already partly considered. (*j*)

(*a*) Col. Dig. Bk II Ch II T 43, Comm.

(*b*) 2 Borr R at 561.

(*c*) *See* however *Lalubhâi Surchand* v *Bâi Amrit,* I L R. 2 Bom. at p 331

(*d*) See *Lalubhâi Surchand* v. *Bâi Amrit,* I. L. R. 2 Bo. at p. 331.

(*e*) *Ib.*, pp. 319, 332

(*f*) *Abadi Begam* v. *Asa Ram,* I. L R. 2 All 162. *See* Act III. of 1877 Sec 50; Transfer of Property Act, IV. of 1882, Secs. 54, 58, with Sec. 5 where the Act is in force.

(*g*) Indian Contract Act, IX. of 1872, Sec. 25.

(*h*) No reference to the enactment is made in the case of *Nasir Husain* v *Mata Prasad,* I. L. R. 2 All. 891.

(*i*) *See* the Transfer of Property Act, IV. of 1882, Secs. 122, 124.

(*j*) Under the English as under the Hindû law (*see* Col. Dig. Bk. V. T. 1, Comm. (vol. II. p. 514 Lond Ed., vol. II. p. 191 Madr. Ed.) "It requires the assent of both minds to make a gift as it does to make a contract," per Mellish, L. J., in *Hill* v. *Wilson,* L. R. 8 C. A. 896. But *see* also per Lord Mansfield in *Taylor* v. *Horde,* 1 Burr. at p. 124.

Whether a gift valid as against the donor is to all intents valid as against his representatives and his coparceners in a joint estate, is a point also left to be determined by the law of the parties. (*a*) The distinction which the legislature had in view was probably one between the donor and his representatives on the one hand and his creditors or persons having claims on the property on the other. A Hindû husband, it has been held, cannot alienate by a deed of gift to his undivided sons by his first and second wives the whole of his immoveable property though self-acquired, without making for his third wife, who has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death, she is entitled to follow such property in the hands of her step-sons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his lifetime. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and unless such right has been defined by partition or otherwise it cannot be released by her to her husband. (*b*)

By the Hindû law, sale of land to be effectual had formerly to take the shape of a gift. (*c*) The rule as to delivery and acceptance applies therefore equally to the one as to the other. But the Courts, in order to defeat fraud, will give an assistance to a purchaser for value which they will not to a

(*a*) As to coparceners see *Pándurung* v *Náru*, Sel. Rep 186; *Lakshman Dádá Náik* v *Rámchandra Dádá Náik*, L R 7 I. A. 181; S. C. I. L. R. 5 Bom. 48; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L R. 7 I. A, 88.

(*b*) *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99.

(*c*) *Lalubhái Surchand* v. *Bái Amrit*, I. L. R 2 Bom. 299; 1 Str. H. L 19. The exception of religious gifts from the general inalienability of the family estate under the early Hindû law had a close parallel in the Saxon and other Teutonic laws in Europe. Grants to the Church might be made without the concurrence of heirs, yet in Europe, exactly as in India, it was usual to obtain the signatures to a grant which might afterwards be disputed of all the persons

mere gratuitous promisee (*a*) whose right, indeed, unless the transaction has been a "gift actually made," is, as we have seen, made null by the Indian Contract Act.

Though a proprietor cannot create interests of a kind unknown to the law, or give to his property an eccentric mode of devolution, and though his powers in these respects are more narrowly restricted by the Hindû than by the English law, (*b*) yet he can carve out of his ownership many interests which his successors must recognize. (*c*) Thus as to his self-acquired property he enjoys a virtual freedom of disposition as to the persons to be benefited by estates in themselves legal. (*d*) As to the inheritance, his son's equal rights do not prevent him from burdening it with debts not prodigally or profligately incurred. (*e*) If he dies with debts unsettled, but not secured by a specific lien, they do

interested. *See* Lex Sax. XV; Laboulaye Histoire du Droit de Propriété Fonçière en Occident, Lib. VIII., Ch. I. The first charters of *book-land* in England were granted to the Church, through which grants to laymen came in. *See* Stubbs, Const Hist. I. 131; Elt. T. of Kent, pp. 15, 16; Mit. Ch. I. Sec. I. para. 32; Vyav. May. Ch. II. Sec. 1, para. 2; Col. Dig. Bk. II. Ch. IV. Text 33; Bk. V. Ch. VII. T. 390.

(*a*) *See* Coleb. in 2 Str. H. L 433, 434.

(*b*) 1 Str. H. L. 25.

(*c*) See *Girdharee Lall* v *Kantoo Lall*, L R 1 I A. 321; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R 6 I. A. at p. 104; *Jatha Náik* v. *Venktápá*, I. L. R 5 Bom. at p. 21. The second proviso in Rule IV. Sec. 11 Madras Act 8 of 1865 does not apply to leases which are *bonâ fide* and valid under the general Hindû law;—only when they are a fraud upon the power of the grantor's successor as manager and to the prejudice of the successor.

(*d*) *See* Mit. Ch. I. Sec. I. para. 27; Vyav May. Ch. IX. Sec. 5; Smṛiti Chand. Ch. II. Sec. I. paras. 22, 24, qualifying Ch. VIII. para. 25; Mádhavya, paras. 16, 5; Coleb. in 2 Str. H. L. 439, 441; Varadrája, pp. 5, 8; *infra*, Bk. II. Ch. I. Sec. 2, Q. 2 and Q. 8.

(*e*) Col. Dig. Bk. II. Ch. IV. T. 15, Comm.; *Hunooman Persaud Panday* v. *Musst. Babooee Munraj Koonweree*, 6 M. I. A. at p. 421.

not form a charge on the estate itself, (*a*) though the heirs taking the estate are so far answerable. (*b*) It is assets for the discharge of the father's debts. (*c*) A gift within reasonable limits to any child must be given effect to, (*d*) and so must a provision for a wife, a concubine, or an illegitimate child. (*e*) These dependents are indeed entitled as of right to a provision even against the terms of a will (*f*) or a gift, (*g*)

(*a*) *Girdharee Lall* v. *Kantoo Lall*, L R. 1 I. A. 321; *Jamiyatrám* v. *Parbhudhás*, 9 Bom. H. C. R. 116

(*b*) *Oolagappa Chetty* v. *Hon. D Arbuthnot and others*, L. R. 1 I. A. 268.

(*c*) *Muttayan Chettiar* v. *Sangili*, L. R 9 I A. 128.

(*d*) Vîramit. Tr. p. 251; 1 Str. H. L. 24 A gift by a Joshi of a material part of his vatan to his daughter's children was pronounced void as against his adopted son who, however, it was said must make good a present of a reasonable portion, Q 712 MS The testamentary power under the Roman law seems to have received recognition on account of its enabling the testator to provide for his children in some measure according to his affection for them. *See* Maine, Anc. Law, Chap. VII. p 218 (and this Section *sub fin*).

(*e*) *Salu* v. *Hari*, Bom H. C. P J. F. 1877, p. 34; *Ráhi* v. *Govinda*, I. L. R 1 Bom. 97 The mistress, it was said, must not alienate the house given to her by her patron, Q. 712 M S.

(*f*) *Comulmoney Dossee* v *Ramanath Bysack*, 1 Fult 189.

(*g*) *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99; *Jamna* v. *Machul Sahu*, I L. R. 2 All. 315.

The Hindû jurists who recognize the power of a father to make away with the patrimony, though he incurs sin in doing so, point to remedies analogous to those provided by the Roman law. The son has a right of interdiction to prevent improvident alienations. Mit. Ch. I. Sec VI. paras. 9, 10; and this the Śâstri said applied equally to the adopted son and the brother, Q. 1735 MS. He may claim to have the gift or disposal set aside if he be thus impoverished as implying mental derangement on the part of the donor. Col. Dig. Bk. II Ch. IV. Sec. 2, T. 53, 54. Comp. Vyav. May. Ch. IX. 3, 6, 7. For the Roman law *see* Voet ad Pand. Lib XXVII. T. X paras. 3, 6, 7; Inst. Lib. II. Tit. XVIII., and Voet ad Pand. Lib. XXXIX. Tit. V. paras. 36, 37; Ortolan ad Inst. § 787 ss. 799; Poste's Gaius, pp. 51, 205; Mommsen, Hist. of Rome, B. I. Ch. XI., Eng. Transl. vol. I. p. 161,

though not as against a sale for the payment of a family debt which it is the duty of the head of the family to pay.(*a*)

The general injunction to perform a father's promise must be regarded now rather as a moral than as a legal precept, and the obligation to pay the debts of the father does not extend to those of the other members of a family, even of a joint family, unless they have been contracted for the common good or under pressure of some severe necessity.(*b*) When there are no sons or grandsons holding a joint estate with the ancestor the line of succession is prescribed by law; but, subject to provisions for maintenance, the property is entirely at the disposal of the owner notwithstanding the existence of collateral heirs. (*c*)

There does not seem to be good authority for saying that the person giving property to the members of a Hindû family can impose on them such terms as that they shall become divided or remain undivided.(*d*) The decision in *Ganpat* v. *Moroba* (*e*) may have proceeded upon a misapprehension of Bâḷambhaṭṭa's comment on the Mitâksharâ Ch. I., Sec. II., para. 1. (*f*) Sons cannot be made separate *inter se* against their will, since partition itself is defined as a particular kind of intention, (*g*) in the absence of which therefore it does not exist. So the declaration of such intention will constitute partition, and cannot be prevented. (*h*) The grantor may bestow separate interests on

(*a*) *Natchiarammal* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

(*b*) Mitâk Ch I Sec. I. paras. 28, 29; 2 Str H L. 342; Col. Dig. Bk. I. Ch V. T. 180, 181.

(*c*) *See* Coleb. in 2 Str. H. L. 15; above, p. 139.

(*d*) See *Maccundás* v. *Ganpatrao*, Perry's O. Cases, 143.

(*e*) 4 Bom. H. C. R 150 O. C. J.

(*f*) See *infra*, Book II. Introd. § 4 C.

(*g*) Vyav. May. Ch IV. Sec. III. para. 2; *infra*, Book II. Ch. III. S. 3, Q. 6, and Book II. Ch. IV. Q. 8.

(*h*) *Mookoond Lall Sha* v. *Ganesh Chandra Sha*, I. L. R. 1 Calc. 104; *Rajender Datt* v. *Sham Chand Mitter*, I. L. R. 6 Calc. 106, 116.

members of a joint family, or a joint interest on separated members; but he cannot thus effect their status *inter se*. As separate properties may be held by members of a united family, (*a*) they may take an estate as tenants in common side by side with their inheritance and its accretions held in union, and separated members may take a property as joint tenants or as partners, (*b*) but their interests and mutual relations are in such a case and without a reunion, essentially different from those of a joint Hindû family. The sacrifices continue separate, and this makes a true unity of the family impossible. It follows that property given to Hindûs, though it may be subjected to charges as already shown, cannot be controlled in the hands of the donee by fantastic directions as to its enjoyment or devolution or by accompanying conditions on matters which the Hindû law intends to leave to the religious feeling (*c*) or the worldly wisdom of the owners for the time being. (*d*) The law itself prescribes many regulations for the preservation and welfare of the family which is its principal care. (*e*) It allows for the varying rules of custom, (*f*) and having done this gives but little scope to the caprices of individuals. It accepts indeed a theory more comprehensive even than Plato's (*g*) of the inherent nullity of acts which, on account of their eccentricity, implying injustice, may be ascribed to a disturbance or perversion of the faculties. (*h*)

The historical reason for the limited powers of disposition allowed to owners by the Hindû law is probably to be found

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(*a*) See *Vásudev Bhat* v. *Venkatesh Sanbháv*, 10 Bom. H. C. R. at pp. 157, 158.

(*b*) See *Rampershad* v. *Sheo Churn Doss*, 10 M. I. A. 490.

(*c*) So under the Roman law, *see* Goudsmit, Pand. p. 168.

(*d*) See *Maccundâs* v. *Ganpatrao*, Perry, Or. Cases, 143, and *Abdul Gannee* v. *Husen Miya*, 10 Bom. H. C. R. at p. 10.

(*e*) *See* 1 Str. H. L. 17.

(*f*) Col. Dig. Bk. V. Ch. V. T. 365.

(*g*) *See* Grote's Plato, III. 396.

(*h*) Col. Dig. Bk. II. Ch. IV. Sec. II. Art. III.; Vyav. May. Ch. IX. paras. 6, 8; Vivâda Chintâmani, Tr. pp. 82, 83.

in the ancient idea of the inalienability of the patrimony. (*a*) This allowed mortgages but prevented sales. (*b*) The mortgages were usually accompanied with possession, and the lien by degrees became confused very often with ownership. Then gifts to religious uses were highly commended. (*c*) They were, in principle at least, inalienable and irrevocable (*d*) even by the sovereign, if the strongest imprecations on him who should resume a grant could make them so. (*e*) It was impossible that these should be attend-

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(*a*) This may have been developed from the sacredness of the house and the curtilage at a stage in which the labour of clearing the land from trees formed the only appraisable element of the value of any holding. The lot was consecrated to those who had cleared it as a safeguard against invasion and alienation both. Comp. Grote's Plato III. 390. It has been found in some cases, as in the Canara Forest case, referred to in the next note, that persons who in remote places had consecrated shrines to the honour of the forest gods, supposed to be protective against tigers and miasma, and maintained a rude worship to these divinities, claimed on that account a lordship of the tract; which was acquiesced in by immigrants through superstitious fear. Continued enjoyment grew in time into a kind of ownership, which it was then attempted to assert with all the incidents belonging to it under an advanced system of individual and exclusive proprietary right. Comp. Lavel. Prim. Prop. 24, 104, 121.

(*b*) Mit. Ch. I. Sec. I. para. 32. *See* 5th Report on Indian Affairs, p. 130, as to the mortgages of Canara redeemable after any lapse of time, and *Bháskaráppá* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at p. 525, and comp. Tupper, Panj Cust. Law, vol. II. pp. 89, 45.

(*c*) Mit. Ch. I. Sec. I. para. 32; Manu IV. 230, 235.

(*d*) Vyav. May. Ch. IX. 6; Ch. IV. Sec. VII. paras. 21, 23; Col. Dig. Bk. V. Ch. V. T. 365; *Náráyan* v. *Chintámon and another*, I. L. R. 5 Bom. 393; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 M. I. A. at p. 273; *The Collector of Thanna* v. *Hari Sitaram*, Bom. H. C. P. J. F. 1882, p. 204 S. C; I. L. R. 6 Bom. 546.

(*e*) It is interesting to compare with the familiar "60,000 years in ordure" in the Hindû grant the invocation of the fate of Dathan and of Judas on those who should resume an ecclesiastical grant in Europe. Annal. Bened. II. 702, "Veniam consequantur quando consecuturus diabolus." Marculf. Lib. II. Form. 1. *See* Lab. *op. cit.* p. 303, compared with Ind. Antiq. vol. XI. pp. 127, 162.

ed with the manifold limitations by which in dealing with purely secular property a settlor or testator might endeavour to mould the interests of successive generations and provide for the reversion of the property in particular events. Sales as they were introduced had to take the form of gifts, (*a*) and were thus made equally without qualification or reserve. The united family, however, providing by birth or by adoption a *heres necessarius* in almost every case, and making the assent of sons necessary for the disposal of immoveable property, (*b*) acted as a continual check on the ingenuity and even on the wishes of the class of proprietors. It would be almost impossible to obtain the acquiescence of the co-owners in any settlement to which they were not bound to submit, and the ancient lawyers unaided by powerful courts of conscience had not hit on the manifold applications of uses. The unchangeableness, too, of the political and social condition of the Hindûs during many centuries favoured the natural immobility of an essentially religious law. The manes had to be duly honoured, (*c*) the present and the coming generation provided for, (*d*) while little or nothing occurred to tempt proprietors from the worn track of past centuries. The widely-spread Mahomedan rule prevented for six or seven hundred years the growth and continuance of Hindû states on a great scale, and the development, if it were possible, of a progressive Hindû polity. Men were driven in upon their families and their traditions as their only available centres of interest, while externally none of the astounding changes of physical circumstances which have marked the period of British dominion, arose to break the shackles of custom, and to arouse dormant intelligence to new possibilities of making wealth

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(*a*) *Lalubhái Surchand* v. *Bái Amrit*, I. L. R 2 Bom. at p. 331; Col Dig. Bk. V. Ch. VII. T. 390; Mit. Ch. I. Sec. I. para. 32.

(*b*) Mit. Ch. I. Sec. I. para. 27; *Rangama* v. *Atchama*, 4 M. I. A. at p. 103; *Pándurang* v. *Náru*, Sel. Rep. 186. *See* above, p. 192.

(*c*) Manu IX. 1858.

(*d*) Mit. Ch. I. Sec. I. para. 27.

and of dispensing it. Some little movement there was: the legislative and systematizing faculty showed itself in such works as those of Aparârka and of Rudra Deva, (a) the *mṛityu patra* and the gift in trust, the mortgage and the lease in their manifold forms supplied a foundation on which a whole system of Hindû equity and of interests in estates, no less far reaching and complicated than those of England, might have been built up; but though the materials were at hand the circumstances were wanting in which they could be organized. It was not until the British rule prevailed that the Hindû found himself a living part of a great and progressive community, with endless incentives to mental activity and to the imitation of rules tending always to extension of the individual's plastic power over property. The subsequent history of the Hindû law, though it presents a development of several purely indigenous principles, has been enormously influenced by English notions. It is impossible, even were it desirable, that these should be wholly cast aside: they are most in harmony with the general mass of English thought which is leavening the native mind; and they practically afford the only common standard and source to which the Courts can resort, when the meagre resources of the primitive law fail. But the Judicial Committee in some of its more recent decisions has shown itself quite alive to the fact that the narrower peculiarities of the English law will not blend with the Hindû system, and has carefully dwelt on the points of distinction. (b) It has shown no favour to any extension to India of the endless "dissipations" of the ownership in minute and tangled

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(a) The Sarasvati Vilása.

(b) See *Tagore* case *passim*, L. R. S. I. A. 47.

"The Hindu law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies." 13 M. I. A. at p. 390.

interests, or to the paralysing restrictions on the use and exchange of property which in England itself are now felt as a serious impediment to the general welfare. It seems likely, therefore, that in yielding to the new influences brought to bear upon it, the Hindû law will go forward in a few and simple steps to the point of adaptation to the actual needs of society without passing through those intermediate stages of nominal ownership united so often with a real helplessness of the proprietor, the rules regarding which form so large a portion of the present English law.

It will have been seen that the creation of a perpetuity by a private person in favour of private persons is impossible under the Hindû law. (a) The nearest approach to it perhaps is in the case of the purohits or hereditary family priests. Property given to the family of a purohit as such for ever is of the nature in part at least of a religious endowment.(b) In creating such an endowment there is a virtually unlimited power of disposal of property fully owned(c) provided only that the support of the family and its dependants be not impaired. (d) The founder may provide for successors to the immediate donee who have still to come into being, (e) and may in some measure prescribe the mode of

(a) In a case from Penang, where the English law prevails "as far as circumstances will admit," it was held that the rule against perpetuities was applicable as founded on considerations of public policy of a general character, but subject to an exception "in favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the term are called charitable uses." *Yeap Cheah Nev* v. *Ong Cheng Nev*, L. R. 6 P. C. A. at p. 394.

(b) *See* 2 Str. H. L. 12, 13; Col. Dig. Bk. II. Ch. III. T. 43, Comm.

(c) Col. Dig. Bk. II. Ch. IV. T. 56; Comm.; T. 3; T. 33; *Dwarkanâth Bysack* v. *Burroda Persaud Bysack*, I. L. R. 4 Calc. 443; *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24.

(d) *See* 2 Str. H. L. 12, 16, 342; Co. Di. Bk. II. Ch. IV. T. 10, 11 Comm.; T. 18 Comm.; *Radha Mohun Mundul* v. *Jadoomonee Dossee*, 23 C. W. R. 369; *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W. R. 41.

(e) *Khusálchand* v. *Mahádevgiri*, 12 Bom. H. C. R. 214.

succession or the qualifications of the successors.(*a*) The idol, deity, or the religious object is looked on as a kind of human entity, (*b*) and the successive officiators in worship as a corporation with rights of enjoyment but not generally of partition (*c*) or alienation except so far as this may be necessary to prevent greater injury.(*d*) Such endowments are frequently founded by subscriptions and are augmented by gifts and bequests simply to the institution. (*e*) No rules have, in a majority of these cases, been formally prescribed: the intention of the founders has to be gathered from the traditional practice, and the succession is thus determined by the custom of each particular institution, (*f*) though this may have become embraced in some more

(*a*) "Where the founder has vested in a certain family the management of his endowment, each member.........succeeds.........*per formam doni*," so that execution proceedings against one do not affect his successor in the endowment *Trimbak Bawa* v. *Narayan Bawa*, Bom. H. C. P J F. for 1882, p. 350 "If a person endows a college or religious institution the endower has a right to lay down the rule of succession" Pr. Co. in *Greedharee Doss* v. *Nundo Kissore Doss Mohunt*, 11 M. I. A. at p. 421; 1 Str. H L. 210; 2 *ib.* 364; Comp. Maine, Anc Law, Ch. VII., p. 230

(*b*) *Maharanee Shibessuree Debia* v *Mothooranath Acharj*, 13 C. W. R. 18, P C. S. C. 13 M. I. A. 270; *Moonshee Mahomed Akbar* v. *Kalee Churn Geeree*, 25 C W. R. 401.

(*c*) Vîram. Tr. 249. *See* below Bk. II., Introd. Impartible Property and Rights, &c arising on Partition; 1 Str. H. L 210, 151; *Anund Moyee Chowdhrain* v. *Boykanthnath Roy*, 8 C. W R. 193.

(*d*) See *Khushâlchand* v. *Mahâdevgiri*, 12 Bom H C R. 214; *Manohar Ganesh* v. *Kesharram Jebhai*, Bom. H. C. P J. F. 1878, p. 252; *Nárâyan* v. *Chintaman*, I. L R. 5 Bom. 393; *Juggernath Roy Chowdhry* v *Kishen Pershad*, 7 C. W. R. 266; *Drobo Misser* v. *Srineebash Misser*, 14 C W. R. 409; *Nimaye Churn Puteetundee* v. *Jogendro Nath Banerjee*, 21 C. W R. 365; *Mohunt Burm Suroop Dass.* v. *Kashee Jha*, 20 C. W. R. 471; *Prosunno Kumari Debya* v. *Goolab Chand*, 23 C. W. R. 253, S. C. L. R. 2 I. A. 145.

(*e*) *Sammantha Pandara* v. *Sellappa Chetti*, I. L. R. 2 Mad. 175.

(*f*) *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, L. R. 4 I. A. at p. 83. *Greedharee Doss* v. *Nundo Kissore Doss*, 11 M. I. A. at p. 427.

extensive custom.(a) And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. (b) The endowment once made cannot be resumed, but performance of the duties may be enforced. (c)

Though a religious endowment is not necessarily confined to a single family, (d) this is a very common kind of estate, (e) and may be attended with the usual incidents subject only to providing for the performance of the religious functions. (f) In the case of other public or semi-public offices the exclusive right of a single family and a several enjoyment of shares (g) is usually accompanied by a rule of non-alienability beyond the limits of the family, as in the case of vatans, (h) and frequently of impartibility, the burden of proving which, however, rests on those who assert it. (i)

(a) Co. Di. Bk. III. Ch. II T 5; *Gossain Dowlut Geer* v. *Bissessur Geer*, 19 C W. R. 215; 1 Str. H. L. 151; *Malhár Sakhárám* v. *Udegir Guru Champatgir*, Bom H. C. P. J. F. 1881, p 108, and the cases therein cited.

(b) Nor can the court prescribe such rules; *Burwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj*, 21 C. W. R 41. As to attempted restraint on choice of a successor; see *Greedharee Doss* v. *Nundokissore Doss*, 11 M. I. A. 405, 421.

(c) See *Juggut Mohinee Doss* v. *Musst. Sokhee Money Dossee*, 14 M. I. A. at p. 302; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(d) See *Sammantha Pandara* v. *Sellappa Chetti*, I L R. 2 Mad. 175.

(e) 2 Str. H L. 368; *Vithal Krishna Joshi* v. *Anant Rámchandra* 11 Bom. H C. R 6; *Divaker Vithal* v *Harbhat*, Bom H. C. R. P J. F. 1881, p. 106; *Manchárám Bhagvánbhat* v. *Pránshankar*, Bom. H. C. P. J. F. 1882, p. 120.

(f) Co. Di. Bk. II., Ch. III., T. 43 Comm.; *Ganesh Moreshwar* v. *Prabhákara Sakhárám*, Bom. H. C. P. J. F. 1882, p. 181.

(g) 1 Str. H. L. 210, 2; *ib.* 363, per Colebrooke.

(h) *See* Index *sub voce*, and Bom. Act. III. of 1874.

(i) *Timungávda* v. *Rangangávda*, Bom. H. C. P. J. F. 1878, p. 240.

It has been thought that trusts were unknown to the Hindû Law.(*a*) Such a notion is quite erroneous, (*b*) though it is true there has been no such development of the first principles as has taken place under the Equity system in England. The endowments just spoken of, especially when founded by the members of a particular caste, are very frequently held by trustees, (*c*) either the mohants bound to a particular appropriation of the revenues (*d*) or the general puncháyat of the caste in the town or village or a body chosen *ad hoc.* (*e*) Trusts for the maintenance of a family idol are very commonly created and give to the trustee a valuable interest. The trust is dissoluble only by the assent of the whole family, (*f*) or of all concerned when the idol is open to public worship (*g*).

Other trusts of a quasi-religious character are such that effect can hardly be given to them (*h*) on account of the uncertainty of the purpose of the testator.

Property is not infrequently given to a husband in trust for his wife in which she consequently has a beneficial interest

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(*a*) *See* the *Tagore* case, L R. S. I A 47

(*b*) *Mussumut Thukrain Sookraj Koowar* v. *The Government*, 14 M. I. A at p. 127 ; *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer*, L R 9 I A at p. 50.

(*c*) *Radha Jeebun Moostuffy* v *Taramonee Dossee*, 12 M. I. A. 380 ; *Ram Doss* v. *Mohesur Deb Missree*, 7 C W R. 446.

(*d*) *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy*, 17 C. W R. 444.

(*e*) *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380, 394 ; *Juggut Mohinee Dossee* v. *Msst. Sokheemoney Dossee*, 14 M. I. A. 289.

(*f*) *Konwur Doorganath Roy* v. *Ramchunder Sen*, L. R. 4. I. A. at p 58. *See* above, pp. 184, 200

(*g*) *Manohar Ganesh* v. *Keshavrám Jebhai*, Bom. H. C. P. J. F. 1878, p. 252.

(*h*) *Mániklál Atmárám* v. *Mancharshi Dinshá Coachman*, I. L. R. 1 Bom 269. In *Promotho Dossee* v. *Radhika Prasad Datt*, 14 Ben. L. R. 175, a dedication by will was set aside as being in reality a settlement in perpetuity on the testator's descendants, and a new dedication was made with the assent of the parties.

quite distinct from her purely dependent joint ownership so called, in her husband's property. (*a*) Trusts for the benefit of widowed daughters and other helpless persons are not very uncommon. (*b*) The remedy in case of failure is a revocation of the gift or a defeasance of the estate given to the trustee (*c*) but the purpose being recognized as beneficial, effect may be given to it according to the law of reason, (*d*) and now it is recognized that the Courts should rather enforce a performance of the trustee's duty than allow the

(*a*) It is substantially the "dotal" estate of the French and other European continental systems. *See* Col. Di. Bk. II. Ch. IV. T. 28 Comm., T. 29 Comm, T. 30 Comm.

(*b*) *See* 2 Str. H L. 234. A settlement may be found in the case of *Subedar Husseinshakhan Sayedshakhan*, Bom. H. C. P. J. F. 1882, p. 247, which, though in that case made by a Mahomedan, follows in form and substance a pattern common amongst Hindûs The settlor being old gives to his son his whole property with a charge to maintain and shelter his step-mother, sister and other dependants. Provision is not made, probably through oversight, for the settlor's own subsistence. If this had been added we should have had the common form of a *Mrityu patra*, a settlement operating substantially as a will.

(*c*) Col. Di Bk. II. Ch. IV. T. 53 Comm., T. 56 Comm. Similarly under the Roman law the *modus*, *i.e.* the charge or obligation accompanying a gift might be enforced by an action to that end or the donor could reclaim the gift. It was impossibility of performance only (including omission of any call for performance where a call was necessary) that excused the donee. This principle has been applied in India to many cases of lands granted for service in the sense that the service must be performed when required by the holders. See *Rajah Lelanund Singh Babadoor* v *The Government of Bengal*, 6 M I A. 101; *Forbes* v. *Meer Mahomed Tuquee*, 13 M. I. A. at p. 463; *Rajah Lelanund Singh Bahadoor* v. *Thakoor Munoorunjun Singh*, L. R. S. I. A. 181; *Keval Kuber* v. *The Talukdari Settlement Officer*, I L R. 1 Bom. 586. Coke, L. 204, applies a more rigorous construction to royal grants than to those of private persons. This should be borne in mind in reading *Forbes* v. *Meer Mahomed Tuquee*, supra.

(*d*) *See* 1 Str. H. L. 151; *Mohesh Chunder Chuckerbatty* v. *Koylash Chunder*, 11 C. W. R. 449 C R.; *Gopeenath Chowdry* v. *Gooroo Dass Surma*, 18 C. W. R. 472 C. R.; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

founder or his representative to annul the trust or hand it over to a new trustee. The aid of the courts may be invoked and the High Courts can in such cases exercise the summary power conferred on them by the Indian Trustees' Act 27 of 1866; the substantive law forming the basis of the rights being the Hindû law, but the application of that law in cases falling within its principles but not its detailed rules being governed by the rules established in the English Courts of Equity.(*a*) The same principles are applied as those of good conscience to the determination of cases arising in the Mofussil: of this there are many instances. (*b*) Thus should a transaction be pronounced void or revocable by the Hindû law (*c*) and accordingly be rescinded by the Court, the determination of the legal relation would probably be governed, in the Mofussil at any rate, by the Sástras as modified by custom, but for dealing with the resulting trust in favour of the grantor recourse would almost necessarily be had to the English precedents, because the Hindû jurists have not furnished any.

Regard may properly be had to native usages and practices in determining whether in any disputed case a trust has been effectively created or not. (*d*) Effect will be given to it so far as it subserves a practicable (*e*) and legal purpose, (*f*) but an estate or mode of devolution or enjoyment not allowed by the Hindû law cannot be compassed by

(*a*) In re *Káhándás Nárrandás*, I. L R 5 Bom. 154.

(*b*) See *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W R. 41; per Sir M Westropp, C. J., in *Wáman Rámchandra* v *Dhondibá Krishnáji*, I. L. R. 4 Bom. at p. 154, referring to *Lalla Chunilal* v. *Savaichand*; 1 Morl. Dig. *Webbe* v *Lester*, 2 B. H. C. R. 52, and *Gouree Kant Roy* v *Girdhar Roy*, 4 Beng. L. R. 8 A. C.

(*c*) *See* Col. Di. Bk. II. Ch. IV. T. 58, Comm.

(*d*) *Merbái* v. *Perozbái*, I. L. R. 5 Bom. 268.

(*e*) *Máníklál Atmárám* v. *Manchershi Dinsha*, I. L. R. 1 Bom. 269.

(*f*) *Anath Nath Day* v. *A. B. Mackintosh*, 8 Beng. L. R. 60; *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Calc. at p. 117.

means of a trust. (*a*) The case at Bk. I. Ch. II. Sec. 7, Q. 17 below, was really one of an attempt to create a trust by a declaration subject to a suspensive condition, or by giving property to a son-in-law for the benefit first of his son and secondly of his daughter, should one or the other be born, and thirdly of his wife the grantor's daughter. The Sástri says that by thus deferring the complete abandonment of his ownership the grantor made the gift invalid.

Though the Hindû coparcener cannot in general dispose of the family estate, and the family lands are especially sacred, (*b*) so that the father desiring to dispose of land must obtain the assent of all his sons, (*c*) yet religious gifts within moderate limits may be made by a father (*d*) and his sons are bound to give effect even to his promise. (*e*) Property thus promised is indeed said to be inalienable, (*f*) but it must not exceed a certain reasonable proportion to the whole. (*g*) If this proportion is exceeded the father is presumed to be deranged, (*h*) though the presumption can be displaced. (*i*) As to mere promises, these, as has been said, are not now regarded as creating a legal obligation except when they have amounted to a contract supported by a consideration. The power of alienation for religious purposes (*j*) by the head of the family qualifies his general incapacity

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(*a*) *Tagore* case, L R S. I. A. at p 72.

(*b*) Yâjñ quoted Col. Di. Bk. II Ch. IV. T 13, 14.

(*c*) *See* above pp. 167, 168, and below, Bk. II. Introduction.

(*d*) Col. Di. Bk II Ch. IV. T. 2. See *Jaggat Mohinee's* case, 14 M. I. A. at pp 301, 302; *see* also *supra*, pp. 192, 193.

(*e*) Col. Di. Bk II Ch. IV. T 3.

(*f*) *Ib.* T. 4.

(*g*) *Ib.* T. 11, 12.

(*h*) *Ib.* T. 15, Comm.

(*i*) As to religious gifts by a woman, *see* on Strîdhana below.

(*j*) Religious and charitable purposes are coupled in the Hindû authorities, and the example given is "a reservoir of water or the like constructed for the public good." Vîram. Tr. p. 250. Under this

to dispose of the immoveable estate, but Hindû ideas on this subject have been so much supplanted in the courts by those derived from the English law, that the general incapacity can hardly now be said to subsist when sons take the estate as assets for fulfilment of all the father's ordinary obligations. And he may sell the whole ancestral property or at any rate get it sold under a decree to pay his personal debts. (*a*) As a disposal of property even acquired by himself by a father which leaves his family unprovided for is by the Hindû law regarded as highly immoral and is absolutely prohibited, (*b*) it may be that the debts, the satisfaction of which out of the estate would almost exhaust it, may be treated as on that account not binding on the sons, should such a case be made for them. (*c*) The religious gift unless actually completed by delivery would now probably be regarded as void under Section 25 of the Indian Contract Act IX. of 1872, but a will necessarily operates without delivery, and dedications occur in almost every will of considerable property.

A gift to a wife by her husband is not invalidated by the joint interest of his sons in the property. This may be attributed either to the once complete dependence of the sons or to the father's administrative authority so long as it is not exercised to the obvious detriment of the family. But his discretion must not be exercised in a grossly partial manner:

definition rest-houses for travellers, groves of trees, roads, conduits, and schools, as well as the distribution of alms have in various cases been held to come. And the courts have exercised a liberal discretion, as in the Dakore temple case, in moulding the application of founders, bounty to meet changed circumstances.

(*a*) See *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321, 334; *Muttayan Chettiar's* case, L. R. 9 I. A. at pp. 143, 144; *Ponappa Pillai* v. *Pappuvâyangâr*, I. L. R. 4 Mad. 1; *Veliyammâl* v. *Katha*, I. L. R. 5 Mad. 61; above, p. 167.

(*b*) *See* Manu in Col. Dig. Bk. II. Ch. IV. T. 11; Yâjñ. *ib.* T. 16; Bṛihasp. T. 18.

(*c*) See the Section on Maintenance, and note (*h*) on next page.

his bounty to his wife must not exceed a reasonable proportion to the joint estate. (*a*) A promise of a provision is to be regarded by the sons as binding on them, (*b*) but a departure from reason and equity is not to be upheld. So in a case where a member of a united family dwelt apart and acquired property the Sástri said (*c*) he could not be allowed to convert it into Strîdhana by making presents of costly ornaments to his wife in fraud of his cosharers, though a woman's jewels are usually excluded from partition. A gift from her husband is usually taken by a wife (or widow) on the terms discussed below under Strîdhana, but when he is full owner he may give her a larger estate. (*d*)

A gift to a daughter is warranted by the same authorities as sanction one to a wife, (*e*) but the gift is for obvious reasons subject to a somewhat narrower limitation in the interest of the donor's family of which his daughter cannot in general remain a member. (*f*) A gift to a favourite son is to be respected though made out of the common property, (*g*) but no rank injustice is to be allowed, much less a donation by which one son is enriched while another is reduced to want. A man may not deal thus heartlessly even with his own acquisitions, (*h*) and as to the ancestral estate though according to the decisions he may go far towards

(*a*) *See* Vyav. May. Ch IV. Sec. X. paras 5, 6; and comp. Mit. Ch. I. Sec. I. para. 25.

(*b*) *Ib.* para. 4; Vîram. Tr. p. 228.

(*c*) Q. 315 MS. Ahmednugger, 13th June 1853.

(*d*) See *Koonjbehari Dhur* v *Premchand Dutt*, I L. R 5 Calc. 684.

(*e*) *See* Coleb. Dig. Bk. V. T. 354; Dâya Bhâga, Ch. IV. Sec. 3, paras. 12, 15, 29.

(*f*) A gift in trust for a daughter out of ancestral property was annulled at the suit of the son. *Ganga Besheshar* v. *Pirthee Pál*, I. L. R 2 All 635.

(*g*) *See* note (*e*). As to an illegitimate, Bk. I. Ch. VI. Sec. 2, Q. 2.

(*h*) Co. Di. Bk. II. Ch. IV. T. 11, 12, 14, 16, 18, 19; Bk. V. T. 26, 27, 33; Vîram. Tr. p. 251; *Baboo Beer Pertab Singh* v. *Maharaja Rajender Pertab Sahee*, 12 M. I. A. 1.

dissipating it he cannot dispose of it unequally amongst his sons. (*a*)

The independent power of dealing with his self-acquired property assigned to the father by Mit., Ch. I., Sec. 5, pl. 10 (now established), seems to be intended to illustrate the incompetence of the sons to exact a partition of such property by bringing into prominence their incapacity to control the father's authority as manager, without contradicting the special rules governing a partition actually made by the father, prescribed in Ch. I., Sec. 2 (*b*). Nârada, Pt. 1, Ch. III., paras. 36, 40, would apparently be explained or limited in the same way as Bṛihaspati; and the Smṛiti Chandrika, Ch. VIII., paras. 21 *ff*, dwells on the difference between "Svâmya" and "Svatantratâ," *i. e.* between "ownership" and "independence." In the father's acquisitions, Devâṇḍa Bhaṭṭa says, the sons have "Svâmya," though the father alone has "Svatantratâ"; in ancestral property the sons have both. Kâtyâyana says that the son has not "Svâmya" in the father's acquisition, but this is explained (para. 22) as a mere looseness of expression; and that it was not considered by its author to justify an irregular distribution may be seen from the Vîramitrodaya, p. 55 compared with p. 74. In *Sital et al* v.

(*a*) *Durga Persad* v. *Keshopersad*, I. L. R. 8 Cal. 656, 663. See *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, I L. R 1 Bom. 561; S. C. L R. 7 I. A. 181, and *infra*, Bk. II. Ch. I, § 2, Q 5, and Introd.

(*b*) So also the Vyav. May Ch. IV. Sec. 1, para. 14; Sec. 4, pl. 4-8 (Stokes, H. L. B. 48, 49); Vîram. Transl. pp. 65, 66.

The principle adopted by the Smṛiti Chandrika of a complete ownership arising immediately on birth accompanied by an exclusive power of administration in the father during his life is contested by Jimûtavâhana and Raghunandana, who argue that the ownership of the son arises only at the father's death. Mitramiśra refutes this contention. (Vîram. Transl. pp. 7–15). At p. 45 he insists on the distinction between ownership and independence in the disposal of property. The different senses of such words as *swamitwa* have caused as much controversy amongst Indian lawyers as those of *dominium* in Europe.

Madho, (*a*) it was held that a father might bestow a house acquired by himself on one son to the exclusion of the other. The learned judges were of opinion that the Mit. Ch. I. Sec. 1, pl. 27, (*b*) conveys only a moral prohibition against the alienation of self-acquired immoveable property. That passage, however, with which the exposition in the Vivâda Chintâmani, page 309, may be compared, declares the participation of sons, not only in the ancestral, but also in the paternal estate, and paragraphs 28-30, (*c*) show clearly, as it seems, that the father's power is there intended to be legally restricted, except in the particular cases specially provided for. (*d*) But for this, indeed, para. 33 (*e*) would be almost unmeaning; and the next paragraph (*f*) which Vijñâneśvara explains (Sec. 5, pl. 1, *ibid.* 392), as relating to self-acquired property, would be superfluous, if the father could give any share he pleased to any son. So too would the permission (Sec. 5, pl. 7) to the father to reserve two shares of such property for himself in making partition *suo motu*. Sec. 5, pl. 10 (*g*) restates the son's right in the father's as well as the ancestral property; and the object of the discussion at that place being to restrict the scope of the texts affirming the son's dependence, not to extend the father's power, it would not be reasonable to extract from it a contradiction to the principles in Sec. I., which it is plain, from para. 33 of that Section, that the author did not intend. (*h*) His view was apparently that which Devâṇḍa Bhaṭṭa adopt-

(*a*) I. L. R. 1 All. 394.

(*b*) Stokes, H. L. B. 375.

(*c*) Stokes, H. L. B. 376.

(*d*) In the Panjâb it appears that an owner cannot in some districts give away his immoveable property whether ancestral or self-acquired without the consent of his sons or male gotraja-sapiṇḍas. *See* Panj. Cust. L. Vol. II. pp. 164-166.

(*e*) *Ibid.* 377.

(*f*) Sec 2, para. 1, *ibid.* 377.

(*g*) *Ibid.* p. 393.

(*h*) *See* the Smṛiti Chandrikâ, Ch. II., Sec. 1, para 22; Dâyakrama Sangraha, Ch. VI. para. 11, 14 (Stokes, H. L. B. 510, 511).

ed,—a view illustrated by the cases of women and minors,—ownership with joint executive power as to ancestral, without it as to paternal property, vested in the sons in virtue of their sonship. (a) At the same time Nârada excludes a parent's gift from partition. Mit. Ch. I. Sec. 1, p. 19, (b) and Yâjñ. (II. 124), says "Whatever property may be given by the parents to any child shall belong to that child." So also Vyâsa in Coleb. Dig. Bk. V. T. 354. This is allowed by Vijñâneśvara to qualify the rights of other children (Mit. Ch. I. Sec. 6, pl. 13, (c) and would possibly, notwithstanding Ch. I. Sec. 2, pl. 13, 14(d) cover the cases of *Sital* v. *Madho*, and *Baldeo Das* v. *Sham Lal*. (e) These assign to the father a power of disposition even over the ancestral property, qualified only by the son's right to call for partition, which does not seem reconcileable with Mit. Ch. I. Sec. 1, pl. 29 (f) or with Sec. 5, pl. 9 (*ibid.* 393). (g) The passage quoted from Coleb. Dig. Bk. V. T. 433, Comm.: "They (the sons) have not independent dominion, although they have a proprietary right," is a statement of the supposed doctrine of Vâchaspati Miśra as to self-acquired property, in an argument which construes the text, Yâjñ. II. 121, Coleb. Dig. Bk. V. T. 92, in a sense different from that insisted on in the Mit. Ch. I. Sec. 5. (h)

Prof H. H. Wilson observes on this subject, in Vol. V. of his Works, at p. 74—"We cannot admit either, that the owner has more than a contingent right to make a very

(a) *See* Colebrooke at 2 Str. H. L. 436.

(b) Stokes, H. L. B. 373.

(c) Stokes. H. L. B. 396; comp. *supra*, p. 194.

(d) Stokes, H. L. B 380.

(e) I L R 1 All. 394 and 77.

(f) Stokes, H. L. B. 376.

(g) *See* 1 Str. H. L. 122; 1 Macn. H. L. 14.

(h) Stokes, H. L. B. 391. *See* Coleb. Dig. Bk II. T 15, Comm.; Vivâda Chin. pp. 225, 72, 76, 79, 250, 309; *B. Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I A. 1; *Bhujangráv* v *Málojiráv*, 5 Bom. H C. R. 161, A. C. J.; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, I. L. R. 1 Bom. 561; 2 Macn. H. L. 210; *Mahasookh* v. *Budree*, 1 N. W. P. R. 57. As to care for a son unborn, *see* 6 M. I. A. at p. 320.

unequal distribution of any description of his property, without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable, it would not of course be allowed to operate. We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice or injustice as shall authorise its revisal. It should never be forgotten in this investigation, that wills, as we understand them, are foreign to Hindû law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid.* p. 71—" It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jîmûtavâhana; 'therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one: but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,' Dâyabhâga, p. 60. (*a*) This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immoveable property if self-acquired, or a coparcener of his own share before partition: but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. 'Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jîmûtavâhana's assertion of this doctrine, and the doubt cast upon it by its expounders, Raghunandana, Śri Kṛishṇa Tarkâlankâra, and Jagannâtha is wholly gratuitous. In fact

(*a*) Stokes, H. L. B. 207.

the latter is chiefly to blame for the distinction between illegal and invalid acts."

§ 9.—THE TESTAMENTARY POWER.

"In Hindû Law," as Sir H. S. Maine says, (*a*) "there is no such thing as a true will. The place filled by Wills is occupied by Adoption." The learned author shows that a will when invented by the Romans "was at first not a mode of distributing a dead man's goods, but one amongst several ways of transferring the representation of the household to a new Chief." (*b*) The subordinate position to which amongst the Romans the Religious was reduced, as compared with the Civil, law, distinguishes it from the Hindû system. In the latter, too, the *patria potestas* has never perhaps been allowed to go the extravagant lengths which were long tolerated by the Romans. (*c*) A man's wife and his child are his "own," but in a sense, as Jagannâtha explains, quite different from that in which property is his own. (*d*) The equal right of sons in the patrimony being recognized, and the right to

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(*a*) Anc. L. Ch. VI p 193 (3rd Ed). *See* Col. Di. Bk. V. Ch. I. Art I. Note. *See* above, p. 181, and the remark of H H Wilson, p. 212.

(*b*) *Op. cit.* 194. In England the estate seems in early times to have been completely represented by the heir. The system of tenures made a universal succession impossible when different feuds were held from different lords, but the executors still take a qualified "universitas" in the personal estate.

(*c*) *See* Nârada, Pt. I. Ch. III 36 ss. Ownership of property was at least very early distinguished by the Hindûs from the relation of a father to a son. *See* Vyav. May. Ch. IV. Sec. I. paras. 11, 12 ; Ch. IX. para. 2. The destruction or exposure of infants, especially of females, was disapproved perhaps, but tolerated without severe censure in both Greece and Rome. The sacredness of the human being as such is a Christian doctrine; but mere humanity has in this respect given to the Hindû ethical system a great advantage over classical paganism or the defective civilization of China. *See* Terence, Heaut, IV. I. 22 ; Schoeman, Ant. Gr. p. 501, 104 ; Manu IX. 8, 45 ; Coleb. Dig. Bk. I. Ch. V. T. 188, 219.

(*d*) Col. Dig. Bk. III. Ch. IV. T. 6, 7, Comm.; Vya. May. *loc. cit.*

subsistence of all at any rate who are under the *potestas* or lordship of the head of a family, (*a*) he is not allowed as he was at Rome and at Athens, too, to reduce them to want by selling or otherwise disposing of the estate. (*b*)

The first intention of wills at Rome was probably to provide successors when natural heirs failed, then to provide for members of the family excluded by the rigorous provisions of the law of inheritance from their due share in a testator's property; it was only as a corrupt abuse that they were employed to disinherit the heirs, a purpose considered so unnatural and unlikely that it had to be expressed explicitly in order to obtain effect. (*c*) At Athens there seems to have been full power of alienation by a householder *inter vivos* ; (*d*) but he could not by will disinherit his heirs—not even his daughter as heiress—though he could practically bequeath her and the estate together to some one who would take her as wife. The English law, a century after the Conquest, disallowed a will or a death-bed gift of the patrimony without assent of the heir, (*e*) and regarded it as inseparably united to the

(*a*) Col. Dig Bk. II. Ch. IV T. 11, 12, 15, 18, 19, Comm. ; 26 Comm. ; Yâjñ, II. 175 ; 2 Str. H L 16 For the case law, *see* Bk. II. Introd.

(*b*) In Attica the older law seems like the older Hindû law to have allowed mortgage, or rather a *vivum vadium*, but not sale, and in general "a remarkable recognition was shown of the necessity of guarding against the sub-division of property, of maintaining each family in possession of its ancestral estates." *See* Schoeman, Ant. Greece, pp. 323, 104. Under the earlier English as under the Hindû law an interest of the son even in purchased lands was recognized so that the father could not wholly disinherit him. *See* Glanv. p. 142 (Beames's Transl.) ; Mit. Ch. I. Sec. I. para 27 ; 2 Str. H. L. 10, 12.

(*c*) Maynz, Cours de Droit Romain, III 236 ss. Comp. Vyav. May. Ch. IX. paras. 6, 7 ; Col. Di Bk. II. Ch. IV. T. 15 Comm. Perhaps, as under some of the Barbarian Codes, no mode could be devised for the alienation of the patrimony which did not take the guise of an heirship replacing the real one.

(*d*) *See* Smith's Dict. of Ant. Tit. Heres.

(*e*) Glanville, pp. 140, 141, 165. Blackstone approved the restrictions, 2 Comm. 373.

family. "Si bocland habeat quam ei parentes dederint, non mittat eam extra cognitionem suam." (*a*) The earlier ideas still prevail amongst the Hindûs. They still regard with horror the disinheritance of a son unless he has proved himself an enemy of his father, from whose celebration of the Śrádhs no spiritual benefit is likely to arise. (*b*) Failing a son by birth the simple expedient of adoption provides one who can equally rescue his adoptive ancestors from the vexations of "Put." Even in the absence of a son there is an elaborate and far-reaching scheme of succession provided by the law which disposes of the estate, and at the same time provides for the sacrifices which it was the part of the deceased owner in his life to maintain, and which after his death he is entitled to share. The need for a universal successor created by appointment having thus not been seriously felt, ingenuity has not been stimulated to furnish the appropriate remedy. It would be seldom indeed that an heir would not be forthcoming; the duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property, (*c*) and a system of free testamentary disposition tends to lessen those pious grants for religious and charitable purposes to which a proprietor resorts rather than leave his estate quite ownerless, and by which he at once improves his own chances of comfort in the other world and the means of comfort in this world for some members of the most revered and influential caste. (*d*)

(*a*) Ll. Hen I. Cap. 70.

(*b*) Col Dig. Bk. V. T. 318, 320, Comm.

(*c*) *See* Nárada, Pt. I Ch. III. 22, 25; Vyav May. Ch. V. Sec. IV. para. 12—17; and Comp. Glanv Ch. VIII.; Bract. 61 a.

(*d*) Col. Dig. Bk. II. Ch. IV. T. 35, 36, 41, 42, 64.

The English law as to superstitious uses is not in force amongst Hindûs. See *The Advocate General* v. *Vishvanáth Átmárám*, 1 Bom. H. C. R. IX. App., where this subject is elaborately discussed. Several cases of the enforcement of Hindû charitable trusts are referred to in the preceding article. Reference may be made to *Fátmábibi* v. *Adv. Gen.*, I. L. R. 6 Bom. 42, 50, for the principles governing this

The system of partition at the will of a son or other co-sharer must be admitted as another reason in the pretty wide region in which it was accepted why the necessity for wills did not become pressing. The emancipated son amongst the Romans was wholly severed from the family, was as an utter stranger to his father and his estate. In India the separating son must be endowed with a real or at least a fictitious share of the property accepted by him as his fair portion. If a general partition has been made he retains a right of inheritance. Inheriting or not inheriting property he must offer sacrifices and pay his father's debts. (*a*) The looser and less tyrannical constitution of the family which the humaner spirit of the Hindûs has framed as compared with that of the fierce Roman spearmen has thus made most of the arrangements possible *inter vivos*, or provided for them after death, which would strike the householder as desirable. Custom, immensely influential even when not consecrated as a law, disapproves contrivances which would set aside its own sufficient rules ; and while the nearest successors cannot be excluded from the patrimony and its accretions, (*b*) the imposition of conditions and limitations

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class of cases. The Hindû law, like the Mahomedan law, instead of regarding religious grants with jealousy treats them with special favour, *see* above pp. 99, 197; Co. Di. Bk. II. Ch. IV. T. 35 ss.; though they are not to be used as a mere cloak for private perpetuities (above, p. 184, 200); nor must they be made a means of reducing the family to want (above p. 194; Co. Di. B. II. Ch. IV. T. 10, 19, Comm). The interest of the State in religious endowments is asserted (Nârada, Transl. p. 115), but no limitation as to time has been imposed on grants by the Hindû law analogous to the English statute 9 Geo. II. Cap. 36, or the Mahomedan law restricting the "marz ul mawat."

(*a*) Nárada, Pt. I. Ch. III. 11. *See* now *supra*, p. 80.

(*b*) The Mitâksharâ, Ch. I. Sec. I. para. 27, disenables a father from alienating even his own acquisitions of immoveable property without the sons' concurrence, as they have a right by birth in both the ancestral and in the paternal estate. See *Tara Chand* v. *Reeb Ram*, 3 M. H. C. R. at p. 55; though this doctrine has not been accepted in Bombay. For the present law, *see* p. 208, and Bk. II. Introd. § 7 A, 1 *a*, with the cases there cited.

creating rights in favour of persons who do not exist to take them is opposed to Hindû conception. (*a*) The now common direction that a property given or devised shall not be divided or alienated cannot be stronger than the ancient law to the same effect(*b*); and as the one is over-ridden by the conjoint volition of those interested, so too is the other. The immediate passing of a right from the creator of it to the beneficiary is as essential to its passing at all by force of the intention, (*c*) as under the English law the absence of any interval between a preceding estate and a remainder was requisite to make the latter good. The estate under the Hindû law like an English freehold at Common Law cannot be made to commence *in futuro*, but neither can it be conferred save on some existing subject of the right for whose benefit the entry or acceptance of the taker of the immediate particular estate may enure. (*d*) Conditions suspending the completion of a gift on a contingency make it inoperative save as a promise. (*e*)

These considerations as they show that an executory devise as distinguished from a remainder could not properly be received into the Hindû system, may serve to account for the absence of any general craving for a testamentary power. Such a power is looked on not as a part of the order of nature, as speculative jurists in Europe have regarded it, but rather as opposed to the order of nature; (*f*) and the great

(*a*) *See* above, p. 179; and *Ram Lal Mookerjee* v *Secretary of State for India*, L. R. 8, I. A. at p. 61.

(*b*) *See* Col. Dig. Bk. V. Ch. I. Art. I.

(*c*) Datt. Mim. Sec. IV. para. 3.

(*d*) Jagannâtha strives to make out that there can be a present gift of property not taking effect until after the donor's death. He employs two arguments for this purpose; but he does not deal with the question as even a possible one, of whether a bounty can be conferred on a non-existent person. *See* Col. Dig. Bk. II. Ch. IV. T. 43, 56, Comm.

(*e*) *See* above, p. 179.

(*f*) Comp. Plato, Laws, XI., and Grote's Plato, III. 434.

accumulations of separate property on which a will could safely be made to operate were until recently almost unknown. Unless, too, the testator could mould the estate more freely than by a mere remainder of the property acquired by himself, it would but insufficiently serve the purposes which in modern times people try to effect by means of executory devises. He might choose amongst the living the objects of his bounty, but could not, as English equity allowed, create rights opposed to his Common law.(a) Such a limited power not substantially exceeding what he could do by gift, with or without a reserve in his own favour, was hardly worth striving for.

The Roman law allowed a paterfamilias to name the continuator of his own civil personality. The English law now allows the creation of an estate without actual change of possession. Both are opposed to Hindû notions; the religious law prescribes who shall perform the sacrifices, who shall be heir or joint-heirs; it recognizes no actual transfer of an ownership of material objects without a change of the possession in the enjoyment of which the exercise of the right consists. Without this change there is an equitable right, but it avails not against actual delivery to one accepting without fraud.(b) But in the case of a will there can be no delivery to make the gift effectual. (c) An entry by a devisee is not the counterpart of a resignation by the preceding holder in which his volition to give up his right is

(a) *See* above, pp. 178, 180, 181.

(b) *Lallubhai Surchand* v. *Bai Amrit*, I. L R. 2 Bom. 299. *See* Index, Possession; Yâjn. II, 27; and Mit. *ad loc.*

(c) Jagannâtha argues for a sort of *constitutum possessorium* (*see* Savigny, Possession § 27) as being sufficient to complete a gift. *See* Col. Dig. Bk. II. Ch. IV. T. 13, Comm.; T. 56, Comm. But the right in these cases passes by a consentaneous volition of both parties which extends to a mental transfer and retransfer of the actual possession impossible in the case of a true testament, though effectual in the case of a *Mṛityu Patra*, as will be seen below. *See* Col. Dig. Bk. V. Ch. I. Art. I. Text cited from Dhaumya, and Commentary.

simultaneous with his releasing of the physical detention to the donee. There is hardly even a moral right, as the utterance of the volition has been deferred until it could not amount to a promise or engagement. A will therefore in the modern English sense could no more take effect than a gift without delivery. Piety might induce the heirs to conform to it, but there would not be any right *in rem* enforcible against them. (*a*) As a will therefore could neither serve its earlier purpose under the Roman law, nor its modern purpose arrived at by gradual development from that earlier one, it is not surprising that it should not have been invented or developed from the somewhat analogous instruments which were effectual because they conformed to the spirit of the Hindû law. A *donatio mortis causa* is recognized, and on this Jîmûtavâhana has attempted to found heritage as an implied gift by the owner; (*b*) but, as Jagannâtha observes, the comparison fails in as much as in heritage there is no surrender with a corresponding acceptance of the owner's property.

At present, as we have seen, a Hindû's power to dispose by will of whatever property was absolutely his own must be considered as finally established. (*c*) It is only necessary to bear in mind that he cannot defeat by will the rights which subsist independently of his wishes, (*d*) and that he cannot

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(*a*) Seisin being requisite to an effectual gift of land under the early English law, a testamentary disposition of it was invalid without the consent of the heir. Glanv. p. 140, 141. It will be remembered that Tacitus observes on the absence of wills amongst the Germans. Family and tribal rights took instant effect on the death of the late owner.

(*b*) Col. Dig. Bk. V. Ch. I. Sec. I. Art. I.

(*c*) *See* above, p. 181. This excludes a testamentary disposal of property held by others in common with the testator. *Vásudeo Bhat* v. *Venktesh Sanbhav*, 10 Bo. H. C. R. 139, 157; *see* also *Vrandávandás* v. *Yamunabái*, 12 Bo. H. C. R. 229, referring to *Gangabái* v. *Rámanná*, 3 Bo. H. C. R. 66 A. C. J.

(*d*) See *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, L. R. 7 I. A. at p. 194; *Vitla Butten* v. *Yamenamma*, 8 M. H. C. R. 6.

create interests or impose restrictions which the Hindû law does not recognize. Nor can the Hindû testator get rid of those claims to subsistence (*a*) as to which he is allowed a large discretion so long as he satisfies them at all, but which may be turned into defined charges when there is an attempt to evade them altogether. (*b*)

Though wills are unknown to the Hindû law, mṛityu patras are common. These are of the nature of a conveyance to operate after the death of the grantor, (*c*) or immediately subject to a trust in his favour for his life. (*d*) Devises of land under the Statute of Wills, 32 Hen. VIII., c. 1, were formerly regarded as of a similar character. The will was of the nature of " a conveyance passing the freehold according to the intent or declaring the uses to which the land should be subject." (*e*) Similarly under the Roman law " the mancipatory testament," as it may be called, differed in its principles from a modern will. As it amounted to a conveyance out and out of the testator's estate it was not revocable. There could be no

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(*a*) *See* Col. Dig Bk. II Ch. IV. T. 7; H. H. Wilson, Works, V. 68.

(*b*) *See* pp. 79, 80, and the Section on Maintenance; *Narbadabái* v. *Mahadev Narayan*, I. L R. 5 Bom. 99, and the references

(*c*) *See* Col Dig. Bk II. Ch. IV. T. 43, Comm ; 2 Macn H. L. 207.

(*d*) The one quoted in *Rágho Govind Parájpe* v. *Balvant Amrit Gole*, P. J. for 1882, p. 341, provides for payment of the grantor's debts, and sets forth a provision for his declining years as a purpose in view, but does not explicitly impose this as an obligation on the grantee. In the one quoted in *Rámbhat* v. *Lakshman Chintaman*, I. L. R. 5 Bo 630, there is a conveyance to the donee coupled with the reservation, "As long as I live I will take the profits and you should maintain me as if I were a member of your family." It was held that this was a conveyance subject to a trust. The grantor afterwards sought to get the deed set aside. He adopted a son *pendente lite*, and the son was allowed to sue the grandson of the donee who had obtained a decree in his favour and possession in the suit brought by the donor. It was held, however, that the gift, as the deed contained no power of revocation, could not be recalled.

(*e*) Spence, Equity Jurisp. vol. I. p. 469; 6 Cr. Dig. 6.

new exercise of a power which had been exhausted. (*a*) Wills were allowed by the XII. Tables; and the essential ceremonies were gradually modified by the exercise of the praetorian equitable jurisdiction, as in England the Court of Chancery showed "unbounded indulgence to the ignorance, unskilfulness, and negligence of testators." (*b*) It is probable that the mṛityu patra of the Hindûs would under the influence of equitable doctrines have received a corresponding development from the English courts. Thus though Jagannâtha insists on a transfer of possession, or at least the semblance of a transfer to make the donation good, yet means would no doubt have been found to give effect to the transfer without an entry. That a devise should "import a consideration in itself," would not be necessary according to Hindû notions, (*c*) but a change of possession is essential to a valid gift, (*d*) and this has to be dispensed with in giving effect to an ordinary will as now construed. But he who takes possession may conformably to Hindû principles take it for himself and as agent for another, or in trust for another as by way of remainder; and in this way estates for any life in being, as they could be created by ordinary grant and acceptance, could be created by mṛityu patra. (*e*) In the Presidency towns the ready-made system of England has in a great measure superseded the indigenous instru-

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(*a*) Maine, Anc. Law, Ch. VI p. 205 (3rd Ed.). *See* Clark, Early Rom. Law, p. 117 ss.; Mommsen, Hist of Rome, Ch. XI. Engl. Transl. vol. I. p. 164.

(*b*) Spence, *op. cit.*

(*c*) Still an undivided co-sharer cannot dispose of his share by gift or bequest. See *Lakshmishankar* v. *Vaijnâth*, I. L. R. 6 Bom. 25; *Râmbhat* v. *Lakshman*, I. L R. 5 Bom. 630. But that is on account of the inefficacy of his single will in dealing with what is not his sole property. *See* Mitâksharâ, Ch. I. Sec. II. para. 30; Coleb. Dig. Bk. II. Ch. IV. T. 28, Comm.

(*d*) Yâjñ. II. 27; Nârada, I. Ch. IV. paras. 4, 18; *see* Transl. pp. 23, 25, and Corrigenda; Coleb. Dig. Bk. II. Ch. IV. T. 32, and Comm.

(*e*) Comp. *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at p. 61.

ment. Still even there mṛityu patras occur, at least in the city of Bombay, and in the mofussil they are common. Many which come into the courts are of an age that negatives the supposition of their being a mere adoption or imitation of the English will. (*a*) They are construed with as little regard as may be to technical rules, but the trust or use created by such an instrument is not now deemed void or revocable on a failure of the trustee to fulfil his duty: (*b*) he is instead made to do the duty he has accepted. (*c*) The greater power and expertness of the courts under the British rule make a complete satisfaction of justice possible in this way, or at least a greater approximation to it than by the strictly Hindû method of taking back the property when the promise or alleged promise upon which it was given and taken has been falsified. (*d*)

As to the form, a nuncupative will is effectual; (*e*) and so is a parol revocation. (*f*) But as a will is a unilateral document

(*a*) As some have accounted for the testament used in Bengal. See Maine, Anc. Law, p. 197 (3rd Ed.). Wills became common in Bengal really because of the view held there that each parcener in a united family had a distinct though undivided portion and could dispose of it by gift and consequently by will. *See* Coleb. in 2 Str. H. L. 431; Dâyakrama Sangraha, Ch. XI

(*b*) This is not in any way inconsistent with the principles of the Hindû law. *See* the distinction drawn by Jagannâtha between the property held by a husband in trust for his wife and the subordinate dependent property of the wife in her husband's ordinary estate. Col. Dig. Bk. II. Ch. IV T. 28, Comm.; T. 30.

(*c*) *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(*d*) Nârada, II. IV. 10; Col. Dig. Bk. II. Ch. IV. T. 53 Comm., T. 56 Comm., T. 65 Comm.; Vivâda Chintâmani, pp 83, 84; Vyav. May. Ch. IX. 6.

(*e*) *Bhagván Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641; *Mancharji Pestonji* v. *Narayan Lakshumanji*, 1 Bom. H. C. R. 77 (2nd Ed.) and the cases there referred to.

(*f*) *Maharaj Partab Narain Singh* v. *Maharanee Soobha Kooer et al*, L. R. 4 I. A. 228. For the statute law, *see* below.

According to the English Common Law lands devisable by custom might by custom be devised orally, Co. Lit. 111 A., and this continued

operating on the principle of a gift, it would seem that where the statute law has not prescribed a mode of authentication the mode followed in analogous cases ought to be followed. In *Rádhábái* v. *Ganesh* (*a*) it was ruled that the common direction given in the Vyav. May. Ch. II. § 1, para. 5, does not apply to a Hindû's will as that is a document not recognized by the Hindû law. That direction is that a document recording a purchase, gift, partition, or the like should either be a holograph of the person to be bound by it, or else signed by him and by witnesses including the writer, who are intended to attest not merely the signature of the party but the transaction and the writing itself which is usually, though not always, read out to them. (*b*) This was formerly the case in Europe also. (*c*) Custom, however, is recognized as governing the mode of proof, (*d*) and by mutual assent of the parties a document may be proved by a single attesting witness. (*e*)

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until by the Statute of Frauds (29 Car. II. Ch. 3) writing attested was made necessary. For personal property a nuncupative will sufficed till long afterwards. The law now regulating English wills is 7 Wm. 4 and 1 Vic. c. 26.

(*a*) I. L. R. 3 Bom. 7.

(*b*) Col. Dig. Bk. II. Ch. IV. T. 33, Comm. *See* Mit. in Macn. H. L. 269 ss.

(*c*) *See* Laboulaye, Hist. du Dr. de Prop. p. 381; Bracton, 38, 396; Co. Lit. 6 A. In Canciani's "Leges Barbarorum," vol. II. p. 475, are two Lombard formulas, one showing that land could not be sold except under absolute necessity, and the other that a conveyance was established by reading it out in Court and calling on the by-standers to witness the transaction.

(*d*) *See* Col. Dig. Bk. I. Ch I. T. XIII. ss.; Bk. II. Ch. IV. T. 33, Comm.; and the Śâstri's response in *Doe* v. *Ganpat*, Perry's Or. Ca. at p. 137.

(*e*) Vyav. May. Ch. II. § III. para. 3.

The Roman *testamentum Comitiis Calatis*, even when oral, as it seems at first to have often been, was a very ceremonious proceeding, checked by the presence of priests and tribesmen. Wills being now recognized it may be expected that the forms attending them will ere long become uniform, as the statutes intend. *See* the case cited note (*b*) next page.

In the Presidency of Bengal and in the cities of Madras and Bombay, Act XXI. of 1870, by making Sec. 100 of the Succession Act, X. of 1865, applicable to the Wills of Hindûs, has rendered a bequest invalid "whereby the vesting...... may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age the thing bequeathed is to belong." This contemplates a power of disposition extending further in time than the Hindû law allows, as by that some one in existence at the testator's own death must be the ultimate legatee.(a) Section 102 of the Succession Act makes inoperative a bequest to a class which may be not finally completed within the prescribed time, and Section 103 annuls a bequest made to take effect after or on failure of a prior bequest which the Act declares void. (b) These are not rules of the Hindû law, and are rather opposed to its principles, which, once its conditions have been satisfied, point rather to those who are capable of benefiting by the intended bounty being taken as the class intended rather than to its failing altogether, and to a remoter bounty being accelerated rather than destroyed by the nullity of an intermediate one, as the delivery in a gift to any other than the donee is conceived as made to him as agent for the donee conceived as existing; but the rules must be all the more carefully borne in mind by the student. It has been held (c) that the effect of Act XXI. of 1871 is to make the rule of construction laid down in the *Tagore* case inapplicable to Hindû Wills made subsequently to the Act, but this has been reversed. By Sec. 3 of Act XXI. of 1870 it is said "that nothing herein contained shall authorize

(a) *See* the *Tagore* Case, L R. S I A. 47; S C 9 Beng. L R. 377; *Sir Mangaldás Nathubhoy* v. *Krishnábái*, I. L. R. 6 Bom. 38.

(b) Comp. the observations of Pontifex, J, in *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Calc. at pp. 388 ss., and in *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Calc. 262, with *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Calc. 157.

(c) *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Calc. 157, 637.

a testator to bequeath property which he could not have alienated *inter vivos* or to deprive any person of any right of maintenance.........And that nothing herein contained shall vest in the executor or administrator.........any property which such (deceased) person could not have alienated *inter vivos*." "And that nothing herein contained shall authorize any Hindû ....to create in property any interest which he could not have created before the 1st September 1870."(a) By Sec. 4 of Act V. of 1881, however, "all the property" of a person deceased vests in his executor or administrator, "but nothing herein contained" it is said, "shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person." (b) Instead of the power of alienation *inter vivos*, therefore, we must now look to survivorship for determining whether an executor takes the property of a testator. By Sec. 4 coupled with Secs. 2 and 3 it appears that the estate may be vested in an executor who at the same time cannot obtain probate. The will, too, if made outside the cities of Madras and Bombay and disposing of property outside those cities, may be truly such within the definition given in the Act, at the same time that none of the provisions of Act X. of 1865 apply to it, which under Act. XXI. of 1870 apply to wills made in those cities or disposing of immoveable property within them. It will hence be necessary in the mofussil to consider what under the Hindû Law amounts to "a legal declaration of the intentions of the testator with respect to his property," without regard to the provisions of Act. X. of 1865, and apparently to recognize all his property as vesting in the

(a) These provisions govern Secs. 98, 99, 101 of the Succession Act. *See* the cases note (b) p. 224.

(b) Previously it was said (for the Presidency Towns) "The Statute 21 Geo. III. C. 70, puts an end to the title of the administrator, as such, when set in competition with the right of the heir by Hindû law, and when it is in proof that all the parties are Hindûs." *Doe dem Goculkissore Seat* v. *Ramkissno Hazarah*, 1 Morl. Dig. p. 246; and see *ibid.* 245; 1 Taylor and Bell 10.

executor (*a*) except such as goes to his co-members of a united family or others taking by survivorship.

Within the presidency towns or under a will made within them it would seem that the creation of a perpetuity for any purpose whatever is prevented by Sec. 101 of Act X. of 1865, while in the mofussil a will made there may create for religious or charitable purposes a perpetuity subject only to the conditions already noticed. (*b*) The statute law on the points just discussed is, however, so complicated and contradictory in principle that it is not possible to say with confidence what view may be taken by the Courts after argument. Under these circumstances it is perhaps fortunate that as lately ruled, (*c*) the law does not oblige a person claiming under a will in the mofussil to obtain probate or to establish his right as executor, administrator or legatee before he can sue in respect of any property which he claims under the will in the mofussil.

The effect of a will on the mutual relations of those taking under it has already been partly considered. (*d*) In *Tara Chund* v. *Reeb Ram,* (*e*) an illegitimate half-caste, devised property which his European father had given to him, to his three sons, who took their several shares as separate estates. On this Holloway, J., says " We can see no ground whatever for doubting that the property which came to the first defendant

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(*a*) *i. e.* where there is one; and where there is not, in him who obtains administration. Act V. of 1881, Secs. 4, 14.

(*b*) *Tagore* Case, L. R. S. I. A. at p 71.

(*c*) *Bhagvánsang Bhárúji* v. *Becharđás Harjivandás,* I. L. R. 6 Bom. 73. If he sues as executor or administrator he must of course set forth his qualification. *See* Civ. Pro. Cod. Sec. 50. As a legatee where probate is possible he will apparently be bound by the condition in Section 187 of the Succession Act, as probate and administration operate from the moment of the testator's death to vest the property in his representative thus constituted. *See* Act V. of 1881, § 4, 12, 14.

(*d*) Above, pp. 195, 196.

(*e*) 3 Mad. H. C. R. 50.

from his father is, as he himself treats it, ancestral property. It seems to us that there is no reason whatever in the contention that its quality was changed by his choosing to accept it apparently under the terms of his father's will. Still less ground would there be for the contention that his acquiescence in that mode of receiving it would vest in himself a larger estate than he would have taken by descent. On what principle can he be conceived capable, by any act of his, of depriving his children of a right given to them by the doctrines of the Mitâksharâ at the very moment of their birth? The argument, therefore that this property is unsusceptible of partition, because self-acquired, seems to us to fail entirely."

The property, however, if the Hindû law was properly applicable, as being a gift, ranked as self-acquired property of the half-caste father. It was only as such that he could dispose of it; but as such he could and did dispose of it, and the three sons taking separately instead of jointly took by the will, that is according to the Hindû law by a gift recognized by the Courts as effectual though wanting one of the ordinary requisites. There was no partition amongst the three brothers; that would have indicated inheritance, and their shares would have been inherited property; its absence shows that they took under the will only, and held their shares as property devised or given. Such property ranks for the purposes of the Law of Partition as self-acquired, and it would seem that although the father (defendant) could not dissipate it so as to leave his son (the plaintiff) destitute, he could not be called on to divide it against his will. On his death his sons would inherit equally, and an attempt to disinherit one of them without good cause would expose the will to a risk of being set aside as inofficious according to the recognized principles of Hindû law.(*a*) In the case of *Vinâyak Wâsoodev* v. *Parmânundâs* (*b*) Sir C. Sargent, J., held that where two brothers took equal shares in

(*a*) *See* Mit. Ch. I. Sec. II. para. 14.

(*b*) Unreported.

property under their father's will, they constituting with their father an undivided family, there would be great difficulty in holding that they took as heirs an estate different from what in the ordinary course would have descended to them in that character. The father had been one of three brothers carrying on business in partnership, and two of the three had died after making wills, by which their shares came to the third. They were held to have been separate in estate, and the survivor of the three to have taken the whole as self-acquired property. He could therefore deal with it at pleasure, and his bequest of a lakh of rupees in charity was upheld. This judgment was affirmed in appeal, and an appeal to Her Majesty in Council has been dismissed.

The extent to which a control of the devolution and of the enjoyment of property bequeathed by will is permitted, has been already discussed. (a) The construction of testamentary instruments executed by Hindûs is governed by the Hindû law, and on this point the Judicial Committee have said "The Hindû law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, (b) and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the

(a) *See* above, pp. 178, 181.

(b) See *Barlow* v. *Orde*, 13 M. I. A. 277; *Moulvie Mahomed* v. *Shavukram*, L. R. 2 I. A. 7; and comp. *Maniklal* v. *Maniksha*, I. L. R. 1 Bom. 269.

testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."(a)

Similar principles are laid down in the *Tagore* case (b) in which it is further said (c) "The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred." As a will on the principle of furthering a bountiful intention of the testator receives a benignant construction as compared with the narrower construction of a document in which benevolence has had no part, (d) words primarily importing male lineal succession may be interpreted as conferring an estate of general inheritance, and when it is consistent with the language employed, a time will be chosen for the commencement of a future estate which will give effect to it, rather than frustrate the apparent intention. (e) Effect cannot be given to a devise merely to "dharm," that term being too vague, (f) but a bequest for specific chari-

(a) *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I. A. 550–551. A will expressed in English must be construed according to the intention as gathered from the English words, not according to the possible sense of the Vernacular words that may have been used in the instructions. See *Gangbai* v. *Thavar Mulla*, 1 Bom. H. C. R. at p. 75. English expressions are, it would seem, to be construed according to the English law. See *Martin* v. *Lee*, 14 M. P. C. 142. But regard must be had in the case of immoveable property to the rule that the language is to be applied according to the law of its place.

(b) *Tagore* case, L. R. S. I. A. at pp. 64, 65, ss.

(c) *Ibid*, p. 79.

(d) *Doe dem Cooper* v. *Collis*, 4 T. R. 294.

(e) See *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. 46, 62; S. C. I. L. R. 7 Calc. 304.

(f) *Gangbai* v. *Thávar Mulla Mulla*, 1 B. H. C. R. 71.

table purposes recognized as beneficial by the Hindû law will be maintained, as *ex. gr.* "for the performance of ceremonies and giving feasts to Brahmans." (*a*) The words "putra pautrádi krame" include female heirs as well as male descendants of a female. A bequest, however, which has for its object to tie up the corpus and give the profits to male descendants is invalid. (*b*)

§ 10.—MAINTENANCE.

In the frequent changes of fortune which occur under the British rule in India giving a new and wider field to individual activity, the claims of destitute dependants of families become more numerous and pressing, at the same time that the general prosperity is advancing. The loosening of old ties makes some members of the Hindû community less ready than formerly to provide for their indigent relatives, while the latter, advised by persons having some acquaintance with the law and the decisions of the Courts, are led to prefer their claims in a more peremptory and inconvenient form than would at one time have been thought of. The family obligation resting on sacred and affectionate associations could not be shaken or too rigidly defined without a good deal of undue harshness and encroachment being attempted on one side or the other. Hence the litigation arising out of claims for maintenance has become frequent as well as troublesome—troublesome chiefly because of the want of any exact boundary in this province between the duties enforced by the law and those imposed only by positive morality. Widows are the most frequent suitors for maintenance, owing to their helpless position during coverture and the restrictions to which they are subjected in

(*a*) *Lakshmishankar* v. *Vaijnáth*, I. L. R. 6 Bom. 24; *Dwárkanáth Bysack* v. *Burroda Persad Bysack*, I. L. R. 4 Cal. 443 ; a *çy près* disposal of a fund bequeathed for charity would be quite in accordance with the Hindû law. Comp. *Mayor of Lyons* v. *Adv. Gen. of Bengal*, L. R. 3 I. A. 32; and the case I. L. R. 4 Calc. 508.

(*b*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I. L. R. 7 Calc. 269.

their widowhood, but claims of children on parents as well as of parents on children, and other members of families on their co-members are becoming common enough to make it desirable to bring the principal decisions together and compare them with what can be gathered from the acknowledged sources of the Hindû law on the same class of subjects.

On the subject of the maintenance of widows, three questions have been judicially discussed since the last edition of this work was published:—(1) Whether the right to maintenance can be asserted by a widow of a separated member. (2) Whether in a united family the right is dependent on the possession by those from whom maintenance is sought of ancestral property or of property inherited from the deceased husband. (3) Whether, when the right exists, the members of the husband's family can in ordinary cases satisfy it by affording board and residence to the widow as a member of their household, or must at her option provide her with a separate income.

As to the first of those questions it is to be observed that a partition does not effect such a total severance amongst the members of a Hindû family that they stand thenceforth in the relation of mere strangers to each other. They may reunite again: they have mutual rights of succession in which fuller blood relationship between severed brethren counterbalances the effect of reunion between those of the half-blood; (a) the obstacles to marriage still subsist between their families; in obsequies, mourning and the ceremonial impurity arising from death, they are still relatives as they were before the partition. A woman by marriage leaves her own gotra of birth to enter that of her husband. Her closest connexion thenceforward is with his family; (b) whose sacrifices she shares and who succeed ultimately to

(a) Yâjñ. II. 139, and Vijñâneśvara's Commentary; Mit. Ch. II. Sec. IX. *See* Col. Dig. Bk. V. T. 433, Comm., and *Ramappa Naicken* v. *Sithamál*, I. L. R. 2 Mad. 182.

(b) *See* Vasishṭha, IV. 19.

any property which she as a widow may inherit. With her own family her connexion is altogether of a remote and secondary character. It is not destroyed, as the humane spirit of the Hindûs fordids an entire renunciation of the ties of blood, and in practice, at least amongst the lower castes, the strong mutual affection of the wife and her parents is a source of much trouble to husbands, but in the law an inexorable logic supported by sacred sanctions transfers with her person her duties and her protection to the family of marriage. In *Sri Viráda Pratáp Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb* (a) the Privy Council say "The Hindû wife upon her marriage passes into and becomes a member of that (the husband's) family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to reside." (b) Her brothers therefore must "support her till her marriage, afterwards her husband shall keep her. When the husband is dead his kin are the guardians of his childless widow: in disposing of her, in protecting and maintaining her they have full power." (c) The word "iśvarah," here translated "power," implies an attribute of superiority which is most conspicuous in the form of active authority, but which has a more comprehensive sense. It sometimes means husband and sometimes the Supreme Being. To say "they are to control, protect and support her as her lords" obviously imposes all these functions as duties on the kindred, (d) and the duties are in themselves unconditional. All these ideas indeed are involved in guardianship. The perpetual dependence assigned to a woman (e) is accom-

(a) I. L. R. 1 Mad. at p. 81; S C. L. R. 3 I. A. 154.

(b) *See* also per Loch, J., in *Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R. at p. 20, A. C. J.; Col. Dig. Bk. IV. Ch. I. T. 39; Bk. V. 499 and Comm.; and comp. Maine, Anc. Law, Ch. V. pp. 153, 184.

(c) Nârada, XIII. 27, 28. *See* also Nârada as quoted by Devâṇḍa Bhaṭṭa below.

(d) So in *Ruvee Bhudr* v. *Roopshankar*, 2 Borr. at p. 725.

(e) Manu, V. 148 ss.; IX. 2, 3; VIII. 416; Vyav. May. Ch. XX. para. 2.

panied by an indefeasible claim to nurture, shelter, and gentle usage. (*a*) Who are to satisfy this claim? Primarily the family she has joined, not the family she has quitted. (*b*) The latter comes next in responsibility before the burden arising from utter destitution is thrown upon the caste and the community.

The general right of a widow to support according to the means of her husband's family is asserted by Newton and Janárdana, JJ., in *Sakvárbái* v. *Bhaváni Ráje Ghátge Zanjárráv Deshmukh.* (*c*) In that case the family property had been transferred by the Satárá Government from an improvident father to his son, subject to a charge for the father's maintenance. In extreme age the father married a second wife who on becoming a widow sued her step-son for maintenance. He offered to support her in his house. The Principal Sudder Amin thinking that the parties could not properly be forced to live together and that it would be equally wrong to allow the young widow to reside where she pleased, ordered the step-son to provide her with a separate apartment in his house or in his village and to pay her a monthly allowance for her support. The widow appealed against the amount of the allowance and the order as to her residence, but the District Judge affirmed the decree on the ground that she must be regarded as "living on enforced charity" and entitled only to "what will keep her." This view the learned Judges of the High Court rejected. They approved Sir T. Strange's statement that a widow is entitled to a maintenance proportioned to the circumstances

(*a*) Manu, III. 55 ss.; Mit Ch II. § 1, paras 7, 27, 28, 37; § 10, p. 14, 15; Vyav. May Ch. IV. § 11, para. 12; Col Di. Bk. V. T. 409; Str. H L., I. 171, 173, 175; II. 291, 297, 299.

(*b*) *Ramien* v. *Condummal*, M. S D. A. R. for 1858, p. 154; Pr. Co. in *Sri Virada Pratap Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb*, I. L. R. 1 Mad. at p. 81; Viváda Chintámani, 261, 262, 265.

(*c*) 1 Bom. H. C. R. 194.

of the family, (*a*) and sent down for determination the following issue, viz.: "Are the circumstances of the case such as require that a separate residence or an equivalent in money should be awarded to her (the widow) or should she be required to reside with the defendant?"

Here though the father as a prodigal had been deprived of the patrimony, and his second marriage had, it was alleged, been brought about by a trick in order to injure his son, yet the notion of the son's repudiating the step-mother's claim to maintenance seems not to have occurred to any one. The only question was as to how the maintenance was to be afforded. In the absence of exceptional circumstances the learned judges thought that it must be given and accepted in the household of the step-son. Step-mothers may perhaps be regarded as having distinct rights resting on special texts, (*b*) but their rights at any rate are recognized by the Śâstras, (*c*) as on the other hand the step-son's succession to his step-mother's strîdhana is also admitted. (*d*)

In *Chandrabhágábai* v. *Kásináth Vithal* (*e*) the widow's husband had separated from his father and brethren. On his death she had received his property and had expended it, as also her mother's property. The Joint Judge in Regular Appeal held that the separation of her husband from his family had deprived the widow of a right to maintenance; but on Special Appeal the High Court rejected this view, reversed the judgment, and remanded the case for trial on these issues—"(1) Are the widow's present circumstances such as to give her a claim to maintenance? (2) If she is possessed of any property, what portion of it is her strîdhana?"

(*a*) So *Buljor Rai* v *Mt. Brinja*, N. W. P. S. D A. R. 1862, Pt II. p. 96. There however the family was united, and had ancestral property.

(*b*) Bk. I. Ch. II. S. 14, I. A. 3, Q. 1, footnote.

(*c*) 2 Str. H. L. 316.

(*d*) Bk. I. Ch. II. S. 14, I. A. 3, Q. 1.

(*e*) 2 Bom. H. C. R. 323.

By strîdhana the learned Judges probably meant such as was not productive of an income, such as to relieve the widow from indigence, and so far free the defendant from his obligation. For the rest that obligation in spite of the partition which had taken place is recognized as binding.

In *Timappá Bhat* v. *Parameshriammá* (a) it was held that the right of the indigent widow to support is not affected by a partition, though the award of a separate maintenance rests in the discretion of the Court. Reference was made to *Bái Lakshmi* v. *Lakhmidás* (b) and to *Mula* v. *Girdharilal.* (c) In the District Court the case had been relied on of *Mamedala Vencutkrishna* v. *Mamedala Vencutratnama,* (d) and to local decisions which had shown the law in Canará, where the case arose, to be that the widow of a separated parcener was entitled to subsistence though her husband had died without ancestral property, and though the ex-parceners sued by her had none. The Madras case had ruled that maintenance could under such circumstances be claimed only in the house of the persons liable, but the District Judge had treated this condition as one that the Court in its discretion might dispense with.

The Bombay cases just referred to were reviewed in *Sávitribái* v. *Luximbái.* (e) The question is stated (f) to be: "Can the plaintiff, not finding it agreeable to live in the house of her husband's uncle, sustain this suit for a money allowance by way of maintenance against him who has separated in estate so far back as 1853, from the branch of the family to which her husband and his father (Sadasiv's brothers) belonged, and who had no paternal estate in his hands at the institution of this suit, and did not, and could

(a) 5 Bom. H. C R. 130 A. C. J.

(b) 1 Bom. H. C. R. 13.

(c) S. A. 3937, decided 6th July 1858.

(d) M. S. D. A. R. for 1849, p. 5.

(e) I. L. R. 2 Bom. 573. See *Apaji* v *Gangabai,* ib 632.

(f) p. 581. See *Madhavrao* v. *Gangabai,* ib. 639.

not, so long as the plaintiff lived, inherit any property from her husband upon whom the estate (if any) of his father Balcrustna would have devolved ?" The judgment proceeds on the two grounds, (1) that the plaintiff's husband and his father were separated from the brother of the latter sued as liable for the plaintiff's maintenance, and (2) that the defendant had not, when the suit was instituted, any ancestral estate or estate of the plaintiff's husband or his father. "Either one of these reasons, the Court say, independently of the other, is we think fatal to the plaintiff's claim to a money allowance."

Though the decision is thus limited to the denial of a right to a money allowance the reasoning extends to the denial of any claim at all by the widow of a separated member upon the other members of his family. Against the *dictum* in *Timappa's* case that "the whole policy of the Hindû law is not to allow even a distantly related widow to starve" (*a*) the learned Chief Justice urges that "for that proposition no other authority than the above cases (dissented from in his judgment) was mentioned by the Court." It would seem, therefore, that so far as any legal obligation goes the preservation of a widow from starvation in the case supposed is not now to be recognized as a duty incumbent on any one. Strange's humane interpretation of the Hindû law (*b*) must be received with this restriction. His observations at p. 171 being limited to the maintenance of a widow as a charge on the inheritance (*c*) taken by other heirs, a thing that would not occur in a divided family as to an estate which in the absence of a son she must inherit herself, are not applicable to the point now under consideration. Should the estate prove deficient the learned author says the family of the husband are notwithstanding liable,

(*a*) *See* 1 Str. H. L. 175. (*b*) Strange's H. L. 67, 68.

(*c*) As to this see *Lakshman Ramchandra* v. *Satyabhámábái*, I L. R. 2 Bom. 494; and *Nátchiarammál* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

but he is still contemplating the case of a possible inheritance by the husband's brethren, not that of their postponement to the widow as heirs as in a case of separation.

The rules as to maintenance were probably formulated without any distinct contemplation of the case of partition. In the Bengal case of *Khetramani Dasi* v. *Kashinath Das,* (a) Loch, J. says "as the law originally stood it appears to me from some of the texts quoted above that no separation was ever contemplated, but that the widow entitled to maintenance was expected to remain in her husband's house and among his relations." This is quite true. "The family is the cherished institution of the Hindûs" (b) and the "associated aggregate community of the family" (c) is as such the principal care of the Hindû law. Property is regarded mainly as a means for fulfilling the duties to the past and present members imposed by the family law. Its characteristics are regarded from the point of view of its capacity or incapacity to subserve the purposes of the perpetual corporate group. Thus though it is moveable and immoveable, sacred and secular, with powers of disposal or management which vary accordingly, the land itself is not "free" or "unfree" subject to gavelkind or other peculiar tenure. All depends in the private law on personal status and personal relations. These are determined by birth and by the second birth of marriage. They impose according to Hindû ideas duties not as springing from or annexed to property but as inseparably united to the person, though property is the medium through which in many cases they must be made effectual and the means by which they must be fulfilled. As the mutual obligations of the family therefore spring from a blood relationship, real or fictitious, and a sacred connexion in sacrifices which is its complement, (d) so the

(a) 2 Beng. L R. at p. 30 A C. J.

(b) *Bhyah Ram Singh* v. *Bhyah Ugur Singh,* 13 M I. A. at p. 391.

(c) Comp. Sir H. Maine, Anc. Law, Ch. I, and Ch. V. p. 126.

(d) *See* Maine, *op. cit,* Ch. VI. p. 191.

laws which govern them rest far less on property save as a modal circumstance than on relationship. This is not abolished by partition though partition modifies the duties arising from it. It is a modern notion to refer these duties, as Devánda Bhatta refers them, merely to cases in which property has been inherited or rather taken by right of participation and survival.(a) The passage which he quotes says nothing of that kind: it imposes the duty of providing food and raiment for a widow in succession on the deceased husband's brother, on his father, on a gotraja, and any other person (amongst the husband's relatives). It is plain that the last two would not in general take the inheritance of the deceased husband, or where partition prevailed be united with him. The duty is prescribed absolutely, and as Devánda Bhatta quotes the rule with approval, the proper sense of his own remark which immediately follows may possibly be explanatory, not limiting, and imply that when in a family the person immediately responsible resigns to the widow the portion on which her husband and she previously subsisted he needs not provide her maintenance too. The treatise being on Inheritance implies generally that there is an estate to inherit, and to this the author's observations are naturally directed, not to the cases of no estate, and of indigence as in itself a ground of right and obligation in a family. The disposition of the property and the provisions for maintenance out of the property would necessarily be the topics to be dealt with directly, others only incidentally, just as in an English treatise dower and equity to a settlement would be considered in their relation to property, without prejudice to the right to protection and sustenance subsisting apart from the possession of

(a) Smriti Chand. Transl. p 158 Participation by birth is the typical form of dáya. It is obvious therefore that the sphere of dáyá and of inheritance by which it is translated lie outside each other in the most important cases. Hence to deal with dáya according to notions exclusively proper to inheritance in the English sense, must needs lead to error and confusion.

property, and from rules which merely determine its form, and how it is to be satisfied in particular cases.

Much has been said in several of the cases on a distinction between the rules of the Hindû law which are mandatory, as contrasted with those which are simply hortative or preceptive. When the distinction is rested on the imposition of a fine in one of two cases and not in the other, it should rather be regarded as assigning the one to the province of the criminal and the other to that of the civil law; but these departments were by no means clearly demarcated in the early jurisprudence. Still less was any exact boundary drawn between the field of moral and that of strictly legal duties. "Amongst the Hindûs the religious element in the law has acquired a complete predominance," (a) and Jagannâtha, arguing from the absence of any fine annexed to unequal partition by a father, that he may distribute his property of every kind as he pleases amongst his sons, (b) is landed in a direct contradiction of the Mitâksharâ and other received authorities.

In Yâjñavalkya's laws of civil judicature the subject of a judicial process is said to be a "complaint of being aggrieved contrary to law or usage;" but "law" translates "Smṛiti," the sacred scripture, as "áchár," may be rendered "ordinance" as well as "practice." The rules in the Smṛitis, as for instance in Yâjñavalkya's, are set forth in immediate connexion and with constant reference to this idea, and so expounded by commentators like Vijñâneśvara in the Mitâksharâ. (c) In chapter VIII. of Manu, "On Judicature and on Law," the connexion is very obvious. The rules for the constitution and government of the Courts are followed by the rules of evidence, and then come those

(a) Maine, Anc. Law, Ch. VI. p. 192.

(b) Coleb. Dig. Bk. V. Ch. II. *ad init.* and T. 77, Comm.

(c) *See* Macn. H. L. p. 141, and Roer and Montriou's Yâjñ. vol. II. 5, 12, 21, I. 7; and Stenzler's Text, pp. 4, 45.

of the substantive law. The 24th distich is identical in sense with the one in Yâjñavalkya; disputes are to be determined by a consideration of what is expedient in the view of public policy, but always in subjection specially to the law of "dharm" or religion. Śloka 164 of the same chapter says that no declaration, however well authenticated and supported, can be effectual if opposed to "dharm," or to recognized usage, and śloka 8 that the king is to adjudicate according to the "eternal dharm." So in Nárada, Bk. II. Ch. X. para. 7, it is said "If wicked acts unauthorized by (= contrary to) the moral law are actually attempted let a king who desires prosperity repress them." Whatever precept of the Smṛitis therefore had been violated to the injury of a complainant, whether expressed in terms hortative or prohibitory, and whether a penalty was annexed to the rule or not, the alleged injury might, if the prince or the judges so willed, be remedied or punished without an "excess of jurisdiction." (*a*) No Hindû Austin had written a "Province of Jurisprudence determined" for the lawyers of India; the rules of the substantive law were, as usual in but partly developed systems, not disengaged from the commands of religion. They were but scantily formulated as aids or supplements to the rules of procedure, while the contents of the Vedas were assumed generally to be well known to the learned and to need no statement. The distinction therefore on which English judges have relied so much was for the Hindû judges hardly a distinction at all. (*b*) They exercised conformably to the Śâstras and to custom a jurisdiction as indeterminate as that of the early Chancellors in England, (*c*) and would enforce any duty enjoined by a Smṛiti which either in the class or in the instance seemed of sufficient importance to warrant the exercise of their power.

(*a*) *See* Yâjñ. I. 360; *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 380.

(*b*) Comp. Maine's Anc Law, p. 16, 23, 192.

(*c*) *See* Spence, Equit. Jurisd. I. 367 ss. and references.

One class of propositions received an early and comparatively full exposition from the commentators and was applied with strictness by the native courts—that relating to ownership, its acquisition, devolution and partition. The needs of society imposed this duty on the Nyáyádhish, but for the Brahman commentator the chief attraction of the subject consisted perhaps in its connexion with the law of sacrifices. In what cases property is constituted or extinguished, gained or lost, is minutely discussed. Possession too as a source or element of property has received a pretty full treatment. But the rights and obligations arising from family relations have been but meagrely dealt with in proportion to their importance, great as this is recognized to be. Positive law is incompetent to enforce a complete fulfilment of duty in such cases, and rules of mutual regard, concession and generosity, supersede or blend with those which can be imposed by external authority. Thus the boundary line between moral and legal obligations being in its nature vaguely drawn and not having been arbitrarily defined, precepts of the Hindû jurists in this sphere take every form from stern command and denunciation to mere suggestion or assumption that a law of kindness is to prevail. Whether in any instance a precept construable as a mere counsel or a proposition of moral beauty was to be enforced by a sanction as a law was left to the judges on a consideration of all the circumstances. In discussing the doctrine of *factum valet* put forward to justify a father's alienation of ancestral property, H. H. Wilson says,(*a*) "It is absurd to say that the judge is to acknowledge as valid or to permit the validity of that which sacred institutes and universal feeling denounce as immoral and illegal.........The only argument of any weight adduced has been this: the law certainly prohibits the practice, but it has not provided for its prevention or

(*a*) Works, V. 73. A husband's alienation depriving his widow of subsistence is invalid. *Jamna* v. *Muchal Sahu,* I. L. R. 2 All. 315.

punishment, and therefore being done it must be recognized. But this is a very incorrect view of the case and would, as observed by Sir F. Macnaghten, authorize the perpetration of a vast variety of crimes. The law has not been so improvident. It has stated what ought and what ought not to be done; and has left the enforcement of its prescriptions to the discretion of the executive power. We are confident that the question between illegality and validity would never have been agitated under a Hindû administration."

Itis plain that under a law thus flexible and discretional, the claims of a widow in a family from which her husband had been separated in estate might be subjected to a rather severer scrutiny than where there had been no partition. A wasting of his substance by the separated brother might be looked on as a kind of fraud which the judges ought to prevent. They would recognize too that the tie of consanguinity was less binding as the relationship was more remote. (*a*) The changed conditions of life in modern as compared with ancient days might also be fairly taken into

(*a*) The recognition of distant relationships in the law treatises has been founded on texts in themselves of much narrower import. Thus Manu's Text, IX. 185, gives the succession to the father on failure of the son, and failing the father gives it to the brothers. Yâjñavalkya's text is the widest. Devala, quoted in Col Dig. Bk. V. T. 80-82, would seem to have limited the connexion which gave rights of inheritance to four degrees (counting inclusively) in the ascending and descending lines Thus the seventh degree, the relationship between two second cousins, would be the extreme point of recognized close family connexion The seven degrees were then transferred to a single ascending line as a source of Gotrajasapiṇḍas, and beyond these were placed seven degrees more of origin for Samânodakas. The want of uniformity amongst the different schools of doctrine as to the remoter successions points to their comparatively recent recognition, and the analogy of the bandhu relation, limited to five degrees—first, instead of second, cousinship either to the propositus or to one of his parents—points the same way. So also does the limitation of responsibility for debt to the grandson. The recognition of a right of maintenance arising from family connexion as far as the sixth degree (second cousins), and the lapsing at that point of the nearer relationship into the clan connexion

account in applying the rule of expediency. Native Courts could not have found a direct warrant perhaps for leaving any widow of the family to absolute starvation, but they might hold that the rules as laid down contemplated a different state of things from the divided family of the nineteenth century. Without saying therefore that the earlier judgments were wrong on the point in question, (*a*) it may be admitted that the learned Chief Justice of Bombay has not, in denying the claims of the widow of a separated parcener, transgressed the latitude of construction which the Hindû law itself approves. That law certainly ascribes extraordinary authority to a Court in which three judges of ordinary attainments sit with a chief judge specially appointed for eminent learning by the king. (*b*)

of superior and inferior, is shown to have been common amongst the European branches of the Aryan family by Dr Hearn (The Aryan Household, Ch. X § 3). In the Canon Law the seventh degree, as the nearest within which marriage was allowed, became identified at one time with seventh in the ascending line and those descending collaterally from that point, as the Canonists counted the degrees only on the longer of the two lines diverging from the common source (*see* Jus Can. by Reiffenstuell, vol. II p. 493-5) But the fourth degree was afterwards resumed as the limit of prohibition, and this, taken exclusively not inclusively, would, according to the Roman reckoning, generally count as the seventh degree reckoned inclusively. The recognized names of relationship amongst the Romans extended only to second cousins, *i. e.* to the sixth, or according to the inclusive mode of reckoning the seventh degree (*see* Poste's Gaius, B. I. § 58), and it seems not unlikely that the range of recognized relationship under the Canon Law and of Gotraja-sapindaship under the Hindû law (*see* above, p. 121) was extended by a somewhat analogous process. The genealogies preserved by the hereditary purohits readily lent themselves to any desired extension of gentile connexion. As to the variations of the Christian ecclesiastical law, *see* Zachariae Jus. Graeco-Rom. Li. I. Tit. I. § 4.

(*a*) *See* also 2 Str. H. L. 16.

(*b*) Manu, VIII. 11. Comp. Mit. on the Adm. of Justice, Ch. I. § 1.

Personal inquiries made since the judgment in *Sávitribái's* case in several districts of the Bombay presidency seem to establish that though a moral claim of every widow to support is recognized even in a divided family, a legal right is hardly admitted. Widows of separated relatives are to be found in the households of many Hindû gentlemen, but it would be a wrong assumption that amongst people thus closely connected no more is conceded than could be enforced. The presence of these ladies whose lot excites pity even in a stranger is, it would seem, to be ascribed to a rule of kindness or at most of positive morality, rather than to one of compulsive customary law. Similar inquiries as to the case of united families led to the conclusion that the right of widows of deceased members to maintenance is almost invariably recognized, though as to the incidence and apportionment of the burden no exact consensus of opinion could be obtained. Here the passages of Nârada already referred to, seem to be applicable, and to make the support of the widow a duty independent of the possession or existence of any estate in which the deceased husband was a sharer, though where this state of things existed he who takes the share is specially liable and the share itself may be allotted to the widow whose relatives are unwilling to receive her. (*a*) The expression used by Nârada is the same in stating the right of widows as in stating the right to subsistence of members of a family disqualified for inheritance. The Vyavahâra Mayûkha limits the text of Nârada (*b*) to the case of an undivided family, but in such a family it does not make the widow's right to subsistence depend on the possession of ancestral wealth. In the passage from Kâtyâyana (*c*) which Nîlakaṇṭha quotes immediately afterwards, the particle "tu," translated "or," includes the sense of "but"; so that the sense is "The

(*a*) Smṛiti Chand. Ch. XI. Sec I. paras. 34, 35, Transl. p. 158, 159.

(*b*) Stokes, H. L. Books, p. 85.

(*c*) Stokes, H. L. Books, p. 85.

widow receives food and raiment but (where there is property) may (also) be assigned a share of it for life." The Śástris have uniformly accepted the rule in this sense so far as can be gathered from their omission to set forth the possession of ancestral property as essential; and it is established by authenticated usage as the law of many castes. This is shown below.

That the recognition of the share of a parcener as primarily liable for his widow's maintenance does not imply that she has no right when there was no property, may be gathered from Jagannâtha's comment on Yâjñavalkya's text providing for the daughters and the childless wives of disqualified members of the family, "since it is directed that daughters must be supported so long as they be not disposed of in marriage, it appears that the nuptial (expenses) shall be defrayed, and that (= that is) if no share be received by a son; but if the son do take a share his sister must be supported and her nuptials defrayed by him alone as is done in common cases by a son whose father is dead." (*a*) The Mitâksharâ cites a passage from Hârîta. "If a woman becoming a widow in her youth be headstrong (still) a maintenance must in that case be given to her for the support of life." The Vivàda Chintâmani quotes this as "A woman is headstrong, but a maintenance must even = still) be given to her." (*b*) The right to support is not contemplated as dependent on property, though should there be property it may be satisfied out of it. If the right as Vijñâneśvara possibly thinks belongs to a widow of a separated parcener, that affords an *à fortiori* reason for recognizing it in the case of a widow of one who has died a member

(*a*) Col. Dig. Bk. V. T. 334, Comm. This is in fact a portion of the father's obligations falling on the son subject to his exoneration only when the misappropriation of property actually existing transfers the duty to him who has taken it. *See* Vyav. May. Ch. IV. Sec. V. para. 16.

(*b*) Mit. Ch. II. Sec. I. para. 37.

of a joint family. While that family subsists and is capable she must look to it alone for maintenance. The Vîramitrodaya lays down this rule for widows and daughters in a reunited family. (a) The duty of the Hindû householder therefore seems not to have been exaggerated by Sir T. Strange when he described it as "co-extensive with his family," (b) or when he said of the widow in a united family "where her husband's property proves deficient the duty of providing for her is cast upon his relations." (c) Yâjñavalkya, like Nârada, assigns the protection of a woman unconditionally to her father, her husband and her son successively, and then "on failure of these, let their kinsmen protect her." (d)

Jagannatha, resting on the familiar text of Manu, declares: "The father is bound to support the family of his son, and it is not true that those to the support of whom the master (*i. e.* the son) is entitled from a certain person (the father) are not (themselves) entitled to maintenance from the same person." (e) This is said of the family of a student who has not then acquired property. Consistently with this Colebrooke says, (*f*) in a case where the son must have died without property, that the father "would have been liable for the reasonable charges of his daughter-in-law's maintenance, had he refused or neglected to support her." Nothing is said of the father's having ancestral property. In a similar case where the father may have had ancestral property, but the son distinctly had no separate estate, the son's widow was pronounced entitled to maintenance from her father-in-law. In this opinion Colebrooke and

(a) Vîramit. Trans. p. 219.

(b) 1 Str. H. L. 67. (c) *Op. cit.* 172.

(d) Col. Dig. Bk. IV. Ch. I. Sec I. T. 6.

(e) Col. Dig. Bk. V. T. 379, Comm. *See* also per Sir M. Sausse, C. J., in *Ramchandra* v. *Dádá Náik,* 1 Bom. H. C. R. lxxxiv. Appendix, and Macn. H. L. vol. II. Ch. II. Case 8.

(*f*) *Op. cit.* vol. II. 412.

Sutherland concur, (*a*) as Sutherland did in a similar claim by the son's widow against the father's widow. (*b*) In another case (*c*) Colebrooke says that the half-brothers of a widow's deceased husband are bound to maintain her. (*d*) It is not even said that the deceased and his brothers were members of a joint family, much less that there was property of the deceased or ancestral property. If there had been separate property Colebrooke must have said that the widow was entitled to it, and if the possession of ancestral property were essential in his view to the existence of the widow's right, he must have mentioned that too.

The same remark occurs as to the opinions of the Śâstris given below at Bk. I. Ch. II. Sec. 1. Q. 17; Sec. 6. A. Q. 27; Sec. 7, Q. 10. In the first of these cases the family was undivided, but whether there was ancestral property is not stated. It would seem that the deceased son left no property solely his own, as there is no reference to it. In the second case the family was undivided or was understood to be so by the Śâstri, but it does not appear that there was ancestral property held by the father. In the third case the predeceased son may or may not have been separated from his father. There is no suggestion that he left any property, nor is there any limitation of the widow's right to the amount of his share. The Śástri evidently regarded the property left by the father as having been solely his own, but the obligation of maintaining the son's widow as one that had been binding on the father and after his death passed to the mother along with the means of satisfying it. In ancestral property the son's right to a share comes into

(*a*) 2 Str. H. L. 233. So in *Rai Sham Ballubh* v. *Prankishen Ghose*, 3 C. S. D. A. R. 33; *Musst. Himulta Chowdrayn* v. *Musst. Pudoo Munee Chowdrayn*, 4 *ib*. 19.

(*b*) *Op. cit.* II. 235.

(*c*) *Op. cit.* II. 297; Macn. H. L. vol. II. Ch. II. Case 4.

(*d*) So 2 Str. H. L. 12, 16; Macn. H. L. vol. II. Ch. II. Case 7.

existence and dies along with him, (*a*) so that it could not be as annexed to an inheritance in the English sense that the father's obligation attached to him. The father and son having been joint tenants if not tenants by entireties, the son could not even charge the common estate according to the principle *jus accrescendi praefertur oneribus*, except under circumstances specially provided for. (*b*)

In the case of a disqualified person no ownership generally comes into existence at all over the ancestral estate. (*c*) He is entitled merely to maintenance which is accorded to him by the texts in the same terms as to wives and widows. His right is a charge or an equity to a settlement on the property when there is property, (*d*) but the duty of maintaining him is not therefore limited to what but for his incapacity would have been his share. (*e*) It is on relationship that the right is founded, and the right of the widow of a member, herself a member of the family, rests equally on relationship, not on property once shared by the deceased, though should such a share have passed into the hands of any particular member of the family the obligation will primarily rest there too. (*f*) In the cases at pp. 83 and 90 of vol. 2 Strange's Hindû Law, the widow left destitute by her husband is recognized as having a right to maintenance from her brother's widows. Her brother

(*a*) *Udárám Sitáram* v. *Ránu Pánduji*, 11 Bom. H. C. R. at p. 86.

(*b*) Mit. Ch. I. Sec. I. paras. 28, 29; *infra*, Bk. I. Ch. II. Sec. 6 B.; *Rádhábái* v. *Nánaráv*, I. L R. 3 Bom. 151.

(*c*) *See* Bk. I Ch. VI. Sec. 1.

(*d*) *Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R. at p. 52 A. C. J.

(*e*) Bk. I. Ch. VI. Sec. 1. Q. 5.

(*f*) In the MS. Collection of Caste Laws gathered by Mr. Borradaile there are many instances in which the caste declare that the helpless person is entitled to his share on a partition; and others in which it is said that he is entitled to maintenance out of his share, or alternatively, his proper share; but along with this it is stated in some instances that his brethren must support him where there is no estate. This shows that a mere reference to the property

could not have held ancestral property along with her husband, or inherited from him, and the obligation arising as against a brother only on the incapacity of the husband's family cannot, it would seem, be made absolutely dependent as to the latter any more than as against the former on any conditions of property taken by inheritance.

The Smṛiti Chandrikâ, true to the principle "To him that hath shall be given," says that even in the case of helpless kinsmen the duty of supporting them rests only on those who have taken the patrimony of the disqualified member's father. (a) For this Devâṇḍa Bhaṭṭa cites a passage of Kâtyâyana ending:—"The kinsmen shall not be compelled to give the wealth received by them not being his patrimony." Here there is nothing about subsistence. The rule given is that the person in question shall not obtain property not his patrimony. But the passage is not quoted by either the Mitâksharâ or the Mayúkha, though many other passages of Kâtyâyana are quoted by both; and the reason is obvious. The whole of it is given at Ch. V. para. 16 of the Dáya Bhâga; and it is plain that it refers to a case which does not now occur, that of a competition between the offspring of persons of different castes. "He," Kâtyâyana says, "is not heir to the estate... ..except.........on failure of the kinsmen. They shall not be compelled to give him the wealth [it] not being his patrimony." There is a various reading "svapitryam" (= it being their patrimony) which leaves the result unaltered. On the point for which Devâṇḍa uses it, the text

where there is property does not imply an absence of right where there is no property, or none chargeable with the maintenance. The questions as to widows were put with reference to property, but still some answers, as in Bk. G sheet 25, state an unqualified duty to support the widow in the family house, her resort to her pulla even being (*ib.* 32, 49, 55) * necessary only in the absence of relatives of her husband.

(a) Smṛiti Chan. Ch. V. paras. 23–25.

* *Ib.* Koombars 8, Machee Gudrya 25, Vaghree 30, Khalpa Khumbarta 48.

says nothing. In *Mamedála Venkutkrishna* v. *Mamedála Venkutratnamah* (a) the Sudder Court of Madras set aside Devâṇḍa's rule in the province where his authority is highest by pronouncing in favour of the widow's right to maintenance by her husband's brothers where there was no proof of their possession of paternal estate; and it cannot be considered as of any great weight in Bombay.

In a case at Allahabad the High Court ruled that a daughter-in-law had no right to maintenance from her father-in-law when he had sold the ancestral property. (b) If the right of the son's widow to maintenance depends on the bare fact of the retention of the ancestral property, this decision must be accepted, and a father can get rid of the burden properly incumbent on him by merely selling the patrimony though he may keep the proceeds, or obtain the fruits of his unprincipled conduct in some other form; but this would so obviously be a fraud on the dependants that the Hindû law would interfere to prevent its success. (c) The case is discussed in *Luximan Ramchandra* v. *Satyabhámá-bái,* (d) and the authorities there quoted seem conclusive of the daughter-in-law's right, and by implication of the right of every coparcener's widow. The passage of the Vîramitrodaya quoted by the Allahabad Court seems to be the one at p. 154 of Mr. Golapchandra's translation. It says, "By reason (= force) of the text 'The heir to the estate of a person shall liquidate his debts'—he alone who takes the estate is declared liable to discharge the debts." This is said by Mitramiśra to illustrate the proposition that if any one improperly deprives the grandson of the estate, such person shall pay the grandfather's debts, and yet in the absence of all estate the grandson's liability is not disputed. (e) So

(a) Mad. S. D. A. R. for 1849, p. 5.
(b) *Gangábái* v. *Sitárám,* I. L. R. 1 All. 170.
(c) Bk. II. Introd. § 4 F.
(d) I. L. R. 2 Bom. at p. 579.
(e) *See* Vyav. May. Ch. V. Sec. IV. para. 14.

also as to the passage of Nârada and the comment on it given at p. 174. Mitramiśra indeed takes the command to support the widows as specially applicable to those of a separated coparcener of a rank lower than the "patnî," and says that "whoever takes the estate" must afford them maintenance "by reason of succession to the estate." Such is the rule, he says, when there is an estate to succeed to: he who takes the benefit must take the burden. But where there is no estate the precept remains unqualified by anything which can transfer the obligation from those immediately subjected to it, just as in the case of the father's debt.

Looking then to the constitution of the Hindû family, to the restrictions placed on a woman's activity, to the prohibition in a united family against her making a hoard, and the maledictions pronounced on those who fail to provide for the helpless members of their family, the conclusion may be hazarded that Colebrooke and others had sufficient grounds for opinions to which the actual practice of the people generally conforms in the Bombay presidency. In a united family it would seem that in some form maintenance may be claimed by the widow of a deceased member as a right not dependent on property though in a measure regulated by it, (a) but on the capacity only of her relatives in the order of nearness to her husband. It must be admitted however that the decisions in recent times go rather to limit the responsibility for maintenance, to the property taken by succession to the deceased husband. Where the widow had made away with her husband's property and then sought maintenance from his two brothers solely dependent on their profession as schoolmasters, the rejection of the claim (b) might be referred to the principle of the repression of fraud in the comprehensive sense given

(a) See *Narhar Singh* v. *Dirgnath Kuar*, I. L. R. 2 All. 407.

(b) *Ganesh* v. *Yamunábái*, Bom. H. C. P. J. 1878, p. 130.

to it in the Hindu law, (*a*) but in other cases (*b*) it has been said that a widow's claim extends only to the interest of her deceased husband in the undivided property.

In close connexion with the right to maintenance, forming part of it indeed, stands the widow's right to a residence in the family house. That such residence must be afforded to her when there is a family dwelling has been uniformly held by the Sástris. (*c*) Should her residence in the family dwelling be extremely inconvenient she may be lodged elsewhere, (*d*) but the obligation cannot be shaken off by a sale of the dwelling. (*e*) The head of the family is still bound, and the property itself (*f*) unless taken by a circumspect purchaser without notice of the widow's right. (*g*) Her general right to sustenance is guarded against fraud in one taking

(*a*) Comp *Paro Bibi* v. *Guddadhar Banerjee*, 6 C W. R 198. In he case of *Bái Lakshmi* v. *Lakhmidás*, 1 Bom. H. C. R. 13, the widow had taken a share of her deceased husband's estate, but when after thirty-four years she became destitute the Śâstri and the Court pronounced her step-son and his sons liable for her maintenance. In that case there had been no fraud. Comp. Bo H. C. P J. 1878, p. 139.

(*b*) See *Mádhavráo* v. *Gangábái*, I. L. R. 2 Bom. 639; the *F B.* case, 7 N. W. P. R. 261; *Visalatchi Ammal* v. *Annasamy Sastry*, 5 M. H. C. R 150; *Ganga Bai* v. *Sita Ram*, I L. R. 1 All. 170; *Narhar Singh* v. *Dirgnath Kuar*, I. L. R 2 All. 407. Bo. H. C. P J. 1878, p. 131.

(*c*) *See* above p 79; Bk I. Ch I Sec. 2, Q. 7, 11, 12, 25, 26. *See* Index, Tit Residence; *Gauri* v. *Chandramani*, I L. R. 1 All. 262; *Bhikham Das* v. *Pura*, I L R 2 All. 141; *Mangal Debi* v. *Dinanath Bose*, 4 Beng. L. R. 73, O. C. J

(*d*) *Ibid.*

(*e*) See *infra*, Bk. I. Ch. I. Sec. 2, Q. 9; *Lakshman Rámchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. 494, 506.

(*f*) *Mangala Debi* v. *Dinanath Bose*, 4 Beng L R 73 O. C. J.; *Srimati Bhagabati Dasi* v. *Kanailal Mitter*, 8 Beng. L. R. 225; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Talemand Singh* v *Rukmina*, I. L. R. 3 All. 353.

(*g*) See *Lakshman Ramchandra* v *Satyabhámábái*, I. L. R. 2 Bom. at pp. 514, 518, 519. In *Parwati* v. *Kisansing*, Y was a widowed daughter-in-law of X. She occupied a house allowed to her as residence by X. This was attached in execution of a decree against X by his creditor C; Y then sued X for maintenance and residence in the

the family property when there is such property, but it does not constitute an interest in the estate unless it has been limited by a decree or a legal transaction.(*a*) Her own resignation of her right cannot be effectual, seeing that as a wife she is incapable of contracting (*b*) except with reference to her strîdhana, (*c*) that during her husband's life her right is a mere expectancy, (*d*) and that afterwards she cannot deal by anticipation with her right to subsistence, which is a personal relation between her and her husband's heirs, though she may dispose of that to which by allotment in partition she has acquired a right *ad rem.* (*e*)

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house occupied by her. This was adjudged to her. In the meantime X's interest in the house had been sold in execution and purchased by C, who sought to expel Y. It was declared however that X's ownership was subject to Y's right of residence, and that C could not take possession until Y's "life estate fell in."

On the remark of the District Judge that debts take precedence of maintenance, the judgment observes "We may assume that this is correct," but found in it no ground for disturbing Y. This if laid down without regard to the nature of the debt contracted by X to C, would go to make Y's title to residence a complete life-tenancy of the house occupied by her. This puts her right rather higher than *Satyabhámábái's* case, but the proceedings may have suggested to the Court that there had been collusion for the purpose of getting rid of the daughter-in-law Y

(*a*) *Lakshman Ramchandra* v *Satyabhámábái*, supra; *Kalpagathachi* v. *Ganapathi Pillai*, I. L. R. 3 Mad 184, 191.

(*b*) Manu, VIII. 416, says her property becomes her husband's, like a wife's chattels under the English Common law Her earnings are her husband's : Vyav. May Ch. IV. Sec. X. para. 7, and even the presents of friends except in special cases, *ib.* Col. Dig. Bk. V. T. 470.

(*c*) S. A. 261 of 1861; *Nathubhái Bháilál* v. *Javher Ráiji*, I. L. R. 1 Bom. 121; *Govindji Khimji* v. *Lakhmidás Nathubhoy*, I. L. R. 4 Bom. 318; *Náhálchand* v *Bái Shivá*, I. L. R. 6 Bom. 470; *Narotam* v. *Nanka*, *ib.* 473; Col Dig Bk V. T. 475; Coleb on Oblig. Bk. II. Ch. III. 54.

(*d*) The Judicial Committee declined to affirm the principle that an expectant interest can be the subject of a sale under the Hindû law. *Baboo Dooli Chand* v. *Baboo Brij Bhookan Lall*, decided 4th Feb. 1880.

(*e*) *See* on the woman's general dependence, below, Sec. 11 ; Yâjñ. I. 85 ; Vyav. May. Ch. IV. Sec. V. para. 17. That she is always under tutelage *see* Steele, L. C. 177 ; especially a widow, per Grant,

The question remains of how the right to maintenance where it exists is to be satisfied. On this point the Mitâksharâ is silent, which however shows only the fragmentary manner in which as a running commentary on a particular Smṛiti it deals with the body of the law. In the Vyavahâra Mayûkha (*a*) it is said that in an undivided family the widow "obtains food and raiment or else a share so long as she lives." (*b*) As a condition however she is to be assi-

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J., in *Comulmoney Dossee* v. *Rammanath Bysack*, 1 Fult. at p. 200, and per Seton, J., *ib.* 203. As to her general incapacity to contract, Nârada, Pt. I. Ch. III. 27, Ch. IV, 61; Vyav. May Ch. II. Sec. I. para. 10; Col. Dig. Bk. I. Ch. I. T. 8; Ellis in Madras Mirasi Papers, 198; that she may like an infant be represented by a next friend, Vyav. May. Ch. I. Sec. I. para. 21. That her right as mother or wife is untransferrible, see *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Ramábái* v. *Ganesh Dhonddev Joshi*, Bom. H. C. P. J. 1876, p. 188, except perhaps where a specific charge has been decreed; *Gangábái* v. *Khrishnáji*, Bom. H. C. P. J. 1879, p. 2. But the right is doubtful even then, see *Seith Gobin Dass* v. *Ranchore*, 3 N. W. P. R. 324; *Bai Lakshmi* v. *Lakhmidás Gopáldás*, 1 Bom. H. C. R. 13; *Ramábái* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283. As to the share given on partition see *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A. at p. 514. The contracts which have sometimes been relied on even if consistent with the relation of husband and wife must in nearly all cases fail through the operation of the principles embodied in Secs. 14 and 16 of the Indian Contract Act IX. of 1872 and the Indian Evidence Act I. of 1872, Sec. 111. See *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99, and the references. In England there can be no contract between a husband and his wife, *Legard* v. *Johnson*, 3 Ves. 352, 358, nor can any agreement between them alter her legal capacities as a married woman, *Marshall* v. *Rutton*, 8 T. R. 545. The same rules hold under the Hindû law by which the wife's dependence, and the husband's dominion and obligations are as strongly recognized as by the English law, and in a way remarkably analogous to it. *See* Vyav. May. Ch. IV. Sec. X. para. 7 ss.; Ch. V. Sec. IV. para. 20; Ch. XX; Col. Dig. Bk. V. T. 470; *Nathubái Bhailal* v. *Javher Ráiji*, I. L. R. 1 Bom. 121; *Ramábái* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283; S. A. 94 of 1873. [As to the English law *see* now 45 and 46 Vic. C. 75.]

(*a*) Ch. IV. Sec. 8. para. 7.

(*b*) *See* Vîramit. Transl. pp. 173, 174.

duous in service to her "guru" that is "to her father-in-law and other (head of the family supporting her). At his pleasure she may receive a share; otherwise merely food and raiment." The "anna vastra," translated "food and raiment," means a direct supply of necessaries as distinguished from a money allowance. (a) Kâtyâyana's Smṛiti (b) on which this precept rests contains the further direction as given in the Vivâda Chintâmani. (c) "If he (the husband) leave no estate let her remain with his family." The same Smṛiti goes so far even as to say that "what has been promised to a woman by her husband as her strîdhana is to be delivered by his sons provided she remain with the family of her husband, but not if she live in the family of her father." (d) A various reading in Varadrâja (e) supports her right to her strîdhana in either of the cases supposed but leaves the condition as to maintenance untouched.

The condition of residence and performance of household duties may however be dispensed with on proper occasions. Thus after providing for a wife's support during her husband's life by a kind of distraint in cases where food, apparel, or habitation is withheld, Kâtyâyana says, (f) "She may take it also (if refused) from his heir..............but when she has obtained it (*i. e.* maintenance = food, apparel and lodging) she must reside with the family of her husband. Yet if afflicted by disease or in danger of her life she may go to her own kindred." (g) Apart from this Kâtyâyana, as we have seen, says property promised by her husband as

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(a) *See* the Śâstri's answer in *Ichha Lakshmi* v. *Anandram*, 1 Borr. R. at p. 130.

(b) *See* Vîramit. Transl. 173, 174.

(c) Transl. p. 261.

(d) Col. Dig. Bk. V. T. 483.

(e) Transl. p. 50.

(f) Vivâda Chint. p. 265.

(g) Col. Dig. Bk. V. T. 481; Coleb. in 2 Str. H. L. 401.

strîdhana—a promise specially sacred (*a*)—may be withheld by the sons if she choose to withdraw to her own family. (*b*) Various readings of the Smṛitis give a different sense, (*c*) but the ones adopted by Jagannâtha were approved by Colebrooke, whose opinion, confirming that of the Śástri, is given at 2 Strange H. L. 401. The widow, it is said, may visit her own relatives but is to reside with those of her husband, who must provide her with a suitable allowance. The Śâstris in the Bombay presidency have always given similar opinions, making the widow's right one to maintenance as a member of the household in the husband's family. (*d*) The Judicial Committee also say, "The Hindû wife upon her marriage passes into and becomes a member of that family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to... .....reside." (*e*)

Consistently with these authorities it was said in *Udárám* v. *Sonkábái*(*f*) that "the ordinary duty of a Hindû widow is to reside with her husband's family, who in return are charged with the duty of maintaining and protecting her," (*g*) but it was in the same case ruled that for a failure in kind usage the widow might leave her father-in-law's house and obtain a separate maintenance. In *Rango Vináyak* v. *Yamunábái* (*h*) it was held that although in the discretion

(*a*) Vîram. Transl. p. 228.

(*b*) Col. Dig. Bk. V. T. 483; Vivâda Chint. 265.

(*c*) *See* Varadrája, pp 50, 51.

(*d*) *Kumla Buhoo* v. *Muneeshunkur*, 2 Borr. 746; *infra*, Bk. I. Ch. I. Sec. 2, Q. 12, 25; Ch. II. Sec. 1, Q. 6; Sec 6 A. Q. 2; Sp. Ap. 5 of 1862; see *Rango Vinayak* v. *Yamunábái*, I. L. R. 3 Bom. at p. 46, and *see* 2 Macn. H. L. 111, 118; 1 Str. H. L 244, 245; 2 *ib.* 272.

(*e*) *Sri Raghunadha* v. *Sri Broze Kishore*, L. R. 3 I. A. at p. 191.

(*f*) 10 Bom. H. C. R. 483.

(*g*) "A widow's nearest guardian, if there be no dower, will maintain her." Answers of Castes (Brahmans) to Borradaile's questions, Bk. E. p. 13 MS.

(*h*) I. L. R. 3 Bom. 44.

of the Court a separate maintenance might be awarded to a widow quitting her husband's family, yet this could not ordinarily be claimed. "All she can strictly demand," it was said, "is a suitable subsistence when necessary and whatever is required to make such a demand effectual." In the absence of any special cause for her withdrawal a separate allowance was refused. (a) In a previous case (b) it had been said by Sir Michael Westropp, C. J., "If he (the father-in-law) ill-treated her and expelled her from the family house the Civil Court would, we think, have been warranted in awarding to her a residence and a separate maintenance out of the family estate in his hands." The mention of the condition implies that it was thought essential.

In a Bengal case, however, that of *Cassinath Bysack* v. *Hurrusoondaree Dossee*, (c) it was said by the pundits who were consulted that a widow removing from her husband's family for other than unchaste purposes does not forfeit her right of succession to her husband's estate. This was made the foundation of the decision of the Judicial Committee in appeal. (d) The Hindû widow in Bengal, it must be borne in mind, takes her husband's share even in an undivided family, (e) and there being no text to deprive her of the estate on her withdrawing from the family abode she retains it, (f) as does even a widow who becomes incontinent. (g) In the subse-

(a) Loss of right to maintenance by removal from her father-in-law's is set forth as a customary law by many castes in answer to Mr. Borradaile's inquiries. *See* Lithog pp. 53, 74, 82, 83, 160, (177) (211), 194, 475–6, 498; MS. C. 50, 155; F sheet 36, 40, 44; G. Sootar Goojar Talabda, Lohar Sootar, Pardesi Sootar, Lohar Surati; Sh. 16, 25, 49, 55; Koombar 8, Mochi 20, Khalpa Khimbatta 48. The only case to the contrary is one in Bk. F, Broach Brahmans.

(b) *Sávitribái* v *Luximibái*, I L. R. 2 Bom. at p. 590.

(c) 2 Morl. Dig 198.

(d) *See* 12 Beng. L R. at p 242, 243.

(e) Dâyabhâga, Ch. XI. Sec. 1, para. 46.

(f) *See* Vîram Transl p 236.

(g) Vîram. Transl. 253. See *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. 115.

quent case of *Jadumani Dasi* v. *Khetra Mohun Shil,* (a) Sir L. Peel said that the right of a widow to maintenance was a charge on the late husband's property in the hands of the heir. As the property did not descend to the widow the case must have been one under the law of the Mitâksharâ, not of the Dâyabhâga. The learned Chief Justice however applies the former decision to the new case under a different law, and gives it an extension beyond the matter to which the earlier decision applied, which certainly could not have been expected by the pundits whose opinions formed the ultimate basis of the judgment. "The freedom of choice (of residence)," his Lordship observes, "had respect to causes as applicable to a widow not an heiress as to one who inherited." "There are certainly texts," he continues, "which speak of the right of the relatives of the husband to have the widow resident under their roof," but these he thinks may be controlled by reference to the needs of modern society, and as a forfeiture of maintenance is not prescribed as a penalty for withdrawal, the widow is equally entitled to it whether she resides at her father's house or with her deceased husband's family.

It does not seem to have occurred to the learned Judge that "the right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession,"(b) and that the converse is equally true. The widow does not forfeit her right by withdrawing from her husband's family, but then the right itself is a right to be supported there not elsewhere. Its enjoyment is lost simply because that enjoyment is essentially local. It is only when the husband's family are unable or unwilling to maintain the widow that her right to a separate allotment of property arises. (c) Strictly it is only in the patnî or principal wife

(a) Vyav. Darp. 384.

(b) Judicial Committee in *Moniram Kolita* v. *Kerry Kolitany,* L. R. 7 I. A at p. 151

(c) Vyav. May. Ch. IV. Sec. VIII. p. 7 ; Smṛiti Chand. Ch. XI. Sec. I. p. 33, 46 ; Vivâda Chint. 265.

that this latter right can become vested. She is answerable for sacrifices to her husband's manes, and ought to have the means of performing them when she cannot share in the united family sacrifices: the wife of inferior class is not a subject of the duty or the right. (*a*) It is not in any case strictly a charge on the estate constituting a property. The widow's maintenance is a personal right (*b*) to be made good by the heir taking the property, (*c*) but the corresponding duty does not necessarily and in all cases adhere to the property itself. (*d*) It is not a right which can be assigned or attached. (*e*) The father's debts take precedence of the mother's subsistence, and even these are not a charge in such a sense as to prevent the sons giving a clear title to a purchaser. (*f*) Although therefore the maintenence of a widow of a coparcener is in a sense a charge on the estate, (*g*) it does seem to be one necessarily attended with the incidents of ordinary property until at least a special lien has been created by agreement or by judgment of a Court. In *Baijun Doobey* v. *Brij Bhookan Lall Awasti* (*h*) the phrase "charge upon inheritance" seems to be used in the sense of a liability passing with the estate to

(*a*) *See* Smṛiti Chand. Ch. XI Sec. I. paras. 9, 10, 12, 15, 21, 35.

(*b*) *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311.

(*c*) What the Roman law called a *modus*

(*d*) *Lukshman* v. *Sarasvatibái*, 12 B. H C. R. 69; *Adheranee Narain Coomary* v. *Shona Malee*, I. L. R. 1 Cal. 365; *Johurra Bibee* v. *Sreegopal Misser*, ib. 470. See *Lakshman* v *Satyabhámábái*, I L. R. 2 Bom. 494.

(*e*) *Bhyrub Chunder* v. *Nubo Chunder*, 5 C. W R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C W. R. 311; *Ramabái* v. *Ganesh*, Bom. H. C. P. J 1876, p 188

(*f*) *Lukshman Ramchandra* v *Satyabhámábái*, I. L R. 2 Bom. at p. 505; *Jamiyatrám* v. *Parbhudás*, 9 B H. C R. 116; *Lakshman Rámchandra* v. *Sarasvatibái*, 12 B H. C. R. 69; *Nátchiarammál* v. *Gopala Krishna*, I. L. R. 2 Mad. 126.

(*g*) *Ramchandra* v. *Sávitribái*, 4 Bom. H. C. R. 73, A. C. J.

(*h*) L. R. 2 I. A. at p. 279.

successors: the claim in that case was realized against the personal interest of the holder of the estate, herself a widow. In *Nárāyanrāo* v. *Ramābāi* (a) the Judicial Committee recognizes that "an obligation.........to make allowance for the support of the widows analogous to the maintenance to which widows by Hindû law are entitled," does not "create a right which [is] a specific charge on the inheritance." The assumption therefore that the right to maintenance is an estate like that taken by a widow on succession seems to be unwarranted, and thus the ground originally taken for giving to the minor right the absoluteness of the other fails. (b)

But however questionable the origin of the doctrine we are considering, it has been so frequently acted on that it must now probably be considered as finally established. (c) The duty of residence with the family of the deceased husband has been reduced to a mere moral obligation. (d) In the case of *Pirthee Singh* v. *Ranee Rajkooer*, (e) an appeal from the High Court at Allahabad, the widow was entitled under her husband's will to maintenance and provision for charities. There was no direction as to residence. The Judicial Committee finding this, relied on the general principle laid down by Sir L. Peel in *Jadumani's* case, (f) and

(a) L R. 6 I. A. at p 118. Comp. *Koomaree Dabea's* case, 1 Marsh. 200.

(b) The husband's obligation under the English law to settle lands on his wife is not forfeited even by elopement and adultery. It is a legal right vested in her and is not divested though dower is barred by similar misconduct: *Sidney* v *Sidney*, 3 P. Wms. 268; and the wife keeping apart from her husband cannot claim a separate maintenance: *Manby* v. *Scott*, 2 S. L. C. 375; *Marshall* v. *Rutton*, 8 T. R. 545, 547.

(c) See *Subsoondaree Dossee* v. *Kisto Kisore Neoghy*, 2 Tay. and Bell, 190; *Shurno Moyee Dassee*, v. *Gopal Lall Dass*; 1 Marshall, 497; *Visalatchi Ammal* v. *Annasamy Śástri*, 5 M. H. C. R 150.

(d) *Koodee Monee Dabea* v. *Tarrachand Chuckerbutty*, 2 C. W. R. 134; *Ahollya Bhai Debia* v *Luckhee Monee Debia*, 6 C. W. R. 37; *Ganga Bai* v. *Sita Ram*, I. L. R. 1 All. 170, 174.

(e) 12 Beng. L R. p. 238.

(f) V. Darp. 384.

declared the right of the widow to an allowance not impaired by her withdrawal from the family of her husband. The case of *Náráyanráo* v. *Ramábái* (a) from Bombay was very similar to that of *Pirthee Singh,* and there being no condition as to residence in the will, the Judicial Committee held that the widow "was to be left in this respect in the ordinary position of a Hindû widow, in which case separation from the ancestral house would not generally disentitle her to maintenance." The law thus laid down was followed in *Kasturbai* v. *Shivajiram* (b) and it must now be taken that when the members of a deceased husband's family have family property it lies not on the widow claiming separate maintenance to show that her withdrawal was necessary or proper, but on them to show that it was improper or else "that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance." (c)

The different incidence of the burden of proof thus established will not probably produce much variance in practice. Under the British rule, a widow could make herself so disagreeable that the members of the husband's family would be glad to part with her on any reasonable terms, and mere disagreement has in some instances been thought by the Sástris a sufficient ground for approving a separate maintenance.

The right to maintenance is by the common law one "accruing from time to time according to the wants and exigencies of the widow." (d) The limitation to a suit for a declaration of the right is now 12 years under Act XV. of 1877, Sched. II. Art. 129, so that decisions under the preceding Acts limiting the claim to 12 years from the husband's death

(a) L. R. 6. I. A 114.

(b) I. L. R. 3 Bom. 372.

(c) See *Rámchandra* v. *Sagunábái,* I. L. R. 4 Bom. 261.

(d) *Náráyanráo* v. *Ramábái,* L. R. 6 I. A. at p. 118; S. C. I. L. 3 Bom. 415 It cannot be attached: *Ramabai* v. *Ganesh,* Bo. H. C. P. J. 1876, p. 188.

are no longer applicable. (*a*) But though limitation arises on a time to be counted from the application and refusal, the right is not to be referred to that demand as its origin so as to prevent the award of arrears in a proper case. (*b*) A decree fixes the payments awarded as a charge on the estate, (*c*) and though future sums to become due are still inalienable (*d*) the amount decreed for arrears may be attached by the widow's judgment creditors. (*e*)

Maintenance may be awarded for the future, subject if necessary to a variation on a change of circumstances. (*f*) The award or refusal of arrears rests in the discretion of the Court. (*g*) These decisions are obviously inconsistent with the sum payable for maintenance being a charge on the property in the strict sense of a real right in it. A wife's right to maintenance has been attributed to a kind of identity with her husband in proprietary right, but then her right is quite subordinate. (*h*) She cannot deal with it nor can she

(*a*) *Ib.*

(*b*) *Jivi* v. *Rámji Válji*, I. L. R. 3 Bom. 207.

(*c*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C W. R. 473; *Koomaree Debia* v. *Roy Luchmeeput Singh*, 23 C. W R. 33; *Gangábái* v. *Krishnaji Dádáji*, Bom. H. C. P. J for 1879, p. 2.

(*d*) This is recognized generally by the customary law of castes, as in Borradaile, C. Rules, MS. G. Sheet 32.

(*e*) *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311; and see *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*, 6 C. W. R 64 M. R.; and *Hoymobutty Debia Chowdhrain* v. *Koroona Moyee Debai*, 8 C. W. R. 40 C. R.

(*f*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C. W. R. 473; *Nubo Gopal Roy* v. *Sreemutty Amrit Moyee Dossee*, 24 C W. R 428; *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99. The successor of a zamindár it was said might readjust the terms of the grant made for maintenance to his predecessor's mother: *Bhávanamma* v. *Rámasámi*, I. L. R. 4 Mad 193.

(*g*) See *Jadumani Dossee's* case, *supra*; *Raja Pirthee Sing* v. *Ranee Raj Kooer*, 12 Beng L. R at p. 248; *Náráyanráo* v. *Ramábái*, I. L. R. 3 Bom. 415; S. C. L. R. 6 I. A. 114; *Venkopadhyáya* v. *Kávañ Hengasu*, 2 Mad. H. C. R. 36. As to the amount to be awarded see *Sreemutty Nittokissoree Dossee* v. *Jogendronath Mullick*, L. R. 5 I. A. 55.

(*h*) *Jamna* v. *Machul Sahu*, I. L. R. 2 All. 315.

effectively release her husband and his heirs from her right to subsistence (*a*) by a document executed in the husband's life, though the amount of her subsistence may thus be defined in case of a disagreement in the family.

The maintenance of parents (*b*) and of children in a united family is provided for by the law which determines their several interests. This is discussed under the head of Partition. Apart from property or after a partition the parents are always entitled to subsistence from their sons. (*c*) The adult son is not usually entitled to support by his father, (*d*) but in extreme indigence the right arises in favour of one who is incapable of maintaining himself. (*e*) These rights cannot however be considered as charges on the property held by those subject to them, though the extent of the corresponding obligation depends very much on the means by which it can be satisfied. Illegitimate children not taking a share of the estate are entitled to maintenance (*f*) but not in general as a charge on the property, though the father of a Súdra may allot a share to him, (*g*) and in the higher castes may make a grant. (*h*)

In families in which a rule of primogeniture prevails, that is generally in families holding estates granted for the support of some public service of importance, the younger members are entitled to a provision by way of appanage in

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(*a*) *Lakshman Rámchandra* v *Satyabhámábái*, I. L. R 2 Bom. 494, 503 ; *Narbadábái* v *Mahádev Náráyan*, I. L. R. 5 Bom. 99.

(*b*) A son must always support his parents, his mother even though she be an outcaste. Baudh. Tr. 230 ; Gaut. Tr. p. 279.

(*c*) *See* Manu quoted Col. Dig. Bk. V. Ch. VI. T. 379, Comm.

(*d*) *Premchand Pepara* v. *Hoolaschand Pepara*, 12 C. W. R 494.

(*e*) Col. Dig. Bk. V. Ch I. T 23; Smṛiti Chand. Ch. II. Sec. para. 31 ss. ; Steele, L. C. 40, 178

(*f*) *Ráhi* v. *Govind*, I. L. R. 1 Bom. 97 ; *Sri Gajapathi Radhik* v. *Sri Gajapathi Nilamani*, 13 M. I. A. at p. 506

(*g*) Coleb. in 2 Str. H. L. 68. *See* below, Bk. I. Ch. VI. Sec. 2, Q. 2, Rem.

(*h*) *Raja Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

the shape either of an assignment of the revenue of particular villages or lands, or else of an income out of the general revenue of the impartible estate. (*a*) It often happens that a family which has an estate of this kind has also property apart from its watan or estate appropriated to public purposes. When that is the case there may be a partition if there is not a family usage to the contrary, in which the "service lands" are taken into account along with the other property in the aggregate for partition. They are assigned to one of the sharers, and if impartible may make that share larger than the others. The lands however though subject to provide for a public service may still be partible within the family, and this is a very common case. When the partible estate is insignificant, the holder of the impartible estate is subject to claims for maintenance of the junior branches of the family so far as he can support them. No precise limit has as yet been set to the degree of family connexion on which the right and obligation depend. (*b*) An allotment of land or revenue seems to continue to lineal descendants in the branch, and on their *extinction* to revert. (*c*) But sometimes it is absolute. (*d*)

When a share is unsuccessfully sued for by a widow or a member of a junior branch of a family it is the practice of the Courts to award maintenance if the right to it is established in the course of the trial. (*e*)

(*a*) Steele, L. C. 229; *Shidhojiráv* v. *Naikojiráv*, 10 B. H. C R. 228; *Narsinh Khanderav* v. *Yádaoráv*, Bom. H C P. J. 1882, p. 345; *Chowdhry Hurcehur Pershad Doss* v. *Gocoolanund Doss*, 17 C. W. R. 129, C. R; comp Imperial Gazetteer of India, Art. Rajputáná, vol. VII. p. 520.

(*b*) *See* Sleeman, Journey through Oude, vol I. p. 169, 173; above, p. 242; and *Sávitriavá* v *Anandrao*, 12 Bo. H. C R 224.

(*c*) *Raja Woodoyaditto Deb* v. *Mukoond Narain*, 22 C. W R 225.

(*d*) *Salúr Zamindár* v. *Pedda Pakir Raju*, I L. R. 4 Mad. 371.

(*e*) *Rakhmábái* v. *Rádhábái*, 5 Bom. H. C. R. 193 A. C J.; *Rázábái* v. *Sadu Bhaváni*, 8 Bom. H. C. R 99 A. C. J.; *Shidhojiráv* v. *Náikojiráv*, 10 Bom. H. C. R. 228, 234.

An allowance for maintenance fixed by a decree "is ordinarily liable to be varied if the party ordered to pay it shows that there are circumstances which render it equitable to vary the amount," and "no Court," it was said, "would pass a decree fixing a grant of maintenance in perpetuity." (*a*)

§ 11.—ON STRÎDHANA OR WOMAN'S PROPERTY.

The simple etymology of the word 'Strîdhana,' 'woman's property,' affords little or no guidance towards determining its exact comprehension. The principal divergencies of view indeed amongst the native commentators may perhaps be ascribed to their efforts to get more out of the term than it really contains, to find a sufficient and decisive direction in that which in itself is essentially ambiguous. (*b*)

The expression 'Strîdhana' may obviously connote:—

(1) A limitation of woman's proprietary competence to certain kinds of things amongst those regarded as generally admitting of ownership.

(2) Special limitations or extensions of the rights and competencies of the woman, as compared with the man, in transactions concerning things her ownership of which is recognized.

(*a*) *Narsinh Khanderáv* v *Yádavráv*, Bom. H. C. P. J. 1882, p 345.

(*b*) The principles of interpretation professedly followed by the Hindû lawyers are closely connected with their philosophical systems. *See* the Introduction, above, pp 11, 14; Coleb. Essays, Vol II. page 239. In practice, "the interpretations of Indian commentators, even if traditional, are chiefly grammatical and etymological, explaining every verse, every line, every word by itself, without inquiring if the results so obtained harmonised with those derived from other quarters." Roth, quoted 2 Muir's Sanscrit Texts, 169 Note, 200, though an isolated construction of the texts is condemned, *ibid.*, page 177. Though the hairsplitting habits of the Commentators are very puzzling to a European, and they constantly appeal to standards which he cannot accept, their conclusions are generally wrought out with rigorous logic from the data assumed by them. Many of their

(3) A special course of devolution, on a woman's death, of the property owned by her while living.

Thus we have—(1) the ordinary enumerations of the six or more kinds of Strîdhana; (2) the woman's unlimited right to deal with Saudâyakam, coupled with the restrictions imposed by some lawyers on her dealings with immoveable property; and (3) the rule, referred to by Ellis, (*a*) that "sons shall succeed to the father, and daughters to the mother." Jîmûtavâhana (*b*) defines Strîdhana as that which a woman may alien or use independently of her husband. (*c*) Vijñâneśvara defines it as property which a woman may have acquired by any of the ordinary modes. What property she is capable of owning, if there be any discrimination between this and the property of males, is not a point embraced within either definition, though if any difference exists, the definition ought apparently rather to have rested on this than on the particular rules which could apply only when the character of the property had been first established. Nîlakaṇṭha, in the Vyavahâra Mayûkha, (*d*) does attempt to define Strîdhana by an enumeration of its several constitu-

rules of construction are identical with those of the English law. Thus the more general, it is said, yields to the more particular, and the determination of which is the more general and which the more particular in any case is to be made by an application of trained experience. *See* Vijñâneśvara in Macn. H. L p. 188. Instances of an expression, taken by some literally and by others as a 'dikpradarśana,' or indication of a principle, are discussed in this volume. For the use of 'Gaṇas,' suggestions of class, *see* Burnell's Introduction to Varadrâja's Vyavahâra-Nirṇaya, p xiii. The Vedic Commentator Vallabha propounds the perfectly correct principle: "A vedic text cannot be interpreted by itself: its context must be considered and the interpretation must harmonize with other texts of the Veda bearing on the same subject." *See* the Mimânsadarśana, p. 371.

(*a*) 2 Str. H. L. 405; *see* Coleb. Dig. Bk. V Ch. IX. Sec. 1, T. 461; and Nârada, Vivâdapada, Ch. XIII. 7, 2, Transl. p. 94.

(*b*) Dâyabhâga, Ch. IV. Sec. 1, p. 18; Stokes, H. L. B. 240.

(*c*) Coleb. Dig. Bk. V. T. 470.

(*d*) Ch. IV. Sec. 10; Stokes, H. L. B. 98.

ents; but accepting the word 'other,' (a) in a text of Yâjña-valkya, as allowing an indefinite extension of the objects of woman's ownership; he is led to divide Strîdhana into two classes, according to its devolution, either as prescribed by texts bearing on particular elements of it, or under a residual rule, which he (b) draws from another passage of Yâjñavalkya, and which brings the inheritance to all other kinds of Strîdhana under the rules applicable to a male's estate.

The notion set forth by Âpastamba, (c) as held by some, is that, though the wife, being identified with her husband in the fruits of piety, and the acquisition of wealth, might during his absence expend the common funds without being guilty of theft, yet in a partition, her share comprises only her ornaments and the wealth given to her by her relations. From this to the liberal rule of Yâjñavalkya, as construed by the Mitâksharâ, it is possible to trace in the Smṛitis something like a gradual development of the recognized capacity of women for property, which may have corresponded in a measure to the successive generations in which the texts were framed, but which at any rate indicates by its progressive reception and influence a growing predominance of personal regard towards wives and daughters over the harsher regulations of the earlier Brâhmanical law. Baudhâyana indeed (d) provides only for the succession, in the case of woman's property, of daughters to their mother's ornaments, consistently with his rule that women are excluded generally from inheritance. In Vasishṭha, (e) daughters are admitted to divide the nuptial presents of their mother. Manu enumerates (f) [1] gifts at the bridal altar, [2] in the bridal pro-

(a) "Âdhivedanika âdyam" = "a gift on supersession and so on,' Yâjñ. II. 143, Stenzler.

(b) *See* para. 26; Stokes, H. L. B. 105.

(c) *See* Praśna II. Patala. 6, Kan. 14, Sl. 9 in the Appx.

(d) Praśṇa II. Kan. II. 27.

(e) Ch. XVII. 24.

(f) Ch. IX. Sl. 194.

cession, [3] as a token of affection, or [4] from a father, [5] mother, or [6] brother, and to these Vishṇu adds gifts by sons, the present on supersession, the wife's fee, and the gift subsequent. The gift subsequent [by parents and relatives] may be considered as included in Manu's 'prîtidatta' or gift as a token of affection, (*a*) and then the real additions are the son's gift, the fee (śulka), and the gift on supersession through the husband's marrying another wife (*Ádhivedanika*). Nârada, who presents some indications, according to Dr. Jolly, of modern influences, merely repeats the rule of Manu, (*b*) with a substitution of a gift from the husband in place of the "gift as a token of affection," which might be taken more extensively. (*c*) Devala goes much further. He says that a gift to a woman for her maintenance, her fee (śulka), and her gains (lâbha) shall be her separate property or Strîdhana. (*d*) The Vîramitrodaya limits the *lâbha* to "gains received in honour of Gaurî and other deities," but this restriction seems to be arbitrary. (*e*)

Lastly, comes the passage of Yâjñavalkya (II., 144) quoted by Mitramiśra in the Vîramitrodaya. As quoted by Jagannâtha and by Jîmûtavâhana, (*f*) the passage seems not to have the word 'Âdyam,' on which Vijñâneśvara in a great measure builds his construction. (*g*) This is in itself vague, since the words "and the rest" or "the like"

(*a*) *See* Coleb. Dig. Bk V Ch. IX. T. 465, 468, Comm.

(*b*) *See* Nârada, Vivâdapada, Part II. Ch XIII. 8, Transl p. 95.

(*c*) *See* Mit. Chap. II. Sec. 11, p. 5; Stokes, H L. B. 459; Coleb. Dig. Bk V. Chap. IX. T. 462, Comm

(*d*) *See* the Vîramitrodaya on Strîdhana, and Coleb. Dig. Bk. V. hap. IX T. 478.

(*e*) *See* the Smṛiti Chandrikâ, Chap. IX. Sec. 2, p 15.

(*f*) *See* also Coleb Dig. Bk. V. Chap. IX. T. 463; Dâyabhâga, Chap. IV. Sec. 1, para. 13; Stokes, H. L. B. 239; Mit. Chap. II. Sec. 11, para. 2, note; Stokes, H. L. B. 458; Smṛiti Chandrikâ, Chap. IX, Sec. 1, para. 3, note (2).

(*g*) Stenzler, Yâjñ. 143, translates this "*und ähnliches.*"

may be translated by reference to the preceding enumeration so as to extend only to property acquired in a way similar to those specified. (*a*) The Smṛiti Chandrikâ adopts the reading "Âdyam," (*b*) yet in the section on Strîdhana makes no mention of property inherited by women, whence the translator of that work (*c*) and the High Court of Madras have concluded that inherited property is not Strîdhana. Yet a widow according to the same authority takes the property of her deceased husband in a divided family, (*d*) and a daughter on failure of the widow succeeds as a *dâyâdi* or sharer of the inheritance. (*e*) The Mitâksharâ, an earlier work, but under the influence of more advanced views, or as an easier solution of the questions arising on Yâjñavalkya's text, takes "Âdyam" as meaning "any other separate acquisition," and indicates, by enumerating "inheritance, purchase, partition, seizure, or finding," (*f*)

(*a*) *See* the Mâdhaviya, p. 41

(*b*) Chap. IX. Sec. 1, para. 3

(*c*) Translation, p. 110, note (1).

(*d*) Smṛiti Chandrikâ, Chap XI. Sec. 1, para. 24.

(*e*) *Ibid* Sec. 2, p. 9; Sec. 4, p. 19.

(*f*) Mit Chap II Sec. 11, para. 2; Stokes, H L B 458 By âdi (=and the rest) Vijñâneśvara must have known that the passage quoted by him from Yâjñavalkya would remind his readers of the instances of female inheritance which he had already given (*see* Stokes, H. L. B. pp 383, 427, 440, 441, 446) He could not but have excepted these expressly had he intended to except them He found a varying enumeration of the constituents of Strîdhana in Smṛitis, all of which had a sacred authority, and adopted a generalization that embraced them all. This was an application of the received principle that where different objects are named as of a particular class by different Smṛitis, all are to be included in it in order to preserve consistency (*ekavâkyatâ*). Inheritance he specifies, and names it first; the comprehensive final term shows that it is not used in any restricted sense. Such words as *âdi* are constantly used in the Smṛitis which were learned by heart to suggest a statement or a class by a single term. Vijñâneśvara, commenting on Yâjñavalkya's smṛiti, interprets the other smṛitis by means of that, and

that a woman may acquire property in precisely the same ways as a man. (*a*) As to inheritance from her husband, Vijñâneśvara supports the complete right of the widow by reference to Bṛihaspati's text, in her favour, (*b*) without the exception contained in another passage of the same Smṛiti, excluding her from succession to Nibandha or fixed property. (*c*) The daughter too inherits from her father, and thus inheriting becomes complete owner, as when she takes her one-fourth share in a partition. (*d*) *See* Bk. I. Ch. II. Sec. 7.

Whether Vijnâneśvara has not given to the text of Yâjña-valkya a comprehension going much beyond the intention of its writer may reasonably be doubted. If we look back to the state of Brâhmanical feeling as the expression of which the principal Smṛitis were composed, we find the position of women regarded as essentially dependent. Those who on account of their weakness had a claim to be protected and maintained by their male relatives in their family of marriage (*e*) or of birth (*f*) were not likely to excite the commiseration out of which might spring the moral and eventually the legal recognition of their right to take the estate

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of Gautama's, which also (Ch. XXVIII, 24) gives but a single general rule for the descent of Strîdhana and a single exception in the case of the śulka or fee. Other lawyers take other texts, as Manu IX, 192-4, 198, as the leading authority, and construe Yâjñavalkya and Gautama by them, but without any precise general agreement as to details.

(*a*) *Ibid.* Chap. I. Sec. 1, para. 8; Stokes, H. L. B. 366.

(*b*) Mit. Chap. II. Sec. 1, paras. 6, 30, 31, 39; Stokes, H. L. B. 428-439.

(*c*) *See* Smṛiti Chandrikâ, Chap. XI. Sec 1 para. 23; Mit. Chap. II. Sec. 2. para. 1; Stokes, H. L. B 440. This incapacity seems to be still recognized in the Siâlkot district of the Panjâb. *See* Panj. Cust. Law, II. 210.

(*d*) *Ibid.* Chap. I. Sec. 1, paras. 3, 8; Stokes, H. L. B. 365, 366; Sec. 7, para. 14; Stokes, H. L. B. 401.

(*e*) *See* Vyâsa quoted Varadrâja, p. 39, and the Comment. p. 42; Vivâda Chintâmaṇi, p. 261, 262; above, p. 245 ss.

(*f*) *See* Nârada, Pt. II. Ch. XIII. Sl. 28; above, p. 246.

dedicated equally to the celebration of sacrifices (*a*) to the dead as to the support of the living members of the family. Such a recognition was wholly opposed to the earlier ideas as to the ownership of land. Yâjñavalkya himself regarded the inheritance as absolutely impartible and inalienable. Uśanas says that such property is indivisible "among kinsmen even to the thousandth degree," and Prajâpati is to the same effect. (*b*) Under such a law there would be no immoveable property for the widow or the daughter to take on the decease of the husband or father, and Bṛihaspati says (*c*) distinctly that a widow shall take her husband's wealth "with the exception of fixed property," as, "even if virtuous, and though partition has been made, a woman is not fit to enjoy fixed property." In this latter passage partition of the immoveable inheritance is as elsewhere in the same Smṛiti recognized, but the older note of exclusion of females as owners is still retained. Kâtyâyana, fully recognizing partition, yet declares that immoveable property is not to be given to a woman; (*d*) and Vyâsa says that the husband even is not to make her a present of more than a limited amount, apparently out of the moveable wealth. (*e*) So jealous was the Brâhmanical law of any impairment of the family estate. The wife being, along with the son and the slave, in this ancient constitution of Hindû Society, "Nirdhana" or without capacity for property, (*f*) and her

(*a*) Manu IX 142; Coleb Dig. Bk. V. T. 413, 484, Comm.; and compare Coulanges La Cité Antique, Bk. II. Ch. VII.

(*b*) Smṛiti, Ch. l. c., p. 44, 46

(*c*) *Ibid.* Ch. XI. Sec. 1, para. 23.

(*d*) Vyav. May. Ch. IV. Sec. 10, para 5; Stokes, H. L. B. 99.

(*e*) Vyav. May. loc. cit.; Dâyabhâga, Ch. IV. Sec 1, para. 10; Stokes, H. L. B. 238. Compare Coulanges, La. Cité, Bk. II. Ch. VI.

(*f*) *See* Manu and Nârada as quoted below. The Smṛiti Chandrikâ tries to explain away "Nirdhana" as incompetent for transactions, not as incapable of holding property. *See* Transl. Ch IX. In China all property owned or inherited by a wife passes to the husband in consequence of the *potestas* with which he is invested, as under the

competence in that respect having been extended by steps, which seem to have been always jealously watched and restricted, the rather sudden and indefinite expansion, which the Mitâksharâ supposes Yâjñavalkya to have given to it seems opposed to all probability. Apart from Vijñâneśvara's authority we should rather construe the words "and the rest" by reference to the context, and explain them as meaning "other kinds sanctioned by express scripture or by custom that may be referred to it." That Vijñâneśvara himself accepted the text in its widest signification cannot reasonably be doubted. (*a*)

It is this construction which underlies his whole subsequent treatment of the subject of inheritance. This is the construction which the Vîramitrodaya (*b*) adopts and which Jîmûtavâhana understands while he combats it. (*c*)

earlier Roman Law *See* Journ. of N China Br. of the R A. Society, Part XIII. p 112 Women were regarded by the Teutonic laws as necessarily dependent, and the traces of this order of ideas still remain in the English law. The proper guardian was the husband, father, brother, or son, the nearest agnate or the King's Court. Lab. *op. cit.* 394. So under the early Roman Law. *See* Mommsen, Hist. of Rome, vol. I.

(*a*) A conclusive confirmation of this being the sense of the Mitâksharâ may be drawn from an exceptional case Inheritance is by Vijñaneśvara named as first amongst the sources of ownership (*see* Mit. Ch. I. Sec. I para. 12). There is a passage of Baudhâyana which says, "the uterine brothers take the property of a deceased damsel." Here is a special rule of inheritance to Strîdhana in the particular case. Vijñaneśvara, amongst the rules on Strîdhana, says that under it the brothers take the property "inherited by her." Thus the inheritance constitutes Strîdhana, and the heirs of the woman, not heirs of the former owner, take it on her decease.

Similarly in the Vyavahâra Mayûkha, Ch. IV Sec. 10, para. 26, property taken by inheritance is distinctly ranked as Strîdhana by the distinction drawn between it and Strîdhana of the less important specified kinds to which special texts apply.

(*b*) Section 1, p. 4 ff, below.

(*c*) Dâyabhâga, Ch. IV. Sec. 2, p. 27 (Stokes, H. L. B. 250); Sec. 3, p. 4 (*ibid.* 251), compared with Mit. Ch. II. Sec. 11, p. 11 (*ibid.*

By what precise course the Hindû woman, from the condition of complete dependence, from being *Nirdhana,* rose in the estimation of the Brâhman lawyers to the high position assigned to her by Vijñâneśvara, cannot probably, upon the existing sources of information, be determined with any certainty. Sir H. S. Maine, tracing her right to property to the Bride-Price paid for the damsel taken in marriage and in which she shared, remarks (*a*) :—

"If then the Strîdhan had a pre-historic origin in the Bride-Price, its growth and decay become more intelligible. First of all it was property conferred on the wife by the husband 'at the nuptial fire,' as the sacerdotal Hindû lawyers express it. Next it came to include what the Romans called the *dos,* property assigned to the wife at her marriage by her own family. The next stage may very well have been reached only in certain parts of India, and the rules relating to it may only have found their way into the doctrine of certain schools; but still there is nothing contrary to the analogies of legal history in the extension of the Stridhan until it included all the property of a married woman. The really interesting question is, how came the law to retreat after apparently advancing farther than the Middle Roman Law in the proprietary enfranchisement of women, and what are the causes of the strong hostility of the great majority of Hindû lawyers to the text of the Mitâksharâ, of which the authority could not be wholly denied? There are in fact clear indications of a sustained general effort on the part of the Brâhmanical writers on mixed law and religion, to limit the privileges of women which they seem to have found recognised by elder authorities."

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460). So also the Smṛiti Chandrikâ, which, though it does not allow inheritance as a source of strîdhana (*see* Transl. Ch. IX. Sec. I.), yet admits that the Mitâksharâ does so (Transl. Ch. IV. para. 10). The Vivâda Chintâmani and the Sarasvati Vilâsa follow the Mitâksharâ. *See* below.

(*a*) The "Early History of Institutions," pages 324, 333.

And again (*a*) :—

"On the whole the successive generations of Hindû lawyers show an increasing hostility to the institution of the Strîdhan, not by abolishing it, but by limiting to the utmost of their power the circumstances under which it can arise. ....The aim of the lawyers was to add to the family stock, and to place under the control of the husband as much as they could of whatever came to the wife by inheritance or gift, but whenever the property does satisfy the multifarious conditions laid down for the creation of the Strîdhan, the view of it as emphatically 'woman's property' is carried out with a logical consistency very suggestive of the character of the ancient institution on which the Brâhmanical jurists made war. Not only has the woman singularly full power of dealing with the Strîdhan—not only is the husband debarred from intermeddling with it, save in extreme distress—but, when the proprietress dies, there is a special order of succession to her property, which is manifestly intended to give a preference, wherever it is possible, to female relatives over males."

That the institution of Bride-purchase existed amongst the Hindûs, and for a time even amongst all classes, seems almost certain. Manu recognizes it (Ch. VIII., 204) and guards against fraud on the purchaser by giving to him both of the young women when an attempt is made to substitute one for another. Âpastamba says (*b*) :—

"It is declared in the Veda that at the time of marriage a gift for (the fulfilment of) his wishes should be made (by the bridegroom) to the father of the bride, in order to fulfil the law. 'Therefore he should give a hundred (cows), besides a chariot; that (gift) he should make bootless (by returning it to the giver).' In reference to those (marriage

(*a*) *Op. cit.* p. 333.

(*b*) Praśna II. Patala 6, Kaṇ. 13, para. 12; *see* also Manu III. 51; and Vasishṭha I. 36, 37.

rites) the word 'sale,' (which occurs in those Smṛitis is only used as) a metaphorical expression; for the union (of the husband and wife) is effected through the law."

This shows at once the former prevalence of the practice and the abhorrence with which at a later time it came to be looked on by the Brâhmanical community. (*a*) It had then become peculiar to, and therefore distinctive of, the lower castes, Vaiśyas and Śûdras, (*b*) though in the approved Ârsha form of marriage, a gift of a bull and a cow, to the bride's father was still prescribed, (*c*) a remnant, probably of a practice amongst a pastoral people, of compensating the family which lost the daughter in the most usual and valuable form of property then recognised. The formula prescribing the gift survived the circumstances in which it originated, but still exacted observance through the associations with which it was connected. (*d*) Manu, (*e*)

(*a*) *See* Baudhâyana, Transl. p. 208.

(*b*) Âpastamba, Praśna II. Pâṭala 5, Kaṇḍika 12, para. 1 ; Gaut. IV. 11 ; Yâjñavalkya I. 58, 61 ; Coleb. Dig. Bk. V. T. 499. At 2 Borr. R. 739, there is a case, *Massamat Rulivat* v. *Madhowjee Pánúchund*, of a mother (a widow) receiving Rs. 700 for consenting to her daughter's marriage which "was deemed disgraceful and was only done secretly," but which did not invalidate the betrothal made in consequence. Secret sales of girls are, it is believed, still very common in Gujarât even amongst the classes which publicly condemn the practice.

(*c*) Âpast. Praś. II. Pat. 5, Kaṇḍ. 11, para. 18 ; Manu III. 53 ; Vasishṭha I. 32.

(*d*) That kine were a common form of gift in the Vedic period, *see* 5 Muir's Sanskrit Texts, 467. In the Huzâra district it is noted that the bridegroom gives his bride a milch cow and some jewels as a premium when their cohabitation begins; and that she is persuaded to forego the rest of her promised dower. By a complete inversion of the ancient ideas a price is given nominally to buy jewels for the bride at betrothal, but usually to the father, who appropriates it. Panj. Cust. Law, II. 220. On the important place of cows in the wealth of a family amongst the ancient Irish, *see* O'Curry's Lect. I. 172, &c.

(*e*) Ch. III., paras. 25, 31, 51.

who condemns the Âsura form of marriage, recognizes it as still in vogue, and as distinguished by a consent gained by a liberal gift on the part of the bridegroom to the bride's father and the bride herself. (*a*) This gift is not, however, by Manu identified with that "gift before the nuptial fire," (*b*) which may accompany the most approved marriages. Vyâsa (*c*) defines the *Śulka* as the bribe given to the bride to induce her to go to her husband's house. Vijñâneśvara, (*d*) commenting on Yâjñavalkya II., 143, 144, who enumerates the nuptial gift as distinct from the '*Śulka*,' or 'fee,' calls the latter 'the gratuity for which a girl is given in marriage'; and the Vishṇu Smṛiti also (*e*) distinguishes the *Śulka* from the gift at the nuptial fire. Kâtyâyana distinguishes the nuptial gift (*f*) from the *Śulka*, which latter he defines as "what is received as the price of household utensils, of beasts of burthen, of milch cattle (*g*), or ornaments of dress, or for works." (*h*) This definition, though passed by in silence by the Mitâksharâ, is adopted by the Vyavahâra Mayûkha, (*i*) by the Vivâda Chintâmaṇi, (*j*) and with a somewhat different reading is adopted by Jîmûtavâhana in the Dâyabhâga. (*k*) This writer insists that the gift of the

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(*a*) So the Ratnâkara. *See* the Smṛiti Chandrikâ, Ch. IX. Sec. I, para. 4, note.

(*b*) Manu IX. 194; III. 54.

(*c*) Dâyabhâga, Ch. IV. Sec. 3, para. 21; Stokes, H. L B. 255.

(*d*) Mit. Ch. II. Sec. 11, para. 6; Stokes, H. L. B 460.

(*e*) Ch. XVII. 18.

(*f*) Mit. Ch. II. Sec. 11, para. 5; Stokes, H L. B. 459.

(*g*) DeGubernatis, Storia Comparata Degli Usi Nuziali, Bk. I. Chap. XV. p. 95, points to "il dono d'una vacca che lo sposo Indiano faceva alla sposa e al prete maestro." Compare Yâjñ. I. 109; Manu XI. 40.

(*h*) Smṛiti Chandrikâ, Chap. IX. Sec. 10, para. 5; Mâdhaviya, p. 41.

(*i*) Chap. IV. Sec. 10, para. 3; Stokes, H. L. B. 98.

(*j*) p. 228.

(*k*) Chap. IV. Sec. 3, para. 19; Stokes, H. L. B. 254. *See* also Coleb. Dig. Bk. V. T. 468; Varadarâja, p. 46.

ordinary *Śulka* may accompany a marriage in any form, (*a*) and is to be carefully distinguished from the *Śulka* presented in marriages according to the disapproved forms to the father or brothers giving the damsel in marriage. The latter, he says, belongs to them alone. (*b*)

Varadrâja, page 48, admitting the two kinds of *Śulka*, says that the "Bride-Price" goes to the mother or the brother, while the gift made for the purchase of ornaments and furniture reverts on the woman's death to its giver. Mitramiśra says there is a *Śulka* given in the form of ornaments

(*a*) Dâyabhâga, l. c. para. 22 ff; Stokes, H L. B. 255.

(*b*) Amongst the Jews "a dowry or purchase money was usually given by the bridegroom to the bride's father." Milman, History of the Jews, I 174. The ancient Germans purchased their wives, and the form remained after the reality had passed away. *See* Guizot, Hist. de la Civ. Fr Leç. VII. The *co-emptio* of the Roman law was in form a purchase of the bride. Gaius I. 113

To buy a wife remained in the Middle Ages the common expression for an engagement to marry. No bargain being complete without a change of possession, the suitor paid money for the *mundium* or guardianship and control of his intended bride, or earnest, on account of it, and this payment completed the marriage contract. (This payment of earnest, and the deposit of valuables as security, is still common in Bombay.) The sum stipulated was in progress of time always secured as a provision or part of the provision for the wife, and the pledging of the husband and his estate was in early times the wedding. As the bride assumed greater independence the earnest-money came to be paid to her, and in the English ceremony was eventually appropriated by the priest as a fee. The effacement of the guardian brought about the marriage *per verba de praesenti*, which may be compared with the Hindû Gândharva rite, but which was never received as sufficient in England. The confusion between betrothal or marriage, or the variance of opinion in regarding the one or the other as the essential ceremony, has prevailed alike in Europe and in India. *See* Baring Gould, Germany, Ch. V.; Nárada II., XII., 32-35. If the bridegroom had failed to purchase the *mundium* or guardianship of his bride from her father, the latter, according to the Code of the *Allemanni*, could reclaim her with damages, and if meanwhile she died leaving children, these ranked as illegitimate. Lab. *op. cit.* 393. The purchase money becoming by degrees the *dos*

for the bride to her parents, and another as a present to her on her going to her husband's house. (*a*)

This perplexity of the Smṛitis and the commentators over "*Śulka*," as a gift to the parent or brothers, and as a gift to the bride, as a gift at the marriage, at the time of the bride's change of residence, and as a fund for procuring household goods and ornaments, shows that at a very early date the word had lost the definite sense of "Bride-Price," if it had ever been confined to it. Stenzler translates *Śulka* as "*Morgengabe*," (*b*) but this gift on the morning after the completed nuptials, an important institution amongst many nations, (*c*) seems not to have obtained special recognition amongst the Hindûs. It would indeed be incompatible with the spirit of modesty with which, according to their

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legitima or marriage gift of the bride herself, was subject to the husband's *mundium* and fell to him on his wife's predecease; but it belonged to her inalienably in case of her survival. Lab. *op. cit.* 403. The Weotuma or Witthum by which parents provided against their daughter's being absolutely dependent on her husband consisted of land, money or stock (*see* below), and it was regarded as essential to a true marriage, so that when there was nothing to give, the bridegroom went through a form of receiving. In return he used to settle lands or houses on his bride. It was only when she was poor that she had to depend wholly on the *morgengabe*, and hence an unequal marriage acquired the name of "Morganatic."

In China the betrothal or marriage contract is made by the heads of the families, but before matrimonial union the bridegroom has to buy the potestas of the father. This is not reduced to a mere form like the Roman *coemtio*, but is a serious and expensive transaction. The wife thus passes into her husband's agnatic connexion and forsakes her own.

(*a*) *See* Vîramit. Tr. p. 223.

(*b*) Yâjñavalkya, II. 144.

(*c*) In Ireland the Coibche (= *morgengabe*) gradually absorbed the bride-price as Christianity softened the manners of the people, and then a part of the gift (called Tindscra) was handed to the father as a consideration for his resigning at once the person and guardianship of his daughter. *See* O'Curry, Lect. I. 174 ss. *See* De Gubernatis Storia Comparata, Lib. III. Ch. VII., Ancient Laws of

law-givers, the relations of the spouses are to be governed.(a) All the Smṛitis, which deal with the subject, agree that this *Śulka* goes on the woman's death childless to her brothers or her parents, (b) for which no good reason could easily be found, unless the more primitive idea, attached to the word, had been that which it really expressed during the formation of the law. All agree too that the property of a woman married by the Âsura rite goes to her own family(c)

Wales, p. 47, § 62, 63. A practice prevails amongst some castes in Western India which may possibly have originated in the same way as the "Morgengabe." On the first night of cohabitation the elder women of both families conduct the married pair to their chamber, and seat them together on the nuptial bed. The bridegroom then puts a gold ring on the bride's finger, and ties in her *sari* or scarf two gold coins. The analogy of this to the use of the wedding ring, the gift of money now taken by the priest, and the concurrent declaration "with all my worldly goods I thee endow," (Bl. by Kerr, vol. II. p. 114,) in the English marriage service is curious and interesting. The gift makes the property Stridhana. The male parents also are present in some cases. The bride's mother retires telling the bride by all means to insist on the agreed *præmium pulchritudinis*. The door is then closed; but outside it the sisters or cousins of the married pair sit in opposite lines, and for two or three hours sing alternately on love and marriage.

(a) The morning gift of favour became in time a matter of contract, and marriage articles eventually stipulated as a rule for a settlement as *morgengabe* of one-fourth of the bridegroom's property by way of dower on the intended bride. This, however, does not seem to be the gift intended by Śulka in the Śmṛitis. *See* Lab. *op. cit.* 407; Baring Gould, Germany, &c., p. 89. Where a husband had failed to present the *morgengabe*, the wife, if left a widow, could claim generally one-third of all acquired lands. The dower and *morgengabe* thus became confused, and in the English law were not distinguished. *See* Bk. I. Ch. II. Sec. 6 A. Q. 7, note.

(b) *See* the Transl. of Gautama XXVIII. 23; Kâtyâyana, quoted Dâyabhâga, Chap. IV. Sec. 3, para. 12; Stokes, H. L. B. 253; Yâjñavalkya, *ibid.* paras. 10, 26; Stokes, H. L. B. 253, 256.

(c) Dâyabhâga, Chap. IV. Sec. 2, para. 24; Stokes, H. L. B. 249; Mit. Ch. II. Sec. 11, para. 11; Stokes, H. L. B. 460; Manu IX. 197; Yâjñavalkya, II. 145.

on her death without children. According to most of the commentators the same rule is prescribed by Yâjñavalkya as to a gift by her own kindred. (*a*) Vijñâneśvara himself, while he converts the rule in favour of the woman's kinsmen generally into one favouring her husband's kinsmen, (*b*) as the necessary complement of the wide extension that he had given to Strîdhana, is forced to set aside his own construction in favour of the brothers, who take the *Śulka* not only as relatives, but under a special text in their favour. (*c*) The Vyavahâra Mayûkha, (*d*) adopting the Mitâksharâ's doctrine as to Strîdhana, defined by special texts, admits the brothers' right to the *Śulka*, and in the case of an *Âsura* marriage the right of the woman's own family to property arising from gifts made by them.

This identity of rules in cases which the modern Hindû law widely distinguishes must probably have originated in some common cause. The form of capture recognised for soldiers as the Râkshasa rite (*e*) still subsists as an essential part of the marriage ceremony amongst several of the uncivilized tribes of India. (*f*) The resistance of the

(*a*) Dâyabhâga, Chap. IV Sec. 3, paras. 10, 29 ; Stokes, H. L. B. 253; 257 ; Coleb. Dig Bk. V. T. 503 ff. The Teutonic Codes provided for a gift by way of advancement on the part of a father or brother at a maiden's marriage. This, which the Lombard law called *faderfium*, was inherited by the bride's children, in default of whom it returned to her family. Lab. *op. cit.* 409 ; Gans, Erbrecht, III. 176.

(*b*) Mit. Chap. II. Sec. 11, paras. 9, 14 ; Stokes, H. L. B. 460 ; Coleb. Dig. Bk. V. T. 508, 509, 512, Comm.

(*c*) So the Smṛiti Chandrikâ, Chap. IX. Sec. 3, paras. 27, 29, 33.

(*d*) Chap. IV. Sec. 10, paras. 27, 32 ; Stokes, H. L. B. 105, 106.

(*e*) Manu, III. 26, 33. An allusion to it seems to be made in the passage from the Rig. Veda X., 27, quoted in Muir's Sanskrit Texts, vol. V. p. 458. The authority exercised by brothers is alluded to, *ibid.* This in Vasishṭha, I. 34, is called the Kshâtra rite.

(*f*) *See* Lubbock's Primitive Condition of Man, pp. 76, 86 ; Transactions of the Literary Soc. of Bom. vol. I. 285 ; Tupper, Panj. Cust. Law, vol. II. 90 ss ; Rowney, Wild Tribes of India, p. 15

bride's relatives was an assertion, until it became a mock assertion, of rights, (*a*) which seems to have been exercised by the ancient Britons amongst many other nations. It is a step in advance when marriages resting on contract, and distinct exogamous families are formed, as in India they seem to have been at a very early period,(*b*) and the legend of Draupadî can be looked on as remote from national experience. This advance is, in some instances, accompanied by a development of ancestor worship, which gives a sacred character to the head of the family, (*c*) and the father or eldest

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(Gonds); p. 37 (Bhîls); p. 46 (Kâthis, amongst whom as amongst the Pâhânas and others the niyoga or levirate prevails); p. 68 (Kholls); p. 76 (Santhâls, who before a maid's marriage require her to take part in a week's sexual orgy like the Babylonian feast of Mylitta); p. 81 (Orâons); p. 147 (Koches, amongst whom the bridegroom becomes a dependent of the wife's mother); p. 177 (Cachâris).

(*a*) *See* however McLennan's Studies in Ancient History, p. 425 ff.

(*b*) The story of Yama, Ṛig. Veda, X. 10, 1, marks the abhorrence with which an incestuous connexion was looked on already in the Vedic period. *See* 5 Muir's Sanskrit Texts, p. 289. In some tribes, as amongst the Jats of Rohtak, a marriage is not allowed to a woman of the father's, mother's, or father's mother's clan. *See* Rohtak Settlement Report, p 65.

(*c*) *See* Muir's Sanskrit Texts, Vol V. p. 295; Tylor's Primitive Culture, Vol. II. 103, 109; Coulanges la Cité Antique, Bk. I. Ch. II. Bk. II. Ch. VIII. The dependence of sons under the early Brâhmanical law may be gathered from Manu I 16, and Nârada, Pt. I. Ch. III. pa. 36; "Women, sons, slaves, and attendants are dependent, but the head of a family is subject to no control in disposing of (or dealing with) his patrimony," as well as Pt II. Ch. V. para. 39. In Ch. IV. para. 4, it is said that a son or a wife can no more be given away than a thing already promised to another; which indicates, as does Yâjñavalkya III. 242, how far the *patria potestas* had been pushed. *See* too Vasishṭha, Ch. XV. A similar superiority is assigned to the eldest brother by the Smṛiti cited in Coleb. Dig. Bk. II. T. 15. Manu IX. 105, directs the eldest brother "to take entire possession of the patrimony," and the others to "live under him as under their father." The modifications introduced at a later time appear from Kulluka's comment, and the following verses of Manu, as also from Nârada, Pt. II. Ch. XIII. para. 5; and the modern law from Jagan-

brother is found exercising despotic power over its other members. He will not part with his daughter or sister except for a reward. (*a*) Natural affection leads to his endowing the bride with some portion of the gain; it becomes a point of honour and ostentation to do this, (*b*)

nâthâ's remarks, in Coleb. Dig. 1. c. The cases of *Duleep Singh et al* v. *Sree Kishoon Panday*, 4 N. W. P. R. 83; *Ajey Ram* v. *Girdharee et al*, *ibid*. 110; and *Musst. Bhowna et al* v. *Roop Kishore*, 5 *ibid*. 89, may be compared with *Jugdeep Narain Singh* v. *Deen Dyal Lall et al*, L R. 4 I. A. 247; and *Mohabeer Pershad et al* v. *Ramyad Singh et al*, *ibid*. 192. The absence of ownership in a wife and son is insisted on in a way which shows that its existence had once been recognized. *See* Vyav. May. Ch. IV. Sec. 1, p. 11, 12 (Stokes, H. L. B. 45); Ch. IX. Sec. 2, para. 2 (*ibid*. 133); Coleb. Dig. Bk. II. Ch. IV. T. 5, 7, 9, Comm. The Hindû law on this point may be compared with the Roman law as to the *patria potestas* in its original and its mitigated forms. *See* Bynkershoek's treatise on this subject.

(*a*) As to the sale of wives amongst the Kholes and other tribes, *see* Rowney's Wild Tribes, pp. 47, 177, 200. The wife thus acquired being not unnaturally looked on as property, he who took her on her husband's death became answerable, as having received the estate, for the debts of the deceased. *See* Nârada, Pt. I. Ch. III., paras. 21—24. In his account of the Himâlyan Districts of the N. W. P., p. 19, Mr. Atkinson says: "the practice of accepting a sum of money for a daughter is gaining ground." This is probably an indication that the tribes least amenable to Brâhmanical influence are improving in their pecuniary circumstances.

(*b*) In the Odyssey the ἔδνα presented by the bridegroom are returned with a favourite daughter. Compare Dr. Leitner's account of a Ghiljit marriage, *Indian Antiquary*, vol. I. p. 11; and Plautus Trinummus, III. 2, quoted by De Gubernatis, Storia Comparata, p. 106; Str. H. L. I. 37; II. 33-35; Coleb. Dig. Bk. IV. T. 175, 184; Manu VIII. 227; IX. 47, 71, 72; Jolly, Ueber die rechtliche Stellung, &c. p. 11 n. 25. Stinginess on the part either of the son-in-law or of the bride's brother was already a reproach in the Vedic era. *See* Rig Veda, I. 109, quoted 5 Muir's Sanskrit Text, 460; Vedârthayatna, Bk. II. 737; and Comp. Coleb. Dig. Bk. V. T. 119, Comm. The reference appears to be to a connexion formed by purchase. The profuse expenditure at Hindû weddings thus finds a kind of warrant in the earliest traditions of the race.

and on her death it seems reasonable that the gift, in early times still retaining its original shape, should return to the stock from which it proceeded. (*a*) At a still later point of progress the sale of women, retained by the uncivilized tribes, comes to be looked on as an opprobrium by those more advanced, and especially where, as amongst the Brâhmanical community, the wife has been admitted to a share with her husband in the performance of the most sacred household rites. (*b*) A concurrent elevation of feeling amongst the warrior caste brings about the Svayaṁvara, (*c*) the choice of her favoured suitor by the high born maiden, or at least a state of manners and ideas akin to that of the age of chivalry in Europe, in which the beautiful pictures of female character presented by the Hindû epic poetry and drama could be conceived and appreciated. (*d*) At this point the rules and the ceremonies which pointed to a ruder age, would be explained away; and the recollection of their true origin dying out as a newer system acquired consistency, the texts would be subjected to such manipulation either in the way of change or of exegesis as we find they have in fact undergone. (*e*) The right of women to marriage gifts continued while the rules still retained became anomalous.

(*a*) It was found necessary at Athens to limit the paraphernalía which a bride might take to her husband's house. The dowry given with her had to be restored on her death. *See* Grote, Hist. of Greece, vol. III. 140.

(*b*) Âpastamba, Pr. II. Pat. I. Kan. 1, para. 1; Pat. V. Kan. 2, para. 14; Baudhâyana, P. 2, Adh. 1, K. 2, Sûtra 27; Coleb. Dig. Bk. IV. T. 414; Bk. V. T. 399. Compare Max. Müller's Hist. San. Lit., pp. 28, 205. Land in moderate quantity is sometimes settled on a daughter for her sole and separate use at her marriage even amongst tribes which most strictly prohibit lands leaving the family or tribe. *See* Panj. Cust. Law, II. 221.

(*c*) *See* Mon. Williams, In. Wis. 438.

(*d*) A Svayaṁvara seems to have been occasionally allowed even in the Vedic times; *see* 5 Muir's San. Texts, 459.

(*e*) *See* Burnell, *op. cit.* Introduction, p. xiv.

Side by side with this source of women's property, however, there was another which has received less attention. (*a*) The total severance from her own family, which in a particular form of civilization the woman undergoes when she marries and thus enters that of her husband, is still unknown to some Indian tribes. (*b*) Many traces of custom

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(*a*) Amongst the Anglo-Saxons a wife did not enter her husband's "maegth" or family by marriage. Her own kindred remained responsible for producing her or making compensation in the event of her committing a crime. Schmid, Die Gesetze-der Angl. Sax., cited Taswell-Langmead, Const. Hist., p. 35. The dotal marriage or *matrimonium sine conventione* of the Romans was attended with a similar effect as to property. The bride remained a member of her father's family. *See* Tom. and Lem. Gaius, p. 102 ss; Smith's Dic. Ant., Art. Matrimonium, Divortium.

(*b*) "In Spiti, if a man wishes to divorce his wife without her consent he must give her all she brought with her, and a field or two besides by way of maintenance. On the other hand if a wife insists on leaving her husband she cannot be prevented," but in this case or in case of her elopement he may retain her jewels. Panj. Cust. Law, II. 192. As to the Nâyars, *see* Buchanan's Mysore, vol II. pp 418, 513. The polyandry formerly universal amongst this tribe has almost disappeared under the British rule. In some families it has taken the intermediate form of a limitation to biandry, not more than two husbands being allowed. In Cochin and Travancore the older institution subsists in its loosest form. A quasi-matrimonial ceremony having been celebrated by a Brâhman or Kshatriya the woman thenceforward associates with anyone she pleases. Where the family is one of position the woman does not leave her own tarwad, and her husband has to visit her at her family residence. Amongst the Thiyens there is a fraternal partnership in the wife formally married to one of the brothers. On this one's death the other marries the widow in an undivided family and all the children inherit in common. A separated brother has not the same privilege or obligation. There is a class of Nambudri Brâhmans in N. Malabar who follow the regular law of marriage but the Nâyar rule of inheritance. (They are probably a race of mixed origin, or who have assumed a higher caste rank than they are entitled to, as it is virtually impossible that Brâhmans with indissoluble marriage and known paternity should adopt the Nâyar law of succession). The manager of a Nâyar tarwad tries to get his own children mar-

remain to show that a connexion through the mother was till recently recognized, and indeed still is in some places recognized, as superior or as running parallel to that through the father, and as in some degree regulating the devolution of property. (*a*) The custom of *patnîbhâg* still prevailing in Madras and in some parts of the Punjab (*b*) is traceable to this source. In Bengal Jîmûtavâhana founds the law of devolution on Viśvarupa's statement that all the property of a woman dying childless goes to her brother. (*c*) The rule indeed under which, according to the Bengal law, patrimony taken by a daughter from her father, instead of passing to her husband and his family, returns to the family stock from

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ried to his sister's in order to benefit by the same estate as himself. Marriages between cousins through their mothers or grandmothers as sisters are considered incestuous. (These particulars are gathered from a letter from Mr. C Sankaram Nair to the Hon. Dr. W. W. Hunter, dated 8th Oct 1882.) In Canara there is a quasi-permanent connection not with the husband but with a paramour; yet though this identifies the children as the offspring of a particular man, his heritage goes not to them but to his sister's children by her paramour. Amongst the Bants there is a conflict between the older law, which favours the nephews and the natural tendency of fathers to enrich their own children, which now requires legislative sanction to give it full effect. Among this tribe there is a polygamy without polyandry: each wife's children and goods are regarded as specially her own; and on her divorce or the death of her husband, go with her to the joint family dwelling of her brothers. The eldest brother manages the estate; but his heir in that capacity is the eldest son of his eldest sister, his own children, like the other offshoots of the family, being entitled only to subsistence. Buchanan's Mysore, vol. III, p. 16, &c. The conflict between paternal affection and duty to the tarwad in Malabar is referred to in *Tod* v. *P. P. Kunhamud Hajee*, I. L. R. 3 Mad. at p. 175, where, too, it is recognized that estates and acquisitions belong wholly to the tarwad or female *gens*, though the manager may grant leases and the mortgages called Kánam and Otti not subject to foreclosure. *See* Rev. and Jud. Selections, vol. I. p. 891; Fifth Rep. App. 23, p. 799; *Edathil Itti* v. *Kopashón Náyar*, 1 M. H. C. R. 122.

(*a*) *See* Rowney, Wild Tribes of India, p. 147, as to the Koches.

(*b*) *Supra*, p. 386; Tupper, Panj. Cust. Law, vol. I. p. 72.

(*c*) Dâyabhâga, Ch. IV. Sec. 3, p. 13 (Stokes, H. L. B. 254).

which it was severed, may be referred to this principle. So as to the effect of Âsura marriages and as to succession amongst Sûdras; so as to prîtidatta the Sm. Ch. quoting Kâtyâyana. Even in Manu, the text (IX. 185) in favour of a father's succession is balanced by one (IX. 217) which says "of a son dying childless the mother shall take the property," and on a mother's death all her sons and daughters are to share her propertyequally (IX. 192). Yâjñavalkya (II. 117) says the daughters, and failing them the issue. (*a*) In the Mitâksharâ (Ch. II. Sec. 4, p. 2; Stokes, H. L. B. 444) a passage is cited from Dhâreśvara, which, failing the mother, assigns the son's heritage to his grandmother in preference to his father, in order that it may not pass to his brothers of another class. This rule, rejected in the later law, may well have come down from a time when the clan connexion through the mother was thought more close than that of mere half-brothership through the same father. (*b*) Many instances of this are to be found in different parts of the world. In India the distinctive marks of an exclusive female gentileship are generally wanting even among the ruder tribes; but the separate subsistence of the wife's property as belonging to her and her own family of birth is still recognized. In a recent case on the Kattiawar frontier the brothers of a woman who had died childless came and took possession of the whole household stuff. (*c*) Varadarâja, page 52, refers that part of Bṛihaspati's text, (*d*) which says that "the mother's

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(*a*) At Athens a husband enjoyed only the fruit of his wife's dowry. On her death or divorce it went to her family. Her marriage gifts remained her own, but she could not dispose of them freely, being looked on as under guardianship except as to petty transactions. Schoe. Ant. of Greece, 516.

(*b*) Compare the case of the Lycians (Herod. I, 173,) and the other similar cases referred to in L. Morgan's Ancient Society, p. 347 ff.

(*c*) *Ex relatione*, J. Jardine, Esq., late Judicial Assistant in Kattiawar, and now Judicial Commissioner in Burmah.

(*d*) Coleb. Dig. Bk. V. T. 513; Vyav. May. Chap. IV. Sec. 10, p. 30; Stokes, H. L. B. 106.

sister......... [is] declared equal to a mother," to the case of an Âsura marriage attended with the consequence of the succession to the wife, not of her husband and his family, but of her own parents and their family. (*a*) And in this latter case he says, "When the mother and father would succeed, then in their default, of the three relatives through them the deceased woman's sister's son takes first. In his default her brother's son takes it. In his default the son-in-law takes it." This preference of a sister's son to a brother's son, which is not confined by other writers to the case of an Âsura marriage, (*b*) points probably to a time when female had not yet become quite superseded by male gentileship. A trace of the same state of things is to be found in Nîlakaṇṭha's preference of these collateral, and, according to modern ideas, but slightly connected, relatives to the husband's sapiṇḍas as heirs to a woman's *pâribhâshika* Strîdhana. Amongst the Brâhmans in the Surat district the custom as stated by the caste gives the succession to a maternal heritage taken by a son first to the widow of the propositus, then to his sister, sister's son and maternal aunt and her son in succession. Only on failure of these it goes

(*a*) *See* Manu, IX. 197; Yajñ. II. 145; Dâyabhâga, Ch. IV. Sec. 2, p. 27; Stokes, H. L B. 250; Sec. 2, p. 6; *ibid.* 252.

(*b*) Smṛiti Chandrikâ, Ch. IX. Sec. 3, p. 36; Coleb. Dig. Bk. V. T. 513; Dâyabhâga, Ch. IV. Sec. 3, p. 31 (Stokes, H. L. B. 257); Vyav. May. Ch. IV. Sec. 10, p. 30 (*ibid.* 106). As to the close connexion subsisting amongst the ancient Germans between nephew and maternal uncle, *see* Tac. de Moribus German. c. 20. In some parts of Germany "the land always travels through a female hand. It goes to the eldest daughter; if there be no daughter, to the sister or sister's daughter." Baring Gould, Germany, I. 96. The succession to lands amongst the cultivating class is still traced through females. In some places a widow even transmits the farm of her first husband by her remarriage to the family of the second. *See* Baring Gould, Germ. Pres. and Past, Ch. III., and the authorities cited in the Appx. to the same work. Mr. Cust reports the existence of the custom of succession of sisters' sons in the Assam hills as well as in Travancore. Mr. Damant says it is in full force amongst the Gáros

to the maternal grandfather. (*a*) Similar rules prevail amongst some of the lower castes, instances of which are recorded. (*b*)

The patriarchal constitution of the family, which grew up amongst the Brâhmanical section of the Indian people, was logically connected with a set of ideas, with which those, to which we have just adverted, were incongruous. Accordingly we find, in the development of the now prevailing system, not only that "women, sons, slaves, and attendants are dependent," (*c*) but also (*d*) that "three persons, a wife, a slave, and a son, have no property; whatever they acquire belongs to him under whose dominion they are." This is the *patria potestas* in almost its full development; and starting from this point some writers (*e*) set down the woman as originally uninvested with any rights at all. Whether she had rights in the full sense of that term may indeed be doubted; but the law of her complete absorption in the family of her marriage was only by degrees and partially adopted by the community at large; and does not afford a sufficient source for the peculiar and varied rules in her favour with which in historical times it has always been blended.

and Khásias, north of Assam. The succession of the chiefs is entirely through females. *See* Ind. Ant. Vol. VIII. p. 205; also Rowney, Wild Tribes of India, p. 190. The Khâsya earns his wife by service to her father. A Gâroo husband has to submit to a mock capture by his bride and her friends, and plays the part of reluctance and grief as well as if he belonged to the other sex. *Ib.* As to the custom of Illatom (= affiliation of a son-in-law) in Madras, see *Hanumantamma* v. *Râma Reddi*, I. L. R. 4 Mad. 272.

(*a*) Borrad. C. Rules, Lith. p. 401.

(*b*) As in Bk. G. Sheet 17 of the same Collection.

(*c*) Nârada, Pt. I. Ch. V. Sl. 36.

(*d*) *Ibid.*, Pt. II. Ch. V. Sl. 39; Manu VIII. 416.

(*e*) As Dr. Jolly, in his Essay, Ueber die rechtliche Stellung der frauen bei den alten Indern, p. 4, and Dr. A. Mayr, Das Indische Erbrecht, p. 152, "Die Weiber waren in ältester Zeit keine Rechtssubjecte."

Amongst the polyandrous classes indeed, who are still much more numerous in India than is generally supposed,(*a*) it is obvious that, as the chief connecting links between successive generations, craving some ideal continuity, are the females, and they the sole centres of any certain identity of blood, the patriarchal constitution of the family, and its ordinary concomitants, are practically out of the question. Such classes, though not within the operation of the stricter Hindû law, have yet obtained a place in the Hindû commu-

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(*a*) In Kamarn, the Rajputs, Brâhmans, and Sûdras all practise polyandry, the brothers of a family all marrying one wife like the Pâṇḍavas. The children are all attributed to the eldest brother alive. None of the younger brothers are allowed to marry a separate wife. When there are in a family but one or two sons it is hard to procure a wife through fear of her becoming a widow. Bhagvânlal Indraji Paṇḍit, in Ind. Ant. March 1879, p. 88 The Khâsias usually have but one wife for a group of brothers. (Rowney, Wild Tribes of Ind., p 129.) Polyandry even is exceeded by the Bootcah women, *ib.* 112. As to the Duflas, *ib.* 151; the Meeris, *ib.* 154. Amongst the Sissee Âbors, a group of brothers have a group of wives in common, *ib.* 159. See as to the mountain tribes of the Himâlyan frontier, Panj. Cust. Law, II. 186 ss. The reason assigned in some of these cases for the polyandrous household is deficiency of means, as in the case of a similar arrangement amongst the Spartans, recorded by Polybius, XII. 6 (*b*), Ed. Didot. The rules, preserved in Manu IX. 58 ff, for regulating the intercourse with the childless wife or widow of a brother, point back to a previous institution which the gradual refinement of sensibility had thus ameliorated. The limitation of the practice to the lower castes mentioned by Manu does not occur in Nârada, who further allows this connexion even with a woman who has had children, if she is "respectable and free from lust and passion" (Nârada, Pt. II. Ch. XII. para. 80 ff). Yâjñavalkya assigns the duty to any kinsman of the deceased descended from the same stock. The male offspring of this kind of union was variously regarded either as the son of the deceased husband only, or of both him and the actual father. *See* Coleb. Dig. Bk. IV. T. 149, Comm.; Mitâksharâ, Ch. I. Sec. 11, pp. 1, 5, note; Stokes, H. L. B. 410, 412; Baudhâyana, Pr. II. Kan. 2, Sl. 23; Vasishṭha, Ch. XVII. 8-11, ss.; Translation, p. 85.; Smṛiti Chandrikâ, Ch. X. That the practice, not subject apparently to severe regulations, obtained in the Vedic period, *see* Ṛig Veda, X 40, quoted 5 Muir's Sanskrit Texts, 459.

nity, and have brought into it notions, which, on account of their harmonizing with some natural feeling or some need of the society, have obtained a more or less general acceptance. (*a*)

It is still the custom amongst some castes for the father of the bride to present with his daughter a household outfit, which is carried in procession at the wedding. (*b*) In others this is becoming superseded by a gift in money, which however is still regulated by the prices of the different equipments for which it is meant as a substitute. The husband who comes into possession in this way of a sum of money, and hands it to his wife to purchase household utensils, provides her with "Śulka" in the second sense. The *Adhyagnika* or gift at the altar, and the *Adhyâvâhanika* or gift during the procession, are probably to be referred, like the 'Sulka,' to a state of things really anterior in its prevalence to the patriarchal system, out of which some suppose it to have grown by a gradual extension of the wife's proprietary capacity. So also as to the Pritidatta or token of affection, which was at first a gift from the woman's own family. She would be incapable of holding this, except through a capacity which Nârada's text denies. But that capacity not having been really extinguished in practice, the gift subsequent, *Anvâdheyika*, from her husband's relatives had a definite body of property,

(*a*) *See* Burnell's Introd. to the Mâdhavîya, p. xv; Introd. to Varadarâja's Vyavahâra Nirṇaya, pp. vii, viii; Ward's Survey Account, and the Madura Manual quoted by Mr. Nelson in his "View of the Hindû Law, &c," pp 141-145.

(*b*) Amongst the Brâhmans of the Southern Maratha Country the provision includes a couch with bedding or carpet, two silver or metal plates, two cups, &c. These are carried in procession to the bridegroom's house as an important if not essential part of the ceremony. In Germany it may be observed that the contribution of the bride towards the furnishing of the home in the shape of beds, linen, &c., becomes joint property of the spouses. Clothes and ornaments remain as we might say the Strîdhana of the bride, free from any right of the husband. An early instance of a simple trousseau is that in the Ṛig Veda, X. 85. *See* De Gubernatis, St. Comp. Bk. I. Ch. XVII.

real or potential, to which it could adhere; and the *Ádhivedanika* or compensation for supersession, in the form of a gift to make the first wife's position, as to paraphernalia, equal to that of the second, (*a*) if it was ever, as probably at first it was, a mere pacificatory present, easily took the character of a legal obligation, when other sources of exclusive female property were familiar to the people.

It seems at least probable then that the woman's distinctive ownership of property was not merely a development within the sphere of the Brâhmanical law itself, but in part a tradition from earlier times, or from an alien race, adopted as a process of amalgamation, blended the older and the newer inhabitants of India into a single people. The Hindû literature preserves many testimonies, that whatever may have been the strictly religious view of women's inferiority and dependence, they in fact retained a position of real influence and freedom down to the time when Mahomedan ideas began to permeate the community. Vijñâneśvara, whose literary activity is to be assigned to the eleventh century, was a stranger to these ideas. He had himself, it would seem, a tolerably high conception of female character and capacity; he looked on the union of the husband and wife as establishing an almost complete moral identity between them; and probably availed himself of a pretty widespread popular feeling, derived from the sources to which we have adverted, to propound his theory of female ownership. (*b*) That theory seems not to have been adopted without some misgiving or reserve by any of his numerous followers. Kâtyâyana and Vyâsa are quoted

(*a*) Mit. Chap. II. Sec. 11, paras. 33-35; Stokes, H. L. B. 466.

(*b*) In this respect, as in his conception of Sapiṇḍaship as resting on consanguinity, and in establishing property as a matter of secular, not of religious, cognizance, Vijñâneśvara showed a boldness and reach of mind which it is hard for Europeans of the 19th century to appreciate. It was by these qualities however that his works became the chief authorities on the Hindû Law.

by the Vîramitrodaya (*a*) and by the Smriti Chandrikâ (*b*) to the effect that separate property bestowed upon a woman is not to exceed two thousand kârshâpanas, (*c*) and is to exclude immoveable property. It is there explained that as the gift might be repeated annually so a single endowment to produce the same amount may be given once for all even in the form of immoveable property. (*d*) The Vyavahâra Mayûkha repeats these rules, (*e*) and the further one that what the woman earns belongs to her husband; as also those gifts, from friends other than near relatives, which, if she could retain them herself, would afford a means of withdrawing her gains from her husband's control. Ornaments given to her for ordinary wear become her property, but in those handed to her for use only on extraordinary occasions the ownership of the nominal donors and of their families remains. (*f*) The Vivâda Chintâmani (*g*) follows the Mitâksharâ in laying no restriction on the woman's capacity to take immoveable property. The "lâbham" or gain which Devala assigns to the woman (*h*) is unrecognized or cut down by all the commentators, except Vijñânesvara, who does not himself expressly cite this authority.

A daughter, unmarried or married, may take immoveable property by gift, from her parents, according to the Dâya-

(*a*) *See* below, Sec. 1, para. 13.

(*b*) Chap. IX. Sec 1, paras. 6—11, 16. The passage of Vyâsa is by Varadarâja (p. 34) construed as a limitation on a widow's right of inheritance.

(*c*) Copper coins of small value, Vîramitrodaya, Trans. p. 224.

(*d*) Instances are given in the Panj. Cust. Law, Vol. II of the gradual recognition of small gifts of land to daughters amongst the tribes which generally restrict land-ownership to males. Compare the Smriti Chandrikâ, Transl. Ch. IX. Sec. I para. 10.

(*e*) Chap. IV. Sec. 10, paras. 5, 6, 7; Stokes, H. L. B 99, 100.

(*f*) 2 Str. H. L. 55, 241, 370. *See* below as to such gifts from a husband.

(*g*) pp. 259, 260.

(*h*) *See* above, and Viram. Transl. p. 226.

bhâga, (*a*) which imposes no restriction on the amount, but Kâtyâyana there quoted is understood, as we have seen, by other commentators, as confining what may be given to married women within narrow limits. (*b*) Even that restriction would be disregarded in the case of property acquired by the donor, (*c*) and all gifts by parents proceeding from natural affection are to be respected, (*d*) unless they are of such a character as to be a fraud on other members of the family. (*e*) As to property which is free from the claims of co-owners a woman may take by gift from her father, mother, or brother, without limitation according to the modern law, which in this respect has become as liberal as the Mitâksharâ would make it. (*f*) A devise is put practically on the same footing as a gift *inter vivos*. (*g*)

Similarly a wife may take gifts from her husband of any kind of property and to any amount, subject only to the rights which others may have in what is thus given to her. (*h*)

(*a*) Chap IV. Sec 3, paras. 12, 15, 29; Stokes, H. L. B. 253, 254, 257. *See* also Coleb Dig. Bk. V. T. 354.

(*b*) So also the Mâdhavîya, p. 41.

(*c*) *Supra*, page 212; 2 Str H. L. 6, 9, 10; *Muttayana Chetti* v. *Sivagiri Zamindár*, I L. R. 3 Mad. at p. 378.

(*d*) Coleb. Dig. Bk. II. Chap IV. Sec. 2, T. 49, 50; Nârada, Pt. II. Chap. IV. Sl. 7; Vyav May. Chap IV. Sec. 7, para 11; Stokes, H. L. B. 76; Mit Chap. I. Sec. 6, para 13, 16 (*ibid.* 396, 397).

(*e*) Nârada, Pt. II. Chap IV Sl. 4; Vyav. May. Chap IV. Sec. 10, p 6; Stokes, H L. B. 99; Vîramitr. Sec. 1, para 5, *infra*; *Sivarananja Perumal* v. *Muttu Ramalinga et al*, 3 Mad H. C. R 75 An interdiction may be obtained by a son or a brother against a dealing with the heritage which would deprive him of his rights. Q 1735, MS.; Vîram. Tr. p. 74; Mit. Ch VI. Sec. VI p. 10.

(*f*) *See* Coleb Dig. Bk. V. T. 482, Comm , quoting Chandeśvar.

(*g*) *See* above, p. 181, 217 ss. *Juduo Nath Sircar* v. *Bussunt Coomar Roy*, 19 C. W. R. 264, S. C. 11 Beng. L. R 286

(*h*) *See* the passages referred to in notes at p. 208. As to the essentials of the gift, see *G.* v. *K*, 2 Morl. Dig. 234; *S. Pabitra Dasi et al* v. *Damudar Jana*, 7 Beng. L R. 697; *Kishen Govind* v. *Ladlee Mohun*, 2 Calc. S. D. A. R. 309. *Venkatachella* v. *Thathammal*, 4 Mad. H. C. R. 460, recognizes the competence of the husband to make a gift, while exacting delivery to complete it.

The commentators, (a) who carefully provide against her alienation of immoveable property thus acquired, thereby acknowledge at least with the Mitâksharâ her competence to receive it. The limitation imposed by Kâtyâyana's text above quoted applies in terms to a husband's gifts as well as to others, but where property ranks as separate estate, no one now has a right on which he can challenge the owner's disposal of it. (b) Colebrooke says (c) without qualification that "land may be given by the husband to his wife in Strîdhan, and will be her absolute property." The last words must, as to Bengal at least, be qualified by the restriction set forth in the Dâyabhâga (d) against alienation of immoveable property given by a husband, but as to the wife's capacity to take such property by gift, they represent the modern law. (e) Ornaments given by the husband merely to be worn occasionally remain his property, but otherwise they become fully hers. (f) It follows from what has been said that a member of an undivided family, residing apart, is not at liberty, by converting his gains into costly ornaments, to deprive the other members of their share in his acquisitions; (g) and if the wife under cover of that position appropriates what belongs to her husband, she subjects herself to punishment. (h) On the other hand the general

(a) *See* the Smṛiti Chandrikâ, Chap. IX Sec. 2, p. 10.

(b) *See* above, p. 209.

(c) 2 Str. H. L. 19.

(d) Chap. IV. Sec. 1, pa. 23; Stokes, H. L. B. 241. See *Koonjbehari Dhur* v. *Premchand Dutt*, I. L R. 5 Calc. 684. For Bombay *see* the case of *Kotrabasapa* v. *Chanverova*, 10 Bom. H. C. R. 403.

(e) *See* above, p. 207 ss.

(f) 2 Str. H. L. 55, 241; *Musst. Radha* v *Bisheshur Dass*, 6 N. W. P. R. 279. *See* above, p. 186. Actual gift without fraud, of ornaments to a wife, passes the property to her, but not a mere handing of them to her for use on ceremonial occasions. *Kurnárám* v. *Hinibhay*, Bom. H. C. P. J. 1879, p. 8; *see* Smṛiti Chandrikâ, Transl. Ch. IX. Sec. I. 11 ss.

(g) Q. 315 MS., Ahmednuggur, 13th June 1853.

(h) Nârada, Pt. II. Chap. XII. Sl. 92; compare Manu IX, 199.

sacredness of a promise (*a*) is upheld in the case of one made to a wife. The sons must fulfil it. (*b*) In this respect the modern treatises go beyond the text of the Mitâksharâ, though not probably beyond its intention, as Vijñâneśvara was a stickler for the literal fulfilment of the mental act in cases of gift without delivery of possession. (*c*)

Gifts to mothers, sisters, daughters-in-law, and to other female relatives occur not unfrequently in practice. (*d*) No difficulty is raised to the reception of such presents even of immoveable property, where the title of the donor is unincumbered; but the subject is not so dealt with in the modern commentaries as to afford a ground for a profitable comparison with the Mitâksharâ. Gifts even from strangers may be accepted; though these, according to the moderns, become the property of the husband when the donee is under coverture. (*e*)

That women may take property generally by inheritance has been shown in the foregoing pages of this work. (*f*) Baudhâyana's quotation from the Veda, (*g*) though supported by Brihaspati, (*h*) is no longer allowed to disqualify them. That text, as we have seen, may be differently construed. (*i*)

(*a*) Nârada, Pt. II. Chap. IV. Sl. 5; Manu IX 47; Vyav. May. Chap. IX. para. 2; Stokes, H L B 133.

(*b*) *See* the Smriti Chandrikâ, Chap IX. Sec. 2, para. 25; Vîramitr. Sec. 1, para. 21, below; Vyav May. Chap. IV. Sec. 10, para. 4; Stokes, H. L. B. 99.

(*c*) *See* the Mit. on the Administration of Justice; 1 Macn. H. L. p. 203, 217.

(*d*) See *Chattar Lalsing et al* v. *Shewukram et al*, 5 Beng. L. R. 123.

(*e*) Vyav. May. Ch. IV. Sec. 10, p. 7.

(*f*) To note (*b*) p 120, add a reference to Dâyabhâga, Ch. XI. Sec. I, p. 49 (Stokes, H L B. 318); Vyav. May. Ch. IV. Sec. 8, p. 2 (*ibid.* 84).

(*g*) *See* Baudh. Pr. II. Ka II. 27.

(*h*) *See* the Smriti Chandrikâ, Ch. XI. Sec. 1, p. 27; Vyav. May. Ch. IV. Sec. 8, p. 3 (Stokes, H. L. B. 84).

(*i*) *Supra*, p. 126 ff.

Manu's Text IX. 18, misquoted by the Vîramitrodaya, (*a*) points indeed to an essential inferiority of women as incapable of pronouncing expiatory formulas, (*b*) and Gautama (*c*) seems by omission to exclude even a mother from a share on a partition, but Kâtyâyana's Śrauta Sûtra, the only one on the White Yajûrveda, gives to women the right to sacrifice as allowed by the Vedas. (*d*) The Dâyabhâga (*e*) and the Smṛiti Chandrikâ (*f*) admit the wife's succession on the special ground of her association with her husband in sacrificial rites. (*g*) Kullûka Bhaṭṭa, commenting on the text of Manu XI., 187, which assigns succession to the nearest sapiṇḍas, says that a wife must be considered a sapiṇḍa, because she assists her husband in the performance of religious duties. (*h*) The Vîramitrodaya (*i*) adopts the less generous construction of the Smṛiti Chandrikâ, (*j*) and the Dâyabhâga (*k*) that a woman's capacity to inherit can arise only under special texts in her favour; but the Mitâksharâ (*l*) and the Vyavahâra Mayûkha do not recognize any general disability. The latter indeed, (*m*) as we have seen, treats a sister with special favour. (*n*)

(*a*) Vîram. Tr p 244.

(*b*) Manu XI 194, 252 ff.

(*c*) Adhyâya 28, 1 ff.

(*d*) *See* Mon Williams, In Wis 159

(*e*) Ch XI. Sec. 1, p 47 (Stokes, II L. B. 316)

(*f*) Ch. XI. Sec 1, p. 10; Max Müller, Hist. San. Lit 28, 205

(*g*) Smṛiti Chand Ch XI. Sec. 1, p 12; Mit Ch. II. Sec. 1, p. 5 (Stokes, H. L. B 428).

(*h*) Coleb. Dig. Bk. V. T. 397, Comm *ad fin.*

(*i*) *See* Transl. p. 244.

(*j*) Ch. IV. p. 5

(*k*) Ch. XI. Sec 6, p. 11; Stokes, H L. B. 346.

(*l*) Ch. II. Sec. 1, paras. 14, 22-24 (Stokes, H. L. B. 489, 490).

(*m*) Ch. IV. Sec 8, para. 19; Stokes, H. L. B. 89; *Supra*, p. 181.

(*n*) The daughters take absolutely and so therefore do the sisters. *Vinayak Anundrao* v. *Lakshmibâi*, 1 Bom. H. C. R. 124.

The nature of the estate, which a woman takes in the property in any way acquired by her, seems to have been regarded by Vijñâneśvara as standing on the same footing as the estate of a male. To this he mentions only one exception, "a husband is not liable to make good the property of his wife taken by him, in a famine, for the performance of an (indispensable religious) duty, or during illness, or while under restraint." (*a*) The Vyavahâra Mayûkha (*b*) and the Vîramitrodaya (*c*) repeat this text. The Smṛiti Chandrikâ (*d*) quotes one to the same effect from Devala. Devâṇḍa Bhaṭṭa goes so far even as to say:—" In a husband's property, the wife by reason of her marriage possesses always ownership, though not of an independent character, but the husband does not possess even such ownership in his wife's property." (*e*) The Hindû notion of ownership seems to be not incompatible, either with this right springing up on particular occasions, or with the woman's general dependence. (*f*) No limitation is prescribed by Vijñâneśvara to the

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(*a*) Mit. Ch II. Sec. 11, p 31; Stokes, H L B. 465 In case of misconduct on the part of the wife of a flagrant kind the husband may take possession of her Stridhana. Viramit Transl p 226.

(*b*) Ch. IV Sec. 10, p. 10, *ibid.* 101.

(*c*) Sec. 1, p. 20.

(*d*) Ch IX. Sec. 2, paras. 14, 15. In para. 26, Devânda insists on the mother's exclusive ownership of her Stridhana as against any claim to partition advanced by her sons But this must be understood by reference to his conception of Strîdhana, and, as to property formerly her husband's, by reference to his notion that the widow's share is not heritage and not partible property. *See* the Smṛiti Chand Ch. IV. p. 11; Ch. VII. p. 22.

(*e*) Coleb. Dig. Bk. V. T. 415, Comm.; "A man, his wife, and his son are co-proprietors of the estate" Reply of the Śâstri at Ahmednuggur, 30th March 1878, MS. No. 39. According to the law of Western India a woman has full ownership of her *pallu* or Strîdhana, *Reg.* v. *Natha Kalyan et al*, 8 Bom. H. C. R. 11, Cr. Ca. The Roman law, like the English Equity, strove to guard a woman's property against dissipation by many provisions *See* Goudsm. Pand. § 26, p. 55.

(*f*) Mit. Chap II. Sec. 1, para. 25; Stokes, H. L. B. 435, and the cases cited above.

wife's or widow's use of the share taken by her in a partition. (*a*) It is shown in the Smriti Chandrikâ (*b*) that this share falls within Vijñâneśvara's conception of inheritance, and thus becomes property in the fullest sense. An unmarried daughter, who on such an occasion "shares the inheritance," (*c*) is similarly unfettered as to the disposal of it by any rule in the Mitâksharâ. (*d*) It accepts the doctrine of the general dependence of women, but without working it out to any practical result. It omits the prohibitions referred to by the modern commentators, against the wife's expending even her separate property without the assent of her husband, (*e*) and in making no special provision as to Saudâyikam it may probably have intended to leave

(*a*) Mit. Chap. I Sec. 2, para. 8; Sec 6, para 2; Sec. 7, paras. 1, 14 (Stokes, H L. B. 379, 394, 397, 401); Dâyabhâga, Ch. III. Sec. 2, para. 37 note, (*ibid* 233).

(*b*) Chap IV. para. 10. Comp Coleb Dig Bk. V. T. 420, 515, Comm.

(*c*) Compare Coleb Dig. Bk. V T. 399, Comm. *sub fin.*; Mit. Ch. II. Sec. 1, p. 25, (*ibid.* 435).

(*d*) Mit. Ch. I. Sec 7, para 14; Stokes, H L. B. 401. *See* above, p. 106, note (*g*)

(*e*) *See* the Vîramitrodaya, Sec 1, paras. 14, 15, below; Vyav. May. Chap. IV. Sec. 10, para. 8; Stokes, H. L. B. 100; Dâyabhâga, Chap. IV. Sec. 1, para. 23 (*ibid* 241); Smrit. Ch. Chap. IX. Sec. 2, para. 12. Under the Teutonic laws the property of a girl remained her own after her marriage subject to the guardianship (*mundium*) of her husband and his use of the fruits during coverture. Of acquisitions made during the coverture the wife was entitled to an aliquot part fixed variously by different laws. The Saxon law gave her a moiety. But though her ownership subsisted her power of disposal was during coverture made subject to the assent of her husband. Lab. *op. cit.* 400. Under the English common law the wife's real estate remained hers, notwithstanding her marriage, subject to her husband's seisin in right of the wife and consequent assignment of the profits. On her death it belonged to her heirs subject only to the husband's tenancy for life by courtesy. But she could not dispose of the property without his assent (which is still required under the St. 3 & 4 Wm. IV. Cap. 75) except in the case of property vested in trustees for the wife's separate use without restraint on alienation. *See* Bl. by K., Bk. I. C. 15; Bk. II. C. 8.

the full ownership constituted by its texts to their natural operation on the whole of a woman's estate. (*a*)

This liberality was quite in accord with Vijñâneśvara's general tendency to carry principles out to their logical consequences without regard to the exceptions and contradictions established by actual practice. It may be doubted whether the equality of a woman with a man as an heir and owner of patrimony was ever generally accepted as a customary law. The ancient Smṛitis did not contemplate it, and caste rules, so far as they have been investigated, are almost uniformly against it. This advance in the position of women moreover seems never to have quite commended itself to those even who are in a general way followers of the Mitâksharâ. The Smṛiti Chandrikâ limits the woman's right of disposition to Saudâyika, defined as wealth received from her own or her husband's family, and excluding immoveable property given by her husband. (*b*) The "patnî" wife's dependent ownership over her separated husband's property becomes, on his death, according to this authority, independent, yet without power to give, mortgage, or sell the estate, except for religious or charitable purposes. (*c*) The Vîramitrodaya (*d*) gives full power of disposition over Saudâyika only. So too does the Vyavahâra Mayûkha, (*e*)

(*a*) *See* above p. 145, 268; *Govindji Khimji* v *Lakshmidas Nathubhâi*, I. L. R. 4 Bom. 318. In a note to the case of *Doe dem Kullammal* v. *Kuppu Pillai*, 1 Mad. H. C. R. at p 90, the principal passages are collected, which bear on a woman's power to deal with her separate property. In *Brij Indar et al.* v. *Rani Janki Koer*, L. R. 5 I. A. 1, a grant to a widow and her heirs of her husband's confiscated estate was construed in favour of her daughter as against her husband's heirs, a grandson through a daughter by another wife and distant collaterals. The restrictive construction of the Mitâksharâ's rule, Ch. II. Sec. XI. paras. 1 ff is denied as to grants made to a widow.

(*b*) Sm. Ch. Chap. IX. Sec. 2, paras. 6, 11.

(*c*) Chap. XI. Sec. 1, paras. 19, 28, 29.

(*d*) Sec. 1, paras. 14, 15, below.

(*e*) Chap. IV. Sec. 10, para. 8 (Stokes, H. L. B. 100).

and as to property taken by the widow on her husband's death, it limits her strictly to a life enjoyment subject only to an exception in favor of religious gifts. (*a*) The Vivâda Chintâmaṇi is to the same effect. (*b*) Jîmûtavâhana, (*c*) while denying the wife's ownership of gifts from strangers, (*d*) says that over all property, really hers, her power of disposition

(*a*) *Ibid.* para. 4 (Stokes, H L. B. 99). In the case of *Chooneena* v. *Jussoo Mull Deverdass*, 1 Borr R 60, it was decided on the Vyav. May that a widow could not devise property inherited from her husband to her family priest so as to deprive the next heir, her nephew's widow. In *Jugjeevun Nuthoojee et al* v *Deosunkur Kaseeram*, 1 Borr R. 436, on the other hand, a widow was allowed to bequeath by way of *Kṛishnarpaṇa* the property inherited from her husband, except the family house and the sum requisite for her obsequies, to the exclusion of her husband's cousin. The decision rested on the sacred character of such a gift; as in the Vyavasthâ in *Dhoolubh Bhaee et al* v. *Jeeree et al*, 1 Borr. R. 75, the Śâstri says, (p. 78) "Goolal Bai was not authorized to assign to the children of her brethren the house of her husband Pitâmber (which after his demise had descended to her) without the sanction of the heirs." In *Poonjeeabhaee et al* v. *Prankoonwur*, 1 Borr. 194, it was ruled that a woman who had a son could not in discharge of her deceased husband's debts alienate property, which she had inherited from her father, without the assent of the son, after he had attained 16 years of age This is referred to the passages from Bṛihaspati and Kâtyâyana, quoted in the Vyavahâra Mayûkha, to show that a woman is generally unfit to enjoy fixed property, and that a widow cannot dispose of it except for special purposes. Her son enjoying according to the Mayûkha an unobstructed right of inheritance (Ch IV Sec 10, p 26; Stokes, H. L. B. 105), was probably regarded by the Śâstris as having a joint ownership in the property, which thus became inalienable without his assent. "A son," says the Paṇḍit at 2 Morl. Dig. 213, "inherits the estate of his mother in the same manner as that of his father" *See* p 152. The Smṛiti Chandrikâ Ch. VIII para. 11; Ch. IX. Sec II. para. 26; Sec. III. para. 4, denies the unobstructed ownership of a son in his mother's property. See also the Mit. Ch. I. Sec. VI. para. 2.

(*b*) p. 262, 263. See *B. Gunput Sing* v. *Gunga Pershad*, 2 Agra R. 230.

(*c*) Dâyabhâga, Ch. IV. Sec. 1, paras. 20, 23; Stokes, H. L. B. 240, 241.

(*d*) Coleb. Dig. Bk. V. T. 420, Comm. II.

is unfettered, save in the case of her earnings and of immoveables bestowed by the husband. (*a*) These she is only to enjoy by way of use; and similarly when she takes his estate on his death, which, according to the Dâyabhâga, she does, whether he was separated or unseparated from his brethren, (*b*) she "must only enjoy her husband's estate after his demise. She is not entitled to make a gift, sale, or mortgage of it," except in the fulfilment of a pious duty, under the pressure of necessity, or with the sanction of the paternal uncles and other near relatives of her deceased husband. (*c*) Jagannâtha, being forced to admit that the widow

(*a*) Coleb. Dig. Bk V. T. 470, Comm.; 420 Comm. As to a gift for maintenance by a son, see *Musst. Doorga Koonwar* v. *Musst. Tejoo Koonwar et al*, 5 C W. R., 53 Mis. R.; and the Dâyabhâga, Ch. IV. Sec. 1, p 18 (Stokes, H. L. B. 240).

(*b*) *Op cit.* Ch XI. Sec. 1, paras. 6, 46 (Stokes. H L. B. 305, 316). See *Keerut Singh* v *Koolahul Sing et al*, 2 M I. A. 331; *Ghirdharee Sing* v. *Koolahul Sing et al*, 2 *ibid* 344; *Rao Karun Sing* v. *Nawab Mahomed Fyz Alli Khan et al*, 14 *ibid*. 187; *The Collector of Masulipatam* v. *C. Vencata Narrain Appah*, 8 *ibid* 500; *Gobind Monee Dossee* v. *Sham Lall Bysack et al*, C. W. R., Sp No, p 165; East, C. J., in *Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al*, 2 Morl. Dig. at p. 215

(*c*) *Op cit.* Ch. XI Sec 1, paras. 56, 62, 64 (Stokes, H. L B. 320-322); *Deo dem Ramanund Mookopadhia* v. *Ramkissen Dutt*, 2 Morl Dig. 115. For the case of an estate taken jointly under this law by two widows, see *Gobind Chunder et al* v *Dulmeer Khan et al*, 23 C. W. R. 125; *Sreemuttee Muttee Brijessory Dossee* v. *Ramconny Dutt et al*, 2 Morl. Dig. 80; and compare p 103 of this work. A wife having a joint interest with her husband may after his death sell her own share, *Madanaraya* v. *Tîrtha Sâmi*, I. L R. 1 Mad. 307. "In respect of gifts by a husband to his wife she takes immoveables only for her life and has no power of alienation, while her *dominium* over moveable property is absolute," per Jackson, J, in *Koonjbehari Dhur* v. *Premchund Dutt*, I. L. R 5 Calc at p. 686 The rule was applied to a bequest by a will which imposed restrictions on a widow's absolute dealing with moveables, but none as to the immoveable property. Comp. *Brij Indra* v. *Rani Janki Kooer*, L. R. 5 I. A. 1; *supra*, p. 101. If a widow turns funds given to her by her husband into land she may dispose of such land as of the money by gift or devise, *Venkata Râma Rao* v. *Venkata Surya Rao*, I. L R. 2 Mad. 333. A gift by a widow to her daughter's

has independent power over *dâya* as her husband's gift or as heritage, (*a*) says in one place that, as to such property, if immoveable, "her enjoyment only of it is authorized," (*b*)—a rule which applies to moveables also. (*c*) He thinks however that her alienation of the property, though blameable, may be valid, (*d*) yet he quotes Nârada (*e*) against any

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son was held valid as against the heirs of her husband's cousin whose share before the husband's decease had been sold in execution, *Gokul Singh et al* v. *Bhola Singh*, Agra S. R. for 1860, p. 222.

(*a*) In the case at 2 Str. H. L. 21, ejectment seems to have been maintained by a woman against her husband for a house which he had given to her on his second marriage. So also in the case CXXIX. of East's notes, *G.* v. *K.*, 2 Morl. Dig. 234. A suit for jewels was maintained, *Wulubhram* v. *Bijlee*, 2 Borr. R 481. *See* Coleb. Dig. Bk. V. T. 481, Comm. Coleb. on Oblig. Bk. II. Ch. III. recognizes this right. The answer at 2 Morl. Dig. 68 (*Jushadah Raur* v. *Juggernaut Tagore*), denies to a mother any power to dispose by will of the personalty inherited from her son, which she might have expended. It escheats to the crown. As to realty, see *ibidem;* and pp. 100 (*Gopeymohun Thakoor* v. *Sebun Cower et al*); 131 (*Doe dem. Sibnauth Roy* v. *Bunsook Buzzary*). At p. 155 (*Doe dem. Gunganarain Bonnerjee* v. *Bulram Bonnerjee*), the opinion of the Paṇḍits, given by Macnaghten, is that in Bengal a widow's estate being only usufructuary and untransferable, her sale of the property is invalid even as to her own interest. This principle might operate where something had been allotted merely for maintenance, as a right to future maintenance cannot be assigned, *Ramabai* v. *Ganesh Dhonddeo*, Bom. H. C. P. J. F. for 1876, p. 188. A widow and mother's right to maintenance out of her deceased husband's estate inherited by her son is a purely personal one and cannot be transferred or sold in execution. *Bhyrub Chunder* v. *Nubo Chunder Gooho*, 5 C. W. R. 111, unless perhaps where it has been made a specific charge on some part of the estate. *Gangábái* v. *Kṛishnáji Dádáji*, Bom H. C. P J. 1879, p. 2.

Compare the case of dower under the English law which cannot be aliened to a stranger, only released to the tenant of the land so as to extinguish it. *Colston* v. *Carre*, 1 Rolle, Abridgm. 30, Langdell, Contracts, 419. But as to a widow's estate properly so called, see *supra*, p. 298, and the further cases cited below.

(*b*) Coleb. Dig. Bk. V. T. 515, Comm.

(*c*) *Ibid.*, T. 402, Comm.

(*d*) *Ibid.*, T. 399, Comm., T. 420 Comm.; as to this *see* above, p. 212.

(*e*) *Ibid.*, T. 476.

such alienation, and says that all the authorities concur in forbidding it as to property devolved on a widow by the death of her husband. (*a*) Property acquired by inheritance by a woman before her marriage he regards as at her independent disposal; (*b*) if acquired during coverture, it is subject to her husband's control like her other acquisitions, so long as the husband lives. (*c*) To a daughter he assigns full power over Strîdhana which devolved on her from her mother. (*d*)

The share taken by a mother in a partition is according to the Smṛiti Chandrikâ (*e*) only a means of subsistence. That given to a sister is only a marriage portion. (*f*) The Vîramitrodaya insists (*g*) that in a partition by brothers, daughters are entitled to shares, not merely to a provision for marriage. The Vyavahâra Mayûkha,(*h*) in providing for the mother and the sisters, says nothing of the nature of the estate they take in the property thus acquired by them. Nîlakaṇṭha does not adopt Vijñâneśvara's definition of heritage, (*i*) and it seems that he would, on a widow's death, assign the share allotted to her in a partitition to her sons, (*j*) but the

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(*a*) *Ibid*, T 402, Comm., *sub fin* *See* Colebrooke, cited 2 Morl. Dig. p. 212 (*Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al*).

(*b*) *See* 2 Macn. H L. 127

(*c*) Coleb. Dig. T. 470, Comm.

(*d*) *Ibid*, T. 515, Comm. Several cases under the Bengal law will be found in 2 Macn. H. L Ch. VIII Property inherited by a daughter from her father is not Strîdhana in Bengal. *Chotay Lal* v. *Chunnoo Lal*, L. R 6 I A. 15.

(*e*) Ch. IV. p. 9. The share which a mother takes as representative of a deceased son in a partition under the law of Bengal is not there, it seems, regarded as Strîdhana. *See* per Kennedy, J., in *Jagmohan Haldar* v. *Sarodamoyee Dossee*, I. L. R. 3 Cal. 149. The pandit's opinion was different. *See* below.

(*f*) Ch. IV. p. 16, 17, 18.

(*g*) Transl. p. 85.

(*h*) Ch. IV. Sec. 4, p. 15, 18, 40 (Stokes, H. L. B. 51, 52, 57).

(*i*) Vyav. May. Chap. IV. Sec. 2, para. 1; Stokes, H. L. B. 46.

(*j*) *Ibid*. Sec. 10, p. 26; Stokes, H. L. B. 105.

same remark might on the same ground be made as to the succession to a share given to a sister. It is doubtful therefore whether any abiding interest of the family of the former co-sharers in such property would still subsist or not. Jagannâtha (*a*) says that such a share may be aliened by its recipient, and he applies the same rule to property inherited, (*b*) but his discussion of these questions shows that conflicting opinions are maintained by the principal modern commentators. (*c*)

The views of English scholars and lawyers on these points have been no less various. Prof. H. H. Wilson, in Vol. V. of his Works, at p. 29, says:—"It is absurd to say that a woman was not intended to be a free agent, because the old Hindû legislators have indulged in general declarations of her unfitness for that character. Manu, it is true, says of women, 'Their fathers protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence'; (*d*) but what does this prove in respect to their civil rights? Nârada goes further, and asserts that 'after a husband's decease the nearest kinsman should control a widow, who has *no sons*, in expenditure and conduct'. (*e*) But as we have observed, this is neither the law nor the practice of the present day. Besides it does not apply to the case of partition, as there the widow has sons, and they surely abandon a right to control property which they themselves have given. To sanction any other mode of procedure would only tend to perpetuate the degraded condition of the female sex in India."

(*a*) Coleb. Dig Bk. V. Chap. II T. 88, Comm.

(*b*) *Ibid.* 399, Comm., and compare T. 470, and T. 483, Comm.

(*c*) The Paṇḍits of the Supreme Court of Bengal in 2 Morl. Dig. at p. 217, said that, even recognizing the restrictions on a widow's estate taken by mere succession, yet what she received on a partition was to be regarded as Strîdhana subject to her absolute disposal. *See* also *ibid.* 239, where the restrictions imposed seem to be only moral ones.

(*d*) XI. 3.

(*e*) Quoted in the Dâyabhâga, p. 269.

And again, at page 20 :—"The old lawyers have said, 'let a widow enjoy a husband's wealth; afterwards let the heirs take it'; what obligation does this involve that she *must leave it ?*...... Now as to the gift, the same authorities, from whom there is no appeal, define what things are alienable as gifts, and what are not. Amongst the things not alienable no mention is made of a widow's inheritance. The *whole* estate of a man, if he have issue living, or if it be ancestral property, he cannot give away without the assent of the parties interested, and this may indeed be thought to apply to the *immoveable* property inherited by a widow, but it is the only law that can be so applied: there being, therefore, no law against the validity of her donation, it follows that she has absolute power over the property, (*a*) at least such was the case till a new race of law-givers, with Jîmûtavâhana at their head, chose to alter it; but they only tampered with the law of inheritance, and the law respecting legal alienation being untouched remains to bear testimony against their interpretation of a different branch of the law."

On the widow's rights in property, to which she has succeeded on her husband's death, the same learned scholar says (page 16):—"There are but two ancient texts which bear positively on the widow's power over the property which she inherits as her husband's sole heir. One is attributed to Kâtyâyana, and states 'Let the childless woman preserving (inviolate) the couch of her lord, and obedient to her spiritual guide, enjoy, resigned, her husband's wealth until her death. Afterwards let the heirs take it.' (*b*) The other is from the

(*a*) In *Doe* v *Ganpat*, Perry, O Ca. at pp 135, 136, the Śástri of the Sudder Court expressed an opinion that the widow of a separated Hindû might make a gift of the property she had inherited from her husband, except for improper purposes. This was followed by Sir E. Perry, but for an additional and inapplicable reason, viz. that the grandson of the deceased husband's daughter was pointed out by English law and natural reason as a successor to the property preferable to the nephew of the deceased, one of the line of heirs expressly named by the Hindu authorities.

(*b*) Vîramitra. Trans. p. 136, 225; Vivâda Chint. p. 261; Dâyakrama Sangraha, Ch. I. Sec. II. para. 3; Ch. II. Sec. II. paras. 11, 12.

Mahâbhârata, which as law, by-the-bye, is no authority at all. 'Enjoyment is the fruit which women derive from the heritage of their lords,—on no account should they make away with the estate of their lords.' (a) Such are the ancient injunctions; which can scarcely be interpreted to mean that if a widow gives away or sells her estate, such gift or sale is invalid. Even the later writers who entertained less reverence for the female character than the ancient sages, have stopped short of such declaration, and Jîmûtavâhana is content to say that 'a widow shall only enjoy the estate; she ought not to give it away, or mortgage or sell it.' (b) He allows her also, if unable to subsist otherwise, to mortgage or even to sell it, and to make presents to her husband's relatives and gifts or other alienations for the spiritual benefit of the deceased. It is not till we come to the third generation of lawyers, the commentators on the commentators, that the restriction is positive, and Srî Krishṇa Tarkâlankâra, expounding Jîmûtavâhana's text, declares 'a widow shall use her husband's heritage for the support of life; and make donations, and give alms in a moderate degree for the benefit of her husband, but not dispose of it at her pleasure like her own peculiar property.' The utmost that can be inferred from all this is, that originally the duty of the widow was only pointed out to her, and she was left, in law as she was in reason, a free agent, to do what she pleased with that which was her own; but that in later times attempts of an indefinite nature have been made to limit her power."

Returning to the same subject, a few pages later, he says (page 24) :—"The spirit and the text of the original law, in our estimation, recognise the widow's absolute right over pro-

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(a) Apahṛi, Take off or away: it is translated in the Digest and elsewhere, "waste," which perhaps scarcely renders its due import. [According to the Dâyakrama Sangraha, the passage is taken from the Dânadharma of the Anuśâsanaparva (?)]

(b) See Dâyabhâga, p. 265.

perty inherited from a husband in default of male issue. (a) In Bengal the authorities that are universally received have altered this law and restrict a widow to the usufruct of her husband's property. They have not, however, provided for its security, nor for its recovery if aliened, and by such neglect have virtually left the law as they found it, or the power, if not the right, of alienation with the widow: it is open to the Court, therefore, to make what regulations on this subject they please, as far as their jurisdiction extends, and as far as they are authorised by the Charter; and the regulation most conformable to reason, to analogy, and spirit of the Hindû Code, would be to give the widow absolute power over personal property, and restrict her from the alienation of the estate, except with the concurrence of her husband's heirs."

Again at page 26, he says:—"In the case of the widow's sole inheritance, we have granted that the Bengal lawyers limit her in all respects to a life-interest, whilst the Mithila writers maintain her absolute right in moveables, and the old law authorities oppose nothing to her absolute right in every kind of property. In the case of property, however, acquired by partition, (b) the arguments in favour of absolute right are infinitely stronger, inasmuch as the Bengal authorities lean to the same view of the subject. Jîmûtavâhana starts no objection to such power, his remark being confined entirely to the case of sole inheritance, and the Vivâda Bhangârṇava concludes a long and satisfactory discussion of the question by the corollary, 'Therefore a wife's sale or donation of her own share is valid.'"

(a) Mitâkh. Ad. Yâjñ. II. 135; Vivâda Chintâmaṇi, p. 151; Vîramitrod. page 193 *a*; Vyavahâra Mayûkha, Ch. IV. Sec. 8, p. 2 ff. (Stokes, H. L. B. 84).

(b) "These laws (of Inheritance and Partition), as is observed by Sir Thos. Strange, are so intimately connected that they may almost be said to be blended together." P. Co. in *Katamma Natchiar* v. *Raja of Sivagunga*, 9 M. I. A. 539, on which their Lordships rest the widow's inheritance to property separately acquired by her husband, as such property would be retained by him in a partition.

With special reference to the share taken by the widow in a partition, (a) he remarks (page 27) :—"It is asserted, indeed, that a husband's heirs succeed to such property in preference to a woman's own heirs, and therefore her enjoyment of it is only for life: but the postulate is supported only by analogy, not by any positive law, and therefore the inference is by no means proved : besides even if admitted, preference of succession does not imply restriction of right in possession : our law of primogeniture does not preclude, under ordinary circumstances, the father's right to sell, give, or bequeath his property as he pleases; and why should any order of succession exercise such influence here, when not specially provided for ? 'Heritage and partition' are included by the text of the Mitâksharâ, which is good law in every part of India, even in Bengal amongst the constituents of 'woman's property,' and a woman is acknowledged by all to be mistress of her own wealth. It is argued that lands and houses *given by a husband* to his wife must not be aliened by her after his death: *therefore*, a share of land and houses *given by his sons* on partition of his wealth, must not be made away with by their mother; but this is surely a different case. A husband, in undue fondness, might bestow upon a wife the *heritage of his sons*, and they would be deprived of that patrimony in which *they have a joint interest with the father* : it is not unwise, therefore, to secure to them the reversion of such effects."

Colebrooke's opinions on this subject appear to have varied to some extent at different times. At 2 Str. H. L. 19, he says:—"Land may be given by the husband to his wife in Strîdhan and will be her absolute property." The same doctrine as to property inherited is supported by a treatise bearing the name of Raghunandana, which Prof. Wilson seems to have thought genuine, but which Colebrooke himself pronounces "more than doubtful," as opposed to the whole current of authorities, in his note to Dâya-

(a) *See* Vîramit. Transl. p. 147; Mit. Ch. I. Sec. VI. para. 2.

bhâga, Chap. IV. Sec. 1, para. 23 (Stokes, H. L. B. 241). At 2 Str. H. L. 402, he agrees with the Sâstrî that a woman may give away her own property, except lands taken by gift or inheritance from her husband,(*a*) "which she cannot dispose of without consent of the next heir." (*b*) At page 407, he seems in a Broach case, to intimate that what comes to a woman from her husband is not even Strîdhana. He must here have had the Bengal law in mind, as the Mitâksharâ, Chap. I. Sec. 1, para. 20 (Stokes, H. L. B. 373), uses the case of a gift by a husband to his wife, as an illustration of the fact that full property may arise, otherwise than by birth. As Mr. Sutherland (*ibid.* 430) points out, the Mitâksharâ is silent on the woman's power to alien her peculiar property,(*c*) and she may, on her husband's death dispose as she pleases of his affectionate gift with the exception of immoveables. As to these (*ibid.* p. 21), the Benares and Mithila authorities, he says, impose a general restriction upon the woman's alienation of the property. (*d*) At pp. 108, 110, Colebrooke says that a widow succeeding is restricted from aliening the immoveables, and in this Ellis concurs on the ground that "No woman under any circumstances is absolutely independent"; (*e*) but as to that the case at p. 241 shows that

(*a*) So in *Haribhat* v. *Damodharbhat*, I. L. R. 3 Bom. 171, as to a will by a daughter who having inherited from her father took, it was said, an absolute estate. But in *Bharmanagavda* v. *Bharmappagavda*, H C P. J. for 1879, p 557, Pinhey and F. D. Melvill, JJ., ruled that a widow *of a collateral* inheriting in that right cannot dispose of the property thus inherited by will. A widow's will was held inoperative against her step-daughter's right as heir to her father, *O. Goorova Butten* v. *C. Narrainsawmy Butten*, 8 M. H. C R. 13. The testamentary power is as to Strîdhana commensurate with the right of disposal during life. *Venkata Râma's* case, I. L R. 2 Mad. 333.

(*b*) So 1 Macn. H. L. 40.

(*c*) *Doe dem. Kullamal* v. *Kupper Pillai*, 1 Mad. H. C. R. 88.

(*d*) *See* also 2 Macn. H. L. 35.

(*e*) So per Grant, J. See *Comulmoney Dossee* v. *Ramanath Bysack*, Fult. R. 200, and as to the higher castes, Steele, L. C. 177.

Colebrooke thought a widow could dispose as she pleased of her Strîdhana, consisting of jewels. (*a*)

As to the share taken by a woman on a partition, Colebrooke appears to have distinctly recognized her as a subject of "Dâya" or inheritance in the fullest sense. (*b*) At 2 Str. H. L. 382, he says that, according to the Mitâksharâ, such a share is an absolute assignment heritable therefore by the widow's daughters. (*c*) And this is confirmed by the rule which makes the wife's share in a partition her separate property even in her husband's life, and as such heritable by her daughters in preference to sons. (*d*) In the case at p. 404, there is an apparent misreading of Colebrooke's note. It should be, "The share allotted as a provision to the widow does not pass to the heirs of her peculiar property, but to her husband's heirs. This point may, however, involve some difficulty according to the opinion of those who hold that it is not a mere allotment for maintenance but parti-

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(*a*) *See* the Vivâda Chintâmaṇi, p. 260. The presumption is that ornaments given for ordinary wear are meant to be Strîdhana, *Musst, Radha* v. *Bisheshur Dass*, 6 N. W. P. R. 279. *See* above, pp. 208 and 186. Family jewels, it has been held in Bengal, are not transferable by a widow as her own property, *Bhagwanee Koonwur* v. *Parbutty Koonwur*, 2 C. W. R. 13 Mis. R., but *see* also the Vyavasthâ Darpana, p. 684. Vishṇu, Ch. XVII. para. 22, seems to exempt a woman's jewels from partition only during her husband's life, but this cannot be regarded as the accepted law, and is indeed, as we have seen, opposed to other Smṛitis. *See* Gautama, Ka. XIV. para. 9, below; Coleb. Dig. Bk. V. T. 473. Macnaghten says (1 H. L. 40) "that the Hindû law recognizes the absolute dominion of a married woman over her separate and peculiar property except land given to her by her husband," but he adds rather inconsistently, "He (the husband) has nevertheless power to use the woman's peculium and consume it in case of distress; and she is subject to his control even in regard to her separate and peculiar property."

(*b*) Mit. Ch. I. Sec. I. p. 2, 8, 12 (Stokes, H. L. B. 364, 366, 370); Ch. II. Sec. I. p. 2, 31, 39 (*ibid.* 427, 436, 439); Sec. 2, p. 1, 2 (*ibid.* 440).

(*c*) *Ibid.* Ch. I. Sec. 3, p. 9; Stokes, H. L. B. 383.

(*d*) Mit. Ch. I. Sec. VI. p. 2, 3; Stokes, H. L. B. 394.

cipation as heir." This makes it agree with the opinion at p. 382. In the same case Sutherland thinks, but with diffidence, that the share allotted to a stepmother reverts on her death to the partitioning sons. In *Bhugwandeen Doobey* v. *Myna Baee,* (a) the Judicial Committee seem to have inclined to the view that, except in Lower Bengal, the widow's property in her share becomes absolute, but the point was not one requiring decision in that case. That a sum of money given to a widow in lieu of maintenance is at her own absolute disposal was ruled in the Madras case, cited below, p. 315, note (*a*). Under the Bengal law, Sir W. Jones says, (*b*) "The moveable property is at the widow's disposal, the immoveable descends to the heirs"; but Colebrooke says, "the doctrine of the Bengal school controls the widow even in the disposal of personal property." (*c*)

This being the state of the authorities, it must probably be admitted, notwithstanding the view of Prof. Wilson, that the more recent writers have prevailed against Vijñâneśvara, at least as to a woman's dealings with immoveable property taken by inheritance or by gift from her husband. (*d*) In a Bengal case, 2 Macn. H. L. 214, the Sâstri says that in the precept "'Let the wife enjoy with moderation the property until her death,' the word 'wife' is employed with a general import," including all cases of female inheritance. The restriction does not apply, he says, to land *given* to a daughter by her father. (*e*) In the case at Bk I. Ch. II. Sec. 9, Q. 7, the Sâstri denies to a mother inheriting from her son

(*a*) 11 M. I. A. at p. 514.

(*b*) 2 Morl. Dig. 243.

(*c*) *Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al,* 2, Morl. Dig. 205, 219.

(*d*) The passage of Nârada, Pt. I. Ch. III. Sl. 30, prohibiting the gift by a widow of land given to her by her husband (Dâyabhâga, Ch. IV. Sec. 1, p. 23; Stokes, H. L. B. 241) seems to qualify the special rule in paras. 39, 40, enabling her as surviving parent to deal at her discretion with the estate.

(*e*) *See* Coleb. Dig. Bk. V. T. 478, 420, Comm.

any power to alien the property, though the Smṛiti Chandrikâ (*a*) and the Dâyabhâga (*b*) would apparently give her an exclusive interest as against her husband. (*c*)

In the Bombay Presidency, immoveable property given by a husband to his two wives was held, as to the share of each, to be Strîdhana not transferable after the husband's death for value to the other, so as to deprive the grantor's daughter of her right to inherit, (*d*) and in *Balvant Rav* v. *Purshotam*, (*e*) Sir M. Westropp, C. J., says, "The widow in this Presidency takes a limited estate only in the immoveable property of her childless husband, or son, but she takes his moveable estate absolutely." (*f*) In *Purshotam* v. *Ranchhod*, (*g*) the same learned Judge has dealt with the nature of the widow's estate with reference to litigation between the death of her husband and the issue of letters of administration to his estate:—

"Here, from the moment of the testator's death, at the very least, up to the 27th January, the date of the letters of

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(*a*) Ch. XI. Sec. 3, p 8.

(*b*) Ch. IV. Sec 1, p. 1, 18, 19 (Stokes, H. L. B. 235, 240).

(*c*) See *P. Bachiraju* v. *V Venkatappadu*, 2 Mad H. C R 402

(*d*) *Kotarbasapa* v *Chanveiova*, 10 Bom. H. C. R 403 Comp. *Rindamma* v. *Venkata Ramappa et al*, 3 Mad. H. C. R. 268

(*e*) 9 Bom. H. C R. at p 111

(*f*) *Bechar Bhagvan* v. *Bai Lakshmi*, 1 Bom. H. C. R. 56; *Vinayak Anandrav et al* v. *Lakshmibai*, ib. 117; *Pranjivandas et al* v. *Devkuvarbai et al*, *ib* 130; *Mayaram* v. *Motiram*, p. 313 of the 2nd Edition, 2 *ibid.* 323; 2 Str. H. L 13 &c. So in *Doorga Dayee et al* v. *Poorun Dayee et al*, 5 C. W. R. 141. *See* above, p. 100 Under a gift from a Hindû, his wife takes only a life estate in immoveables, and an absolute estate in moveables. There is no difference whether she takes either kind of property by will or gift. It is necessary for her husband to give her in express terms a heritable right or power of alienation to enable her to dispose of immoveable property. *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Calc. 684. A gift from mere generosity by a widow out of a gift from a husband was held invalid. *Rudra Narain Singh* v. *Rup Kuar*, I. L. R. 1 All. 734.

(*g*) 8 Bom. H. C. R. at p. 156 O. C. J.

administration, and the day on which they were issued (a period covering the institution of these suits, the laying on of the attachments before judgment, and the recovery of the judgments themselves), the representation was full. It was filled by the widow, who took as heir, and, although a Hindû widow's estate in immoveables inherited from her husband, which has been compared to that of a tenant-in-tail after possibility of issue extinct, (*a*) [is such that] she may alien only under very special circumstances, and although she may be restrained by injunction from committing waste,(*b*) yet she does fully represent the inheritance even in that kind of property. (*c*) Peel, C. J., once described her estate thus: 'The estate, although sometimes so expressed to be, is not an estate for life: when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do, if she had not a life-estate in quantity. There is no ground for altering the nature of the estate. It devolves as an estate by inheritance under the Hindû law, and is the estate which passed from the late owner: nothing is in abeyance. (*d*) The incapacity to alienate is not in any way inconsistent with an inheritance.' (*e*) And then he instances estates tail after the statute *de donis* and until the invention of recoveries, and other estates of inheritance which are not alienable; and I may add that

(*a*) *Mohar Ranee Essadah Bai* v. *The E. I. Company*, 1 Taylor and Bell, 290.

(*b*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al*, 2 Taylor and Bell, 279; *Oojutmoney Dossee* v. *Sagormoney Dossee*. 1 *ibid* 370; *Sreemutty Jadomoney Dabee* v. *Saradaprosoon Mookerjee*, 1 Boulnois, Rep. 120.

(*c*) *Doe dem. Rajchunder Paramanic* v. *Bulloram Biswas*, Fulton, Rep 133, 135; *Gopeymohun Thakoor* v *Sebun Cower et al*, 2 Morl. Dig. 105, 111; *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al*, 2 *ibid*. 210, 215.

(*d*) A right of pre-emption may be exercised by a widow who takes her husband's property by inheritance. *Phulman Rai* v. *Dani Kurai*, I. L. R. 1 All. 452.

(*e*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al*, 2 Taylor and Bell, 281, 282.

of a Hindû, entitled to ancestral lands of inheritance, who, after he has male issue, and while they are living, is unable to alienate their inchoate shares in the lands which he holds undoubtedly as of inheritance. (*a*) Peel, C. J., continues: 'Nor does the fact that the next taker takes as heir to a prior owner, and not to the immediate predecessor, furnish any reason for holding the estate a mere life-estate. It is, however, for purposes of alienation unwarranted by Hindû law, no greater an estate—and in one respect it is less beneficial—than a life-estate under the English law, since the accumulations on the death of the female heir pass, not to her heir, but go with the principal. Whenever, in legal decisions or in text-writers, the estate is described as one for life, nothing more is meant than a reference to the usufruct and the power of disposition, where the exceptional power of disposition is not properly exercised. The estate is not held in trust, express or implied. It is a restrained estate: not a trust estate. In her husband's moveable property at this side of India she takes an absolute estate, subject to payment of her husband's debts. (*b*)

"In *Ramchandra Tant*[*r*]*a Das* v. *Dharmo Narayan Chuckerbutty,* (*c*) a Full Bench held at Calcutta 'that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under Sec. 205 of the Civil Procedure Code."

As to what is said by Peel, C. J., in the passage quoted from his judgment on the subject of accumulations, reference may be made for the Bengal law to the language of the Judicial Committee in the recent case of *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.* (*d*) Their Lord-

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(*a*) As to this *see* now under Partition, Bk. II. Introd.

(*b*) *Vinayak Anand Rav et al* v. *Lakshmibai,* 1 Bom. H. C. R. 118; *Pranjivandas et al* v. *Devkuvarbai et al, ibid.* 130.

(*c*) 7 Beng. L. R. 341.

(*d*) L. R. 2 I. A. at p. 261, S. C. 24 C. W. R. 168.

ships say, "if she took the estate only of a Hindû widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal." But the documents executed by the husband and son gave, as construed, such an interest to the widow, it was said, "that whatever property, real or personal, was bought by Chunderbutti out of the proceeds of her husband's estate belongs to her and consequently to the defendant." In the same case it was held that land or personal property purchased out of the accumulations were the widow's equally with the fund, and devolved upon her heir. (*a*)

In the case of *Gonda Kooer et al.* v. *Kooer Oodey Singh*, (*b*) their Lordships considering that purchases made by the widow were to be deemed accretions to the deceased husband's estate, awarded them to his heir against her devise, but purposely refrained from expressing an opinion as to what would be the effect of a widow's making purchases out of the profits of her widow's estate, with a distinct intention of appropriating such purchases to herself and conferring them on her adopted son. (*c*) The Mitâksharâ, as we have seen,

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(*a*) See further the case of *S. Soorjeemoney Dossee* v. *Denobundoo Mullica et al*, 6 M. I. A. 526, and 9 *ibid.* 123; *Govind Chunder et al* v. *Dulmeer Khan et al*, 23 C. W. R. 125; *Nihalkhan et al* v. *Hurchurn Lall et al*, 1 Agra R. 219. In *Sri Raja Rao Venkata Mahapati* v. *Mahipati Suriah Rav* (16 Nov. 1880), the Judicial Committee held that immoveable property bought by the widow out of funds given by the husband is equally at her disposal as the money with which it was purchased. Accumulations from her maintenance or her life estate and presents may be invested by a lady in land, which remains Strîdhana. *Nellarkumaru Chetti* v. *Marukathammal*, I. L. R. 1 Mad. 166, and the cases at pp. 281, 307 of the same volume, elsewhere referred to.

(*b*) 14 Beng. L. R. 159.

(*c*) *See* also *Sonatun Bysack* v. *T. Juggutsoondree Dossee*, 8 M. I. A. 66; *Gooroo Pershad Roy et al* v. *Nuffar Doss Roy et al*, 11 C. W. R. 497; *S. Puddo Monee Dossee* v. *Dwarka Nath Biswas et al*, 25 *ibid*. 335.

would not restrict her dealing with such property. In one case the Śâstri said that a carriage and bullocks purchased by a widow out of her pension were Strîdhana, (a) and in the recent case at Madras of *Venkata Râma Rau v. Venkata Suriya Rau et al*, (b) it was held that where a widow, having received presents of moveable property from her husband, had, after his death, purchased immoveable property with these and the money raised on her jewels, the property was Strîdhana which she could dispose of by will. Under the Bengal law, as decided by the Judicial Committee, in *Luchmunchunder Geer Gossain et al* v. *Kalli Churn Singh et al*, (c) a woman purchasing property out of her Strîdhana has full power to dispose of it during her husband's life. (d)

The Śâstri in the case of *Musst. Thakoor Deyhee* v. *Rai Baluk Ram et al*, (e) a case from the N. W. Provinces, governed generally by the Mitâksharâ, went so far as to say, " The real property which *G.* or *H.* acquired during their lifetime with the proceeds of the former's separate share is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own." He seems to have been hampered by his recollection of some of the ancient texts against a severance of the patrimony from the family, (f) but apart from the practical error into which

(a) Q. 1576, MS, Ahmednuggur, 26th August 1856.

(b) I. L. R. 1 Mad. 281.

(c) 19 C. W. R 292.

(d) In *Gunnesh Junonee Debia* v. *Bireshur Dhul*, 25 C. W. R. 176, a widow sued her husband's brother successfully for two-thirds of a house partly as her husband's heir, partly on a conveyance to her during her husband's life by her husband's brother of his one-third share on a purchase, said, but not proved, to have been made out of her Strîdhana.

(e) 11 M I. A. at p. 150.

(f) Even now "the Rajput never gives lands with his daughters, except possibly a life-interest in the revenue." Sir A. C. Lyall, in *Fortnightly Review* for January 1, 1877, p. 111.

this led him, it would not be easy to demonstrate that this opinion was not in accordance with the Mitâksharâ. The Judicial Committee, however, after a review of the principal text books and decisions, dissented from the Śâstri's view. They say (at page 175): "The result of the authorities seems to be, that although according to the law of the Western Schools, the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Paṇḍit between ancestral and acquired property. In some of the cases cited the property was not ancestral."

In *Vijiarangam's* case, (*a*) it was said that property, inherited by a woman from her husband, ranked like that inherited from any other relative, as Strîdhana, according to the Mitâksharâ, but her capacity to deal at will with such property, if immoveable, as a necessary consequence of this proposition, was denied. At page 263, it is said :—

"We have seen that Vijñâneśvara includes all property inherited by a woman in her *Stridhan*. In the same chapter (Mitak., Ch. II. Sec. 1, pl. 39) he had previously arrived, through an elaborate course of argument, at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. This doctrine, therefore, must have been fully present to his mind when he developed his theory of *Strîdhan* in Sec. 11. He makes no distinction between the inheritance of a woman from her husband and her inheritance from any other person. The right which he thus confers on her is balanced by a corresponding right which he allows to the husband and his

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(*a*) *Vijiarangam et al* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J.

sapiṇḍas. That inheritance from a member of her own family, which on a woman's death would, according to the Bengal School, revert to the next heirs of him from whom she inherited (*a*) and which, according to the Vyavahâra Mayûkha, would go to her heirs as though she had been a male, is assigned by Vijñâneśvara (*b*) to her daughters, her sons, and after them to her husband and his *sapiṇḍas.* The two rules spring from the same source—a higher conception of a woman's capacity for property, and of her complete identification by marriage with her husband's family, than the Bengal lawyers would entertain—while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren, harmonises more with the Hindû theory of the united family than the opposite doctrine of her taking his share equally, whether the family have been divided or not.

" Vijñâneśvara, like all the Hindû lawyers, denounces the appropriation of a woman's property by her husband, except in cases of great pressure, and by the other kinsmen under any circumstances. (*c*) But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estates of a male proprietor. Now in Ch. I. Sec. 1, pl. 27, 28, it is laid down that a man is 'subject to the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited,' though he may make a gift or sale of it for the relief of family necessities or for pious purposes. (*d*) It is

(*a*) Colebrooke, Dig. Bk. V. T. 399, 477.

(*b*) Mitâk. Ch. II. Sec. 11, pl. 9, 12, 25.

(*c*) Mitâk. Ch. II. Sec. 1, pl. 32, 33; Stokes, H. L. B. 465–66.

(*d*) If he reserve enough for the support of the family, however, the father is allowed to deal, free from interference with what he has himself

clear, therefore, that a right of absolute disposal did not enter into Vijñâneśvara's conception of the essentials of ownership. (*a*) He admits (*b*) the genuineness and the authority of the text of Nârada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a hus-

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acquired. Such is the effect of the passage referred to when taken with Chapter I. Sec. 5, pl 10, unless the latter is to be referred—as perhaps on correct principles of interpretation, it ought to be referred—solely to moveable property.

(*a*) With the Hindû conception of ownership as consisting in exclusive use not necessarily including a right of alienation, we may compare in the English law the estate of the tenant for life under the Statute *De Donis* and under the Roman law the estate of an heir subject to substitutions. He was during his life regarded as sole proprietor, the substitute down to the time when the substitution opened had only a bare expectation; judgments and prescriptions operative against the successor as heir operated also against the substitute; yet subject to special exceptions the former could not alienate the property. The substitute moreover, though he had but a mere hope of succession, could take all measures requisite for the preservation of the property. *See* Poth. Tr. des Substitutions, Sec. V. Art. 153, 155, 160, 175, 178.

The closest resemblance however to the estate of the Hindû widow is perhaps to be found in that of the widow under the old Teutonic laws in the property enjoyed by her as dower. Of this she was proprietress, yet without any power of alienation. The rights of the heirs were suspended during her widowhood; the succession opening only on her death or remarriage. This dower in the lands of the husband was variable in proportion according to the settlement, but by custom was fixed usually at one-third. This was exclusive of the *dos legitima* or money gift, the amount of which it was found necessary to limit by law. The dower of the English law was confined to the husband's lands, though called *dos*. It originated probably in the Saxon law which is continued in that of gavelkind and free-bench, giving a moiety of the lands to the widow during a chaste widowhood modified by the more widely spread custom, limiting her enjoyment to one-third. This she holds as a sub-tenant for life of her husband's heirs who must set out her lands by metes and bounds. *See* Laboulaye, *op. cit.* 401; Bl. Comm. Bk. II. Ch. VIII.

(*b*) Mitâk. Ch. II. Sec. 1; pl. 25, Stokes, H. L. B. 435.

band, as we have seen, in some cases to dispose of his wife's property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yâjñavalkya also (Ch. I.). Kâtyâyana, so frequently quoted in the Mitâksharâ, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (*a*) consistently with that passage of the Mahâbhârata (*b*) which limits the widow to simple enjoyment. Jagannâtha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Bṛihaspati, who, as we have seen, insists emphatically on a widow's right of inheritance, is equally emphatic in restraining her power of dealing with it (*c*). .... It seems a reasonable inference from these and other authorities that, as to immoveable property at any rate, (and with immoveable property, according to the Hindû law, is classed every kind of property producing a periodical income,) the woman's ownership is subject to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice. Kâtyâyana, indeed, as quoted by Nilakaṇṭha, (*d*) says expressly "she has not property therein to the extent of gift, mortgage, or sale," except, as Nîlakaṇṭha adds, for appropriate purposes. A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *Strîdhana* by no means involves the

(*a*) Colebrooke, Dig. Bk. V. T. 477.

(*b*) T. 402.

(*c*) Vyav. May. Ch. I. V. Sec. 8, pl. 3 ; *ibid.* 84.

(*d*) Vyav. May. Ch. IV. Sec. pl. 4; Stokes, H. L. B. 84. This restriction applies equally to lands given by a husband to his wife as Strîdhana. As wife or as widow she cannot alone dispose of them. 2 Macn. H. L. 35.

consequence that she can alien it without good reason. (*a*) The argument in support of this consequence put forward by Jagannâtha in his comments on Colebrooke's Digest, Bk. V., T. 399, involves a very obvious fallacy.

And this is the practical conclusion at which Prof. H. H. Wilson at last arrives. He says (page 77) :—" We have so fully discussed the doctrine of alienation by widows that we need not advert to the cases illustrative of grants made by them. There is clearly a difference between the situation of a widow inheriting, and a father in possession, because the sons and grandsons have a direct lien upon the estate, which remote heirs have not : although, however, the law might be held to permit a widow's alienation of property to which she succeeds as heir, yet the obvious analogy of the case, and the general impression on the subject, operate to prevent her alienation of fixed property and chattels, and therefore the decisions of the Sadr Dewani in the cases of *Mahoda* v. *Kalyani et al*, (*b*) and *Vijaya Devi* v. *Annapurna Devi* (*c*), may be admitted as law, the authority of the Court having been interposed, as we have recommended it should be, in every case, to make that invalid which was considered immoral."

At 1 Macn. H. L. p. 40, it is said that a wife is subject to her husband's control even as to her separate and peculiar property; but this is opposed to the definition of Strîdhana in the Dâyabhâga. (*d*) It rests perhaps on the general texts as to a woman's dependence which are cited in Coleb. Dig.,

(*a*) *See* Nârada, Ch. I. Sec 3, p. 28. Property consists not in the right of alienating at pleasure; Coleb. Dig. Bk. V. T. 2, Comm. Dependence does not imply defect of ownership, *ibid.* Bk. II. Ch. IV. T. 17, Comm. As to property taken as her share by a wife or widow in a partition, Jagannâtha asserts her power to dispose of it equally with Strîdhana. Coleb. Dig. Bk. V. T. 87, 88, Comm. This agrees with the opinion of the pandits cited below, and with the **Mitâkshara** Ch. I. Sec. VII., Sec. II. para. 8; above, p. 303, 308, 310.

(*b*) 1 Calc. S D. A. R. 62.

(*c*) *Ibid.* 162.

(*d*) *See* above, p. 266.

Bk. III. Ch. I., T. 51, 52; and on these Jagannâtha throws out a suggestion that, although a widow, being free from the dominion contemplated by Manu and Nârada, is absolute mistress of her acquisitions of property, yet an unmarried daughter, being possibly comprehended within the general term 'son' takes any acquisition of wealth subject to her father's superior right, which, as to such property, continues during her subsequent coverture, so as to prevent an alienation without his assent. (*a*) But her guardianship is transferred to her husband and his family on her marriage. The texts, if taken literally, would prevent any acquisition at all, and being superseded or explained away so as to allow of a widow's acquisition of property, they cannot properly be applied to a state of things which their writers did not conceive as possible.

The circumstances under which a widow may, according to the law which assigns her only a special estate, deal with the property inherited from her husband, have already been considered at p. 99. The chief of them are compendiously stated in the case of *Lalla Gunpat Lall et al* v. *Musst. Toorun Koonwur et al* (*b*) :—" The Śrâddha of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are legitimate grounds of necessity for alienations." Self-maintenance, discharge of just debts, protection or preservation of the estate, are grounds of expenditure equally justifiable as pious purposes. (*c*) The charges of a pilgrimage were refused recognition as a ground for alienation in *Huro Mohun* v. *S. Auluck Monee Dassee et al.* (*d*) A compromise made by the widow in fraud of the rights of the expectant heirs is not binding against them. (*e*) That her defective capa-

(*a*) Coleb. Dig. Bk. V. T. 477, Comm.

(*b*) 16 C. W. R. 52 C. R.

(*c*) *Soorjoo Pershad et al* v. *R. Krishan Pertab*, 1 N. W. P. R. 49.

(*d*) 1 C. W. R. 252.

(*e*) *Musst. Indro Kooer et al* v. *Shaikh Abdool Purkat et al*, 14 C. W. R. 146 C. R.

city however must not be made a means of fraud is noticed in Bk. I. Ch. II. Sec. 2, Q. 4, as also that her transactions must be made good so far as they can be out of her limited estate. (*a*) A wife in Bengal has a power of sale over immoveables which she has purchased out of her separate funds. (*b*) The wife, however, according to Macn. H. L. 40, on whom their Lordships rely, is subject to her husband's control, even as to her Strîdhana. A widow turning her moveable Strîdhana into immoveable property can dispose of the latter by will. (*c*)

Srî Kṛishṇa Tarkâlankâra in the Dâya Krama Sangraha regards Strîdhana chiefly from the point of view of the particular modes of devolution prescribed for the different elements of it. It is for the purpose, he says, of determining precisely to which of these the different rules of succession apply, that the definitions of the different kinds of Strîdhana have been framed. (*d*) Vijñâneśvara's rules for the succession to Strîdhana are discussed in the Introductory Remarks to Bk. I. Ch. IV B., Sec. 6, of this work, (*e*) where too the rules of the Vyav. May. on the same subject are considered. The statement of Sir W. Macnaghten (1 H. L. 38) that "In the Mitâksharâ whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*," is entirely unsupported by anything in the Mitâksharâ itself, (*f*) and has been the source of much con-

(*a*) See *Mayaram* v. *Motiram*, 2 Bom. H. C. R. 313; *Bugoon Jha* v. *Lal Doss*, 6 C. W. R. 36 C. R.; *Râm Shewuk Roy et al* v. *Sheo Gobind Sahoo*, 8 *ibid.* 519.

(*b*) *Luchman Chunder Geer Gossain et al* v. *Kalli Churn Singh et al*, 19 C. W. R. 292, P. C.

(*c*) *Venkata Rama Rau* v. *Venkata Suriya Rau et al*, I L. R. 1 Mad. 281.

(*d*) Dâya Krama Sangraha, Ch. II. Sec. 2, pa. 1; Stokes, H. L. B. 487.

(*e*) *See* also Bk. I. Introd. p. 145 ff. above.

(*f*) "Vijñâneśvara......erklärt Âdyam......als alles auf irgend eine Art......Erworbene; er behauptet, dass Strîdhana hier einfach in seiner

fusion in practice. That work, having enlarged the woman's capacity to take property all of which it terms Strîdhana, then lays down rules of corresponding breadth as to its devolution. The exception of the Śulka and its probable origin have already been noticed. The Mayûkha, as we have seen, (a) while accepting Vijñâneśvara's definition of Strîdhana, distinguishes between the kinds specially described in the Sâstras, and for the devolution of which special rules are laid down, and all other kinds, which descend, he says, as if the female owner had been a male. (b) In the absence of a distinct rule in the Mitâksharâ for the devolution of woman's property this might have been an admissible doctrine under that law. But first the Mitâksharâ makes the woman inherit; then it says that Strîdhana includes the property thus taken (Mit. Ch. II. Sec. XI. para. 3); then it says "Strîdhana has been thus described" (Mit. Ch. II. Sec. XI. para. 8); "Failing her issue Strîdhana *as above described* shall be taken by her kinsmen.........as will be explained" (Mit. Ch. II. Sec. XI. para. 9); then that daughters and their offspring take in priority to sons; lastly that sons

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etymologischen Grundbedeutung.........zu nehmen sei: .... Im ganzen folgenden Abschnitt über das Strîdhana und die Succession in dasselbe wird diese Definition festgehalten."—Jolly, Ueber die Rechtliche Stellung der Frauen &c p 57. Vijñâneśvara explaining Ádyam so as to include every kind of acquisition, insists on the etymological sense of the definition and adheres to it throughout the section on Strîdhana and its devolution If by *peculium* Macnaghten meant the kinds of property specifically enumerated in the Smṛitis, he is in direct contradiction to the Mitâksharâ, or else draws a distinction which the Mitâksharâ does not draw, and on which therefore nothing turns. The rules given are as to "woman's property," not as to *peculium*, except in the single instance of Śûlka.

(a) Above, p. 145, 150 note (b); p. 272.

(b) The Sâstri in a Bengal case, at 2 Macn. H. L 121, directed that a woman's sons should succeed to land acquired by her. In this he agreed with the Mayûkha, but in excluding a grandson he disagreed with it. The succession of the remoter heirs is in all cases governed by the same rules as though the property were a male's, according to the Dâya Krama Sangraha. *See* Vyavasthâ Darpaṇa, p. 727.

take (Mit. Ch. II. Sec. XI., para. 19). An exception made as to the Śulka (Mit. Ch. II. Sec. XI. para. 14) and the special rule laid down as to that, serve to emphasize Vijñâneśvara's intention that the general rules should extend to every other case, "the author," as he says, "now intending to set forth fully the distribution of Strîdhana, begins by describing it," (Mit. Ch. II. Sec. XI. para. 1) and then gives rules for its devolution as above. (*a*)

The view taken by Jîmûtavâhana, and constituting the Bengal law, is this. The Anvâdheya or gift subsequent and the Prîtidatta or present from a husband are types of all the special kinds of Strîdhana, which he recognizes, and are, he says, to be equally divided between sons and daughters. The Yautaka or gift at the marriage goes to the unmarried daughters alone, (*b*) who have a preference over their married sisters in the distribution of the other Strîdhana also. (*c*) Next after daughters as successors come the sons and their sons, taking precedence of the daughter's sons, after whom come the barren and widowed daughters. (*d*) This line of succession resting on the principle of exequial benefits differs widely from Vijñâneśvara's, who next to daughters, places their daughters, and next to them, daughter's sons, (*e*) before the sons of the deceased woman are admitted. On failure of offspring, Jîmûta-

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(*a*) What Yâjñavalkya (II 117) calls the "mother's property," Vijñâneśvara calls Strîdhana. Unless, therefore, what the mother has inherited is not her property, it follows of necessity that he intended Strîdhana to include heritage. So as to property inherited by a daughter included in Strîdhana but subject to a special rule of devolution. Mit. Ch. II. Sec. XI. para. 30.

(*b*) See *Srinath Gangopadhya et al* v. *Sarbamangala Debi*, 2 Beng. L. R. 114 A C.

(*c*) Vîramit. Sec. 3, p. 20.

(*d*) Dâyabhâga, Ch. IV. Sec 2 (Stokes, H. L. B. 243-251). For the step-son by a co-wife, see *ibid.* Sec. 3 (*ibid.* 251); Dâya Krama Sangraha, Ch. II. Sec. 3, para. 11 (*ibid.* 493); Coleb. Dig. Bk. V. T. 505, 506.

(*e*) Mit. Ch. II. Sec. 11, p. 10, 12, 18, 19; Stokes, H. L. B. 460-2.

vâhana (*a*) assigns to the deceased woman's husband married by an approved rite only property received at the nuptials. Her other property goes to her brother, mother, and father in succession. (*b*)

Jagannâtha (*c*) follows Jîmûtavâhana to some extent in his rules as to the succession to Strîdhana. Sons and daughters succeed jointly except to the Yautaka. This on failure of sons is taken by daughter's sons, after whom come the son's sons. To other Stridhana, failing maiden daughters, sons, and married daughters, the son's son succeeds, and in default of him the daughter's son. (*d*) After these the inheritance goes to the woman's own family of all her property, except gifts at the marriage. (*e*) The husband as to such property comes in after her brothers and parents. (*f*) The succession of the husband in the first place is limited to the specially enumerated kinds of Strîdhana. As to property taken by inheritance the rule is that on the death of the woman it goes to the then nearest heirs of him whom she succeeded. The woman's own heirs are not regarded as heirs to property thus acquired. (*g*) Jimûta

(*a*) Dâyabhâga, Ch. IV. Sec. 3, p 4 ff; Stokes, H L. B. 251.

(*b*) See *Judoonath Sircar* v. *Bussunt Coomar Roy*, 11 Beng. L R. 286. Further details on the Bengal law will be found in the summary, Dâyabhâga, Ch. IV. Sec. 3 (Stokes, H. L. B 251), under the head of Strîdhana, in Macnaghten's H. L and in the Vyavasṭhâ Darpaṇa. At 2 Morl. Dig. 237, the Śâstri says, in a Bengal case, that even immoveable property given to a woman by her husband descends, on her death as a widow, to the heirs of Strîdhana or female property. Compare the answers, referred to above, pages 304, 308. Property taken by a woman before her marriage by bequest from her father is in the same case pronounced Strîdhana. If it is her Strîdhana then her heirs as classed in the province should inherit it. *See* Coleb. Dig. Bk. V. T. 420, Comm; Mit. Ch. II. Sec. XI. para. 30.

(*c*) Coleb. Dig. Bk. V. Ch. IX. Sec. 2.

(*d*) *Op. cit.* T. 445, Comm.

(*e*) *Ibid.* T. 504, 508, 509, 511.

(*f*) *Ibid.* 512.

(*g*) Dâyabhâga, Ch. XI. Sec. 1, p. 56 ff; Stokes, H. L. B. 320, &c. Sec. 2, p. 30, *ibid.* 329; Coleb. Dig. Bk. V. T. 420, 422, Comm.; 1 Str. H. L. 130 ff.

extends the rule even to a daughter's son succeeding to his maternal grandfather, but this is contradicted by Jagannâtha. (*a*) Mitramiśra (*b*) condemns the explanation given by Jîmûta and generally follows the Mitâksharâ. He however not only gives the Śulka to the brothers, but also immoveable property bestowed by their parents, and what was given by the kinsmen. The husband married by an approved rite succeeds, with these exceptions, to the whole property left by his childless wife, not merely to her nuptial presents. The rules of the Smṛiti Chandrikâ (*c*) and the Mâdhavîya (*d*) are glanced at in the course of Mitramiśra's discussion. The Vivâda Chintâmaṇi gives the Yautaka to the unmarried daughter, the son, and the daughter's son in succession. Presents from the woman's kinsmen it distributes equally between sons and daughters. The Śulka it assigns to the brothers. On failure of issue as far as her daughter's son, the deceased woman's husband is pronounced heir. (*e*)

This slight sketch of the systems or attempts at system of the other commentators will serve to show the great advantage of Vijñâneśvara's scheme in point of simplicity. This, as shown in Bk. I. Ch. IV. of this work, and above, p. 146 ss., has generally prevailed in Bombay. Thus in *Gangârâm et al* v. *Bâlia et al*, (*f*) it was ruled that property inherited by a woman from her father is Strîdhana, which descends first to her daughter, and failing a daughter, to her husband and his heirs. In *Prânjeevandás et al* v. *Dewcooverbáee et al*, (*g*) it was held that "daughters take the immoveable property absolutely from their father after their mother's death." In *Vináyek Anundráo et al* v. *Luxumeebáee et al*, (*h*) it is said of the mother

(*a*) *Sitabai* v. *Badri Prasad*, I. L. R. 3 All. 134.
(*b*) Vîramitrodaya, Transl. p. 221, 228 ss.
(*c*) *See* Smṛiti Chandrikâ, Ch. IX. Sec. 2, 3.
(*d*) Mâdhavîya, p. 43.
(*e*) Vivâda Chintâmaṇi, p. 266 ff.
(*f*) Bom. H. C. P. J. F. for 1876, p. 31.
(*g*) 1 Bom. H. C. R. 130.
(*h*) 1 Bom. H. C. R. 121.

inheriting from her son :—" The quantum of estate which she is allowed to take in the character of heir to her son, is not free from doubt; although in the category of those who take as heirs to a separated brother, there is no distinction or difference made between the quantum of estate taken by a mother from that taken by a son, a father, a brother, or any other relative, who admittedly takes in such an inheritance the most absolute estate known to Hindû Law." (a) As to sisters it is said (p. 124) :—" As to the mode in which sisters take, it would appear by analogy that they take as daughters. In a passage from the Commentary of Nanda Paṇḍita, cited by Mr. Colebrooke in his annotations to para. 5 of Sec. 5 of the second chapter of the Mitâksharâ, occur these words : 'The daughters of the father and other ancestors must be admitted like the daughters of the man himself, and for the same reason,' but the daughters of the man himself take absolutely, and so, therefore, do the sisters."(b)

In the case already referred to, the Śâstri says that the property taken by inheritance by a mother from her son is for the purpose of further descent to be regarded as her property. In the case of *Jugunâth* v. *Sheo Shunkar*, (c) the Suddur Court, on the advice of its Śâstri, applied the law of the Vyav. May., by pronouncing a woman's own sister heir in preference to her husband's sister to property that the deceased had inherited from her father. The case, Q. 5, is a strong one, for there the son of a woman by her first marriage was pronounced her heir to property inherited by her from her second husband, in preference to that husband's

(a) Manu, Ch. IX. Sec. 185, 217; Mitâksharâ on Inheritance, Ch. II. Sec. 3 (Stokes, H. L. B. 441); Vyavahâra Mayûkha, Ch. IV. Sec. 8, p. 14 (Stokes, H. L. B. 87).

(b) *See* now Bk. I. Ch. II. Sec. 14, I. A 1, Q. 4, Remark. A maternal great-niece takes an absolute estate by inheritance like a daughter or sister. I. L. R. 5 Bom. 662.

(c) 1 Borr. R. 102.

own family. In *Bai Muncha* v. *Narotamdas Kashidas et al*,(a) it was ruled that property inherited by a woman, except by a widow from her husband, ranks as Strîdhana and descends accordingly, and lastly, as we have seen in *Vijayarangam* v. *Lakshman*, (b) that a widow succeeds to her husband's property as Strîdhana, which then devolves according to the law of the Mitâksharâ or of the Mayûkha, as either authority may locally prevail over the other. (c) In *Kotarbasapa* v. *Chanverova*, (d) property given by a husband to one of his wives was held to be Strîdhana, held by her under a restriction against a sale after his death to her co-widow, so as to deprive her daughter of her right of inheritance.

The use of the word *Strîdhana* in the several senses to which we have referred may be observed in the above cases. According to the Mitâksharâ, the property must have been Strîdhana in every case, but it is not clear that in some instances the idea was not present that there might be property held by a woman which was not Strîdhana, and which was not subject according to the Mitâksharâ to the general rules laid down for the devolution of that kind of property. In Bengal and Madras (e) this notion has gained a distinct ascendancy through the prevalence, in those provinces, of authorities which, as we have seen, give to Strîdhana a narrower meaning, and prescribe for its devolution much more intricate rules than Vijñâneśvara.

(a) 6 Bom. H. C. R. 1 A. C. J.

(b) 8 Bom. H. C. R. 244 O. C. J.

(c) As to this see *Sakhárám Sadáshiv* v. *Sitabái*, I. L. R. 3 Bom. 353; and above, pp. 10 ss.

(d) 10 Bom. H. C. R. 403.

(e) Colebrooke (2 Str. H. L. 403) says the descent from the widow is regulated by the text of Bṛihaspati, Bk. V. T. 513 (misquoted as T. 413) of Coleb. Dig. This the Vyav. May. Chap. IV. Sec. 10, para. 30 (Stokes, H. L. B. 106) applies to the special Strîdhana only, in the case of a failure of the nearer heirs provided by para. 28, *i.e.* the husband in case of an approved marriage, and the parents in other cases, though apparently before the Sapiṇḍas of either. The Mit.

In *Chotay Lall* v. *Chunnoo Lall*, (a) Pontifex, J., says, "It appears to me, therefore, that if this case was uncovered by authority, property taken by inheritance by a woman from her father would be her separate property, unless the words 'acquired by inheritance' are altogether rejected from the text'; but being constrained by the weight of the contrary authorities he felt bound (p. 239) "to decide that in this case Luckey Bibee's estate was only a qualified estate, and that, upon her decease, the plaintiffs, as the heirs of her father, became entitled to the property in dispute: though I must confess that, speaking for myself, if the case had been untouched by authority, I should have felt compelled to give a plain meaning to the plain and unqualified words of the Mitâksharâ, rather than explain them away or in effect reject them, by the application of principles of which, after all, we have only a hazy and doubtful knowledge." (b) On appeal this decision was affirmed by Sir R. Couch, C. J., and Ainslie, J. In the judgment of the learned Chief Justice, the chief precedents for a departure from the text of the Mitâksharâ are cited. (c)

Chap. II. Sec. 11, para. 11 (Stokes, H. L. B. 460) merely allows the sapiṇḍas of husband or parents to succeed. In this case Colebrooke must have intended to state the law of the Smṛiti Chandrikâ and Mâdhaviya, not of the Mitâksharâ. *See* Smṛiti Chandrikâ, Chap. IX. Sec. 3, para. 36. In Madras on the death of one who inherited as a maiden daughter she is succeeded by her married sisters, not by her own sons, *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, I. L. R. 3 Mad. at p. 335; and *Simmani Ammal* v. *Muttammál*, *ib.* at p. 268. *See* p. 107 ss. *supra.*

(a) 14 B. L. R. at p. 237.

(b) A similar conclusion is arrived at by Innes, J., I. L. R. 3 Mad. at pp. 310, 313, and at p. 333, Muttu Swâmi Ayyar, J., says, "There is no doubt that Vijñâneśvara Yogi, the author of the Mitâksharâ, classes it as strîdhanam," but these learned judges held that the Mitâksharâ did not on this point give the law to the Madras presidency.

(c) These are : *Musst. Gyankoowur* v. *Dookhurn Singh*, 4 Calc. Sel. Rep. 330 ; *Sheo Sehai Singh et al* v. *Musst. Omed Koowar*, 6 Calc. Sel.

Of these four are Bengal cases, and rest partly on the doctrine of the Dâyabhâga and partly on Macnaghten's mistaken notion that the Mitâksharâ recognized woman's property which was not Strîdhana, or that it provided some rule for the descent of such property different from the one prescribed for Strîdhana. A Madras case (*a*) also is cited in which it is said that the texts recognizing a daughter's inheritance as Strîdhana relate only to the appointed daughter. This is directly opposed to the Mitâksharâ, (*b*) as is another theory started in the same case that the daughter inherits only as the passive instrument of providing a worshipper for the deceased. (*c*) Vijñânesvara basis Sapiṇḍaship entirely on consanguinity. (*d*) The Bombay case of *Navalram Atmarâm* v. *Nandkishor Shivnarayan,* (*e*) referred to by the learned Chief Justice of Bengal, rules that property inherited by a married woman from her father is Strîdhana and descends as Strîdhana to her daughters. Vijñâneśvara's leading principle is that women gain as full ownership by inheritance as by any other recognized mode of acquisition. If however they take a full ownership they must in the absence of an express rule to the contrary transmit the property to their heirs. (*f*) Kâtyâyana's rule, (*g*) supposed

Rep. 301 ; *Heralal Baboo* v. *Musst. Dhuncoomary Beebee,* Calc. S. D. A. R. for 1862, p. 190 ; *Punchunand Ojhab et al* v. *Lalshan Misser et al,* 3 C. W. R. 140 ; *Deo Persad* v. *Lujoo Roy,* 14 Beng. L. R. 245 *n,* 246 *n,* S. C. 20 C. W. R. 102 ; *Katama Natchiar* v. *the Raja of Shivagunga,* 6 M. H. C. R. 310.

(*a*) *Katama Natchiar* v. *The Raja of Shivaganga,* 6 M. H. C. R. 310.

(*b*) *See* Mit. Ch. II. Sec. 2, para. 5, and Ch. I. Sec. 11, para. 1; Stokes, H. L. B. pp. 441, 410.

(*c*) 6 M. H. C. R. p. 338; Mit. Ch. II. Sec. II paras. 2, 3.

(*d*) *See* above, p. 120.

(*e*) 1 Bom. H. C. R. 209.

(*f*) *See* Vyav. May. Ch. IV. Sec. X. paras. 22, 26; Smṛiti Chand. Ch. VIII. para. 11.

(*g*) Coleb. Dig. Bk. V. T. 477.

by other commentators to bring in the husband's heirs after the widow by the mere word "heirs," is by Vijñâneśvara significantly omitted.

Jagannâtha shows (*a*) that the inference drawn in the case of other female successors by Jîmûta Vâhana from the text of Kâtyâyana relating to a widow is altogether unfounded. Of Jîmûta's view that on the death of a daughter who had succeeded as a maiden to her father's property, that property passes to her married sisters as his heirs previously excluded by her, he says it is "not directly supported by the text of any legislator or the concurrence of any commentator." Hence, he says, in the case of a daughter's succession to her father, her heirs, not his, take on her death except where Jîmûta's personal authority is accepted.

In one of the Bengal cases the Vivâda Chintâmani is referred to as if it supported the narrower limitation of the estate taken by way of inheritance by a widow or daughter. What the Vivàda Chintâmani says, however, as stated by the learned editor, is that "any property which a woman inherits is her Strîdhana. Hence any property of her husband which she inherits shall on her death be received by the heirs of her peculiar property." (*b*) This being so even in the case of a widow to whom Kâtyâyana's rule in favour of "the heirs" directly applies, it follows *a fortiori* that "if the mother die after inheriting her son's property such property becomes her Strîdhana. Hence the heirs of her peculiar property get it." Similarly Visveśvara and Bâlambhaṭṭa, the two principal commentators on the Mitâksharâ, say: "If the succession (to a man deceased) be taken.........by the grandmother it becomes a maternal estate and devolves on......... her daughters, or successively on failure of them on her daughter's sons, her own sons and so forth, (*c*) *i. e.* the property

(*a*) Coleb. Dig. Bk. V. T. 420, Comm.

(*b*) *See* Viv. Chint. Table of Succession XII, XIII, pp. 262, 292.

(*c*) Mit. Ch. II. Sec. IV. para. 2, note. At Allahabad, however, exactly the contrary was held, consistently with the other cases, *Phukar Singh* v. *Ranjit Singh*, I. L. R. 1 All. 661.

is Strîdhana though taken by inheritance from a grandson. The term is not used, because the doctrine of the Mitâksharâ being once received, it had no specific significance, (a) but the devolution prescribed necessarily implies it.

The Saraswati Vilâsa, Sec. 264, explains Yâjñavalkya's text in precise agreement with the Mitâksharâ. It describes Strîdhana as a kind of " dâya "(b) Sec. 333 ff; and includes a woman's succession in the class of unobstructed inheritance, Sec. 398. (c) In providing also for succession to Strîdhana in this largest sense, though it recognizes the special rules applicable to Sûlka, &c., Secs. 288, 303, it does not ground any difference on the fact of the Strîdhana's having been inherited or not inherited property. In all cases save those which are the subjects of special rules, it assigns the succession first to daughters on account of their partaking their mother's nature more fully than sons. It limits the woman's power of dealing with immoveable property as do the Vivâda Chintâmani and the other commentaries, (d) without contra-

(a) Comp. Vyav. May. Ch. IV. Sec. X. para. 25.

(b) The Smṛiti Chandrikâ, Ch. IV., reconciles the familiar Vedic text on the unfitness of women to inherit with the passages that assign shares to a mother and a sister, by arguing that these shares not being of definite portions, constituting property subject to partition, cannot be Dâya (commonly rendered heritage), which involves the notion of a continuous right of participation in the successive male members of the family, inherent in each member from the moment of his birth. As women have not common family sacrifices to support, that central notion of the joint family fails in their case as a support of the group of ideas, applicable to an undivided estate amongst males. No rules are provided for the regulation of a joint female property, and the Vyavhâra Mayûkha, Ch. IV. Sec. 8, pp. 9 and 10 (Stokes, H. L. B. 86,) says that in the case of a plurality of widows or daughters, they are to divide it and take equal shares.

(c) The importance of this from the Hindû point of view consists in this, that the " unobstructed " right is the fullest conceivable, not being obstructed or deferred as ownership by the existence of the present possessor.

(d) *See* Smṛiti Chandrikâ, Ch. IX. 13, 15.

dicting the Mitâksharâ, which recognizes her constant dependence.(*a*) In *Kâtama Nâtchiâr* v. *The Raja of Shivagunga*, (*b*) however, the Privy Council say: "The passages in the Mitâksharâ contained in clauses 2 and 3 of Section 1, Chapter I......when examined, clearly appear to be mere definitions of 'obstructed' and 'non-obstructed' heritage, 'and to have no bearing upon the relative rights of those who take in default of male issue,'" and consistently with this Jagannâtha points out (*c*) that if "obstructed" inheritance gives but a defective ownership as some authors have contended as a ground for cutting down the estate of a female successor, the principle must apply to a daughter's son, a pupil, and the other remote heirs in whose cases no such limitation is admitted. Notwithstanding the cases that rest on a different interpretation, the high native authorities just referred to seem to place it beyond reasonable doubt that the Mitâksharâ intended rightly or wrongly to give a woman full ownership by inheritance, and to make her the source for property thus taken of a new line of succession. (*d*) Still the decisions have gone so far and are now so numerous in a sense opposed to this construction that it cannot properly be acted on. In the case of the *Widow of Shanker Sahai* v. *Raja Kashi Pershad* (*e*) the Judicial Committee refused to limit a widow's estate to a mere life interest, but in *Brij Indur Bahadur Singh* v. *Ranee Janki Koer* (*f*) their Lordships said:—

"It is unnecessary to determine whether immoveable property acquired by a woman by inheritance is 'woman's property.

(*a*) Mit. Ch. II. Sec. I. 25.

(*b*) 9 M. I. A. 539, 613.

(*c*) Coleb. Dig. Bk. V. T. 420, Comm. II.

(*d*) *See* also above, page 272, note (*a*), which makes it clear that property inherited by an unmarried woman passes on her death to her heirs as such, according to the express rule of the Mitâksharâ for that case.

(*e*) L. R. 4 I. A. at p. 208.

(*f*) L. R. 5 I. A. 1.

It has been decided that a woman cannot, even according to the Mitâksharâ, alienate immoveable property inherited from her husband, and that after her death it descends to the heirs of her husband and not to her heirs, *Musst. Thakoor Deyhee* v. *Rai Baluk Ram,* 11 M. I. A. 175." (*a*) And still more recently it has been pronounced (*b*) "impossible .... to construe this passage [of the Mitâksharâ] as conferring upon a woman taking by inheritance from a male a Strîdhana estate transmissible to her own heirs."

While this has been the course of the decisions of the Privy Council in cases from Bengal and Madras, (*c*) another development by inference from the restrictions on a widow has been arrived at in Bombay. The absolute estate of a woman is necessarily her Strîdhana, (*d*) and as she can deal with it as she pleases (*e*) so it, if any thing, must be inherited as hers by her heirs. So also as to a sister according to the law of the Mayûkha and with the same consequences. (*f*) In Bengal and in Madras where the restrictions on women's inheritance are thought consistent with the doctrine of the Mitâksharâ the daughter succeeding as such has but the same limited interest as the widow and transmits no rights to her own heirs. (*g*) Jagannâtha recognizes it as incongruous that

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(*a*) P. C., in *Brij Indur Bahadur Singh* v. *Ranee Janki Koer,* L. R. 5 I. A. at p. 15.

(*b*) *Muttu Vaduganadha Tevar* v *Dorasingha Tevar,* L. R. 8 I. A. at pp. 108, 109.

(*c*) In Madras as well as in Bengal, contrary to the law as construed in Bombay (above, p. 106), it is said that daughters once excluded as being married at the father's death succeed in turn as the father's heirs. On the same principle after their death the father's heir should be sought again. *See* above, p. 106, notes (*f*) (*g*).

(*d*) *See* above, p. 297 ss.

(*e*) *Venkatráma's* case, I. L. R. 2 Mad. 333.

(*f*) *Vináyak Anundráo* v. *Lakshmibái,* 1 Bom. H. C. R. at p. 124.

(*g*) See *Chotay Lal* v. *Chunoo Lal,* L. R. 6 I. A. 15; *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar,* L. R. 8 I. A. 99.

the daughter who is postponed as heir to the widow should have a larger power of alienation. (*a*) It did not occur to him that entrance to the family by birth or marriage made a difference. But lastly the Judicial Committee in *Mutta Vaduganadha* v. *Dorasinga* (*b*) say "how impossible it is to construe the passage (Mit. Ch. II. Sec. XI. para. 2) as conferring upon a woman (in that case a daughter) taking by inheritance from a male a Strîdhana estate transmissible to her own heirs. The point is now completely covered by authority." Hence it seems a female heir must be regarded as taking in no case more than a life estate before that of the other heirs of her own predecessor, and it appears that the distinction made in Bombay can hardly be maintained. In the great case of *Katama Natchiar* v. *the Rajah of Shivagunga* (*c*), the estate of a Zamindâr was adjudged to belong to the daughter of the deceased owner in preference to his nephew, and it thus "passed from the line of Muttu Vaduga," the nephew, after being held by him, his two sons, and his grandson in succession. The wife and daughter were pronounced the immediate heirs, though the heirs of the last male owner still had an interest, according to the doctrine of reversion. (*d*) The daughter died, and then it was adjudged that, not her children, but the eldest grandson of her father, through her half-sister, was entitled next in succession to the whole estate, it being impartible. (*e*)

Now in the case of *Tuljârâm Morârji* v. *Mathurâdâs and others* (*f*) it is said that all females entering a family by

(*a*) Coleb. Dig. Bk. V. T. 399, Com.

(*b*) L. R. 8 I. A. at p. 108.

(*c*) 9 M. I. A. 539.

(*d*) See *Periasami et al* v. *The Representatives of Salugai Tevar*, L. R. 6 I. A. 61.

(*e*) In the Multan district, it is observed, any property inherited by a woman passes on her death to her family of marriage and not of birth. Panj. Cust. Law, II. 272; see *Muttu Vaduganadha Tevar* v. *Dorasinga*, L. R. 8 I. A. 99.

(*f*) I. L. R. 5 Bom. 662.

marriage and becoming heirs through that connexion are subject to the same restrictions as a widow of the propositus, that is, they take moveable property absolutely, but in immoveable property only an estate *durante viduitate.* Other female heirs, as daughters, it is said take absolutely. This is an intelligible distinction, and the rule as to the daughters is generally followed in Bombay, (*a*) but the opposition is not one made by any Hindû authority. In *Vinâyak Anundrâo* v. *Lakshmibai,* (*b*) Arnould, J., says, "there is no difference made by the texts in the quantum of estate taken by a mother and by a son." The daughters succeeding take absolutely as the Sâstris agreed in the *Devacooverbâi's* case, (*c*) and "as the daughters take absolutely so do the sisters." (*d*) But "from these authorities [the Mitâksharâ and the Mayûkha] it would appear that a widow takes an absolute interest in her husband's estate." (*e*) The Śâstris referred to said she could expend even the immoveable property, though only for proper purposes. Hence Sir M. Sausse concluded to "a mere life use of the immoveable estate" and "an uncontrolled power over the moveable estate" as descending to a widow. The limitation of the widow's estate is thus evolved from Kâtyâyana's restriction as to her use of the property, (*f*) but without the widow's estate being made as in Bengal a type of all inheritance by females. (*g*) By the recent decision it is made a type of all female inheritance in the family of marriage but not of birth; but if the restriction is to be construed as proposed, and applied to any others than

(*a*) *See* Bk. I. Ch. II. Sec. 7.

(*b*) 1 B. H. C. R. at p. 121.

(*c*) *Ib.* at p. 132.

(*d*) *Ib.* at p. 124.

(*e*) *Ib.* at p. 132.

(*f*) Vyav. May. Ch. IV. Sec. VIII. paras. 3, 4; Coleb. Dig. Bk. V. T. 399, 402; Dâya-Krama-Sangraha, Ch. I. Sec. II. paras. 3–6; above, pp. 301, 306.

(*g*) *See* above, p. 311; Coleb. Dig. Bk. V. T. 420.

the widow, who alone is mentioned by Kâtyâyana as bound to economy of the estate taken from her husband, there seems to be no good reason why it should not be applied to all female heirs as well as to some of them. If the Mitâksharâ doctrine is accepted all take a complete estate, especially the widow who, it is elaborately proved, takes the whole estate of her deceased husband. (*a*) If the views of other lawyers prevail no woman takes an absolute estate by inheritance. An instance of the former doctrine already given shows well how it was understood by the principal commentators on the Mitâksharâ. The grandmother enters the family by marriage and the property inherited by her is, as we have seen, regarded as Strîdhana, or maternal estate, devolving on her daughters and daughters' sons as heirs in priority to her sons. (*b*) A daughter may thus inherit while many male agnates of the family remain, who, by her taking an absolute estate are deprived of their succession. (*c*)

(*a*) Mit. Chap. II. Sec. I. paras. 3-39.

(*b*) Mit. Chap. II. Sec. IV. para. 2, note.

(*c*) So the allotment retained for the wife by her husband in a partition goes to her daughters as Strîdhana; Mit. Ch. I. Sec. VI. para. 2. It thus passes away to their heirs, and leaves their family of birth, except in the particular case of their dying before their marriage is completed. In that case their brothers of the full blood alone take as heirs; the property does not blend again with the general family estate. Mit. Ch. II. Sec. XI. para. 30.

BOOK I.

INHERITANCE.

CHAPTER I.

HEIRS TO A MEMBER OF AN UNDIVIDED FAMILY.

SECTION 1.—SONS AND GRANDSONS.

Q. 1.—A man of the Sûdra caste died. He has the following relations :—1 son of the deceased's eldest son, 3 younger sons, 2 brothers, and 1 cousin. The deceased received a cash allowance from Government on account of certain "Hakka" and *Lâjima* (a) rights. It is an old ancestral property. How should the certificate of heirship be granted to each of them ? Describe his share. If it is not an ancestral property, how should the share of each be described in his certificate ?

A.—If the property was acquired by the forefathers of the deceased, and if it has never been divided before, it should be first divided into two shares, the one to be considered as belonging to the deceased's father and the other to the cousin's father. Then the share of the deceased's father should be sub-divided into three shares, one to be allotted to each of the three brothers including the deceased. The deceased's own share, which is $\frac{1}{3}$ of $\frac{1}{2}$, should be divided again into four shares, one to be assigned to his grandson and three to his sons.—*Tanna, 16th April,* 1852.

(a) Lavâjimâ.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 1; (2) f. 50, p. 1, l. 7, (see Auth. 3); (3) f. 48, p. 2, l. 5:—

" Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs (Colebrooke, Mit. p. 268, Stokes, H. L. B. 384). It devolves as though there had been a partition." (*a*).

(4) Mit. Vyav. f. 44, p. 2, l. 13 (*see* Chap. II. Sec. 4, Q. 1.)

REMARKS.—1. The answer applies equally to the higher castes. Bhalchandra Śâstri said the son of the wife first married was to be regarded as the elder, but this is not warranted by the Mitâk. or the Vayav. May. *See* Steele, L. C. 40.

2. For details regarding " indivisible or separate property," *see* PARTITION, Book II.

3. In case the deceased had alone acquired the property in question, it goes in equal shares to his sons and grandson.

4. An unseparated son excludes separated ones. See *Bajee Bapoojee* v. *Venoobái.* (*b*)

5. A son born in wedlock is held legitimate though begotten before it. (*c*)

6. A son may relinquish his share in the common estate for money. He then takes the place of a separated son. (*d*)

7. An elder son by a younger wife succeeds to an impartible estate in preference to a younger son by an elder wife. (*e*)

8. A joint trade is joint family property (*f*). *See* Book II. INTRODUCTION.

9. A joint trade loan is a charge on joint family property. (*g*)

(*a*) See *Musst. Phoolbas Koonwar* v. *Lalla Jogesher Sahoy*, L. R. 4 I. A. at p. 19.

(*b*) S. A. No. 282 of 1871, Bom. H. C. P. J. F. for 1872, No. 41.

(*c*) *Collector of Trichinopoly* v. *Lakhamani*, L. R. 1 I. A. at p. 293.

(*d*) *Balkrishna Trimbak* v. *Savitribai*, I. L. R. 3 Bom. 54. *See* below, Chap. II. § 1, Q. 6.

(*e*) *Padda Ramappa* v. *Bangari Sherama*, I. L. R. 2 Mad. 286.

(*f*) *Sámalbhai* v. *Someshwar et al*, I. L. R. 5 Bom. 38.

(*g*) *Sheoji Devkarn* v. *Kasturibai*, Bom. H. C. P. J. F. for 1880, p. 255; *Bemola Dossee* v. *Mohun Dossee*, I. L. R. 6 Cal. 792. *See* Coleb. Dig. Bk. I. Ch. V. T. 182, 185, 186.

SECTION 2.—OTHER MEMBERS OF AN UNDIVIDED FAMILY.

Q. 1.—A man got his son married and spent a good deal of money on his education. The son afterwards emigrated, and was for a long time in service in another country, where he acquired considerable property and died. Who will be his heir, his father or his wife ?

A.—Whatever he may have given to his wife out of affection, or whatever may be her strîdhana, belongs to her. All the rest of the son's property goes to his father.

Ahmednuggur, September 29th, 1854.

AUTHORITIES —(1) Vyavahâra Mayûkha, p. 153, l 2:—

"A wife, a son, and a slave are (in general) incapable of property, the wealth which they may earn is (regularly) acquired for the man to whom they belong." (Borradaile, p. 121, Stokes, H. L. B. 100.)

(2) Vyav. May. p. 151, l. 1; (3) Vîramitrodaya, f. 221, p. 1, l. 10.

REMARK —As the son was instructed at the father's expense, the property gained by him cannot be separate as against the father, unless acquired by means not referable to the family estate. *See* Book II. "PROPERTY SELF-ACQUIRED"

Q. 2.—A father and his son were undivided. The latter died, and left a daughter and a wife. Will these be his heirs, or his father, or his brother, or his mother ?

A.—All have an equal right to the estate of the deceased. But the ornaments of the wife belong to her alone.

Dharwar, October 10th, 1859.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) Vyav. May. f. 155, p. 4.

REMARK.—All the deceased's property, as far as it is not separate property (avibhâjyam), will go to the father, and be divided between him and his surviving son on partition. *See* Question 1.

Q. 3.—If there is an ancestral Inam in the possession of five brothers, and some of them die without issue, will the survivors inherit their shares ?

A.—Yes.—*Rutnagherry, September 15th,* 1846.

AUTHORITY.—Vyav. May. f. 136, l. 2:—

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property." (Borradaile, p. 101, Stokes, H. L. B. p. 85.

Q. 4.—Who will be the heir to a deceased brother?

A.—If the brother was undivided, his brothers will inherit his property.

But if he was divided, his wife, etc., will be his heir.

Brothers who have divided and afterwards again lived together are called "re-united." If a re-united brother die his re-united coparcener will inherit his estate.

Poona, October 24th, 1845.

AUTHORITIES.—(1*) Vyav. May. p. 136, l. 2, (*see* Chap. I. Sec. 2, Q. 3); (2*) Mit. Vyav. f. 55, p. 2, l. 1:—

"The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student; on failure of the first among these, the next in order is indeed the heir to the estate of one who departed for heaven having no male issue. This rule extends to all (persons and) classes." (Colebrooke, Mit. p. 324, Stokes, H. L. B. 427.)

(3*) Vyav. May. p. 144, l 8:—

"Yâjñavalkya enumerates the order of those entitled to succeed to the wealth of one re-united; as of a re-united (co-heir) the re-united (co-heir), so of the uterine brother the uterine brother." (Borradaile, p. 112; Stokes, H. L. B. p. 93.)

Q. 5—A man died and left an ancestral Watan. Will his widow or his younger brother inherit it?

A.—If the property is ancestral, and the brothers were undivided, it will belong to the younger brother, though it may have been entered in the records of Government in the name of the eldest only. The wife has no right to it.(*a*)

Broach, May 14th, 1855.

(*a*) A vatan cannot be enjoyed by a female while males of the family claim it.—*Anpoornabái* v. *Janrow,* S. D. A. R. 1847, p. 74, following

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 7; (2*) Vyav. May. p. 136, l. 2. (*See* Ch. I. Sec. 2, Q. 3.)

Q. 6.—Two brothers, Bhâî and Bhâîdâsa, possessed a village. They gave to a certain Bhikâri Râmadatta four bighas of land for himself and his heirs. Râma had four sons. One of these sons died, and after him his son, leaving a widow. The latter claims one bigha as the share of her husband. Upon inquiry it appears that the land had not been divided. Is her claim under these circumstances admissible?

A.—The claim is not admissible since the land was undivided. The other three sons of Bhikâri Râmadatta inherit their brother's share.—*Broach, May 18th,* 1855.

AUTHORITIES.—(1) Mit. Vyav. f. 45, p. 1, l. 1; (2*) Vyav. May. p. 136, l. 2. (*See* Chap. I. Sec. 2, Q. 3.)

REMARKS.—The brothers deceased were held to be represented by their sons in a joint Hindû family in *Bhagwan Goolabchund* v. *Kripa-*

an interpretation of 1832 on Sec. 20 of Reg. XVI. of 1827. But the reason there given is now no longer applicable. A female may succeed, Ch. IV. B., Sec. 1, Q. 12; *Bái Suraj* v. *Government of Bombay et al,* and *Bápubhái* v. *Bái Suraj et al,* 8 Bom. H. C. R. 83 A. C. J.; *Bái Jetha* v. *Haribhai,* S. A. No. 304 of 1871 (Bom. H. C. P. J. F. for 1872, No. 38); *The Government of Bombay* v. *Dámodhar Permánandás,* 5 Bom. H. C. R. 202 A. C. J.; (comp. *Keval Kuber* v. *The Talukdári Settlement Officer,* I. L. R. 1 Bom 586); *Sayi Kom Náru Powár* v. *Shriniv́asrao Pandit,* Bom. H. C P. J F for 1881 p. 270, subject to the provisions of the Vatandars' Act, (Bom. Act 3 of 1874). There is not a general presumption in favour of the impartibility of Vatan estates. He who alleges the impartibility must prove it. *Adreshappa* v. *Gurrushidappa,* L. R. 7 I. A. 162, *infra,* Bk. II. Introd. § 5 C. As to the succession generally to inams and vatans, *see* Chap. II., Sec. 6 A, Q. 8, Remark; and as to claims to inclusion amongst the recognized vatandars, see *Gurushidagavda* v. *Rudragavdati et al.* (I. L. R. 1 Bom. 531.) In Madras it is said that a woman cannot hold the office of Karnam except nominally. *Venkatratnama* v. *Ramanujasámi,* I. L. R. 2 Mad 312. She may perhaps appoint a deputy, as in Bombay, under Sec. 51 of the Act above referred to.

ram Anundran; (*a*) *Debi Pershád* v. *Thákur Dial*; (*b*) *Bhimul Doss* v. *Choonee Lall* (*c*).

In *Moro Vishvanáth* v. *Ganesh Vithal* (*d*) it was held that the representation descends without limit when there is not an interval of more than three generations between the deceased and his surviving descendant.

Q. 7.—Three brothers divided their father's property and lived apart. But one room was left undivided, and given to their mother as a dwelling place. One of the brothers died, leaving a widow. Then the mother of the brothers died. The widow claims a third of the room as her husband's share. Has she a right to it? She has given it as Kṛishṇârpaṇa to her daughter's son. Has she a right to do so?

A.—The widow has no right to any part of the undivided room.—*Broach, March* 17*th*, 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 47, p. 2, l. 13; (2*) Vyav. May. p. 136, l. 2. (*See* Chap. I. Sec. 2, Q. 3.)

REMARK.—As to residence in the family dwelling, *see* above, p 252, and Book II. Introduction, "PROPERTY NATURALLY INDIVISIBLE." *See* also Q. 9.

Q. 8.—Two brothers lived apart, and each managed his own affairs. The elder of them died without male issue, leaving a widow only. Can she claim a share of the family Watan?

A.—A widow without male issue has no right to demand a share of any Watan, Vṛitti, or hereditary offices which

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(*a*) 2 Borr. 29.

(*b*) I. L. R. 1 All. 105.

(*c*) I. L. R. 2 Calc. 379.

(*d*) 10 Bom. H. C. R. 444. So in the Panjâb; *see* Tupper, Panjâb Customary Law, vol. II. p. 141.

were acquired by ancestors, and which were not previously divided.—*Ahmednuggur, August 7th*, 1854 (*a*).

REMARK.—A Hindû widow has no estate in the joint family property. (*b*)

AUTHORITIES.—(1 and 2*) Vyav. May. p. 136, l. 6 and l. 2 (*see* Chap. I. Sec. 2, Q. 5).

Q. 9.—Four brothers effected a partition and lived separate from each other. As usual, a house, some ground, and other immoveable property remained undivided. Two of these brothers died. The question is whether or not the share of the immoveable property should be made over to the widows or to the surviving two brothers.

A.—The widows of the deceased brothers cannot claim *the whole* of the shares of their husbands, but they should be provided with a suitable residence. The rest of the immoveable property will fall to the two surviving brothers.

Ahmednuggur, January 5th, 1849.

AUTHORITIES.—(1) Vyav. May. p 136, l. 2 (*see* Chap. I. Sec. 2, Q. 8); (2) Vyav. May p. 134, l. 4, 6, and 7; (3) Mit. Vyav. f. 49, p. 1, l. 10.

REMARK.—The Śâstri means that to the portion left undivided the ordinary rules governing the inheritance of undivided property must be applied, and that these will exclude the widow, saving her right to residence.

That right cannot be extinguished even by a sale of the house. (*c*)

2. When two united brothers successively die, each leaving a widow and no children, the widow of the last deceased brother takes

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(*a*) The right to a vritti (upádhyáya) bëing established in a family a fresh cause of action arises on each infringement of the right by a rival family. *Divákar Vithal Joshi* v. *Harbhat bin Mahádevbhat*, Bom. H. C. P. J. F. for 1881, p. 106.

(*b*) *Lallubhai* v. *Raval Bapuji*, Bom. H. C. P. J. for 1880, page 243; *Antaji Raghunath* v. *Pandurung*, P. J. 1879, p. 478.

(*c*) See *Mangala Debi* v. *Dinanath Bose*, 4 Ben. L. R. 72 O. C. J.; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353; *Parvati Kom Balapa* v. *Kisansing bin Jaising*, Bom. H. C. P. J. F. for 1882, p. 183.

the property, the widow of the first deceased being entitled only to maintenance. (*a*) For the share of an undivided coparcener, who leaves no issue, goes to his undivided coparceners, whether the property is ancestral or acquired by the coparceners as joint estate. (*b*)

Q. 10.—A man had three sons. One of them died without issue. He and his two brothers had not divided their ancestral property. Although the deceased had left a widow, the certificate of heirship was given to his two brothers. They subsequently died. One of them has left a widow and two daughters. The other has left three daughters. The property of the first deceased brother is in the possession of the widow, who is the mother of two daughters. It will be observed that one brother who had not taken his share from his two brothers died, and that his two brothers survived him. Now his widow claims the share of her husband from the heirs of the two brothers, who possess the ancestral property. The question is whether she can claim a share, or a maintenance only.

The widow of the first deceased brother wishes to take the share due to her husband, but it is to be noticed that the two brothers who died afterwards have left some daughters to be married. According to the custom of the caste, a large expense is required for the marriages and subsequent ceremonies. The widow who demands the share of the common property has no children. Will this circumstance cause any obstacle to her claim?

A.—The husband of the widow appears to have died without having previously divided his property. He has left no sons. His widow cannot therefore claim any share from the heirs of the two brothers who died afterwards. They should only give her maintenance (*c*).

Surat, March 17*th*, 1858.

(*a*) *Musst. Surajmookhi Koonwar* v. *Musst. Bhagavati Koonwar*, Privy Council, 8th Feb. 1881.

(*b*) *Rádhábái* v. *Nánárâv*, I. L. R. 3 Bom. 151.

(*c*) The custom of the City of London and of other places reserves

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 10 (*see* Auth. 3); (2) Mit. Vyav. f. 48, p. 1, l. 9; (3*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3).

Q. 11.—A man died and his widow has filed an action against her brother-in-law for the recovery of certain property belonging to her deceased husband. The brother-in-law had lived apart from his deceased brother for about 25 years. A division of the family property had not, however, taken place. Can the widow claim a share?

A.—The widow cannot claim a share of that which may be undivided and ancestral property; but if there is any which may have been acquired by her husband without making use of the property of his ancestors, she can claim it from her brother-in-law.

AUTHORITIES.—(1) Vyav May. p. 136, l 4:—

"But if her husband have departed for heaven the wife obtains food and raiment; or (*tu*) if unseparated, she will receive a share of the wealth as long as she lives" (*b*) (Borradaile, p 102; Stokes, H. L B. 85).

(2) Vyav. May. p 136, l. 2 (*see* Chap I Sec. 2, Q 3).

Q 12.—Two brothers of the Kanojî caste were undivided. One of them died, leaving a widow. The other brother does not maintain her, nor does he assign to her any property to live upon. Who has, under the circumstances,

the chief room in the family dwelling as the widow's chamber. *See* Elt. Ten. of Kent pp 42, 173; and below, Ch II Sec. 7, Remarks.

(*b*) NOTE —The words "if unseparated" (*avibhakta*) belong to both halves of the sentence, and the translation should run thus:—

"In an undivided family, if her husband have departed for heaven the wife obtains food and raiment, or she will, etc." In the explanation, which in the Mayûkha follows this text, the word avarudhâ is wrongly translated by "a woman set apart." It means "a concubine."

the right to collect the money due to the deceased, the wife or the brother ?

A.—The brothers were undivided. The brother has therefore the right to collect debts due to the deceased. The widow of the latter has a claim to maintenance only. But she must stay with her brother-in-law if she has no good reason to show why such an arrangement is impossible.—*Ahmednuggur, March* 15*th*, 1849.

AUTHORITY.—Vyav. May f. 136, p. 2, Borr. 101; Stokes, H. L. B. 85 (*see* Chap. I. Sec. 2, Q. 3).

REMARK.—*See* above, Introduction, Section on MAINTENANCE, p. 254 ss.

Q. 13.—1. There are three brothers, whose property is undivided. It consists of an office of priest called the "Yajamâna Vṛitti," a house, and some other things. On the death of one of these brothers, a question has arisen whether the surviving brothers, or the son of the deceased brother's sister, are the heirs ?

2. Suppose the property of the brothers was divided, and they themselves separated, who would be the heir in this case ?

3. Will the son of a cousin, or the son of a uterine sister be entitled to inherit the ancestral office of a priest held by a deceased in an undivided state ?

4. Supposing the above-mentioned property was divided, which of the two relatives above-named would be entitled to inherit it ?

A.—1. If one of the three brothers, whose property was undivided, died without leaving either a son or a grandson, his uterine brothers must be considered the heirs.

2. In the case of a family whose property is divided, the order of heirs laid down in the Śâstra is as follows :—The widow, the daughter, the daughter's son, the parents, and the uterine brothers. In the absence of each of these, the next succeeding becomes the heir.

3. When the office of priest is undivided, and when a co-sharer dies, his cousin's son will be entitled to inherit the deceased's share, provided the following kinsmen are not in existence:—The uterine brother, nephew, parents, half-brother, sons of half-brother, uncle, sons of uncle, and widow.

4. When the property is that of a deceased person divided in interest, his sister's son inherits his share; as long as the sister's son is alive the cousin's son cannot succeed.

Surat, October 18th, 1845.

AUTHORITIES.—(1*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3; (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—*Ad.* 3. The undivided coparceners alone inherit the deceased's share. (Auth. 1.)

Ad 4. The cousin's son inherits the deceased's property, in preference to the sister's son, since he is a "Gotraja Sapinḍa," connected by funeral oblations with, and a member of, the same family as the deceased, whilst the sister's son is only a Bhinnagotra Sapinḍa. (Auth. 2.) *See* also Introductory Note to Chap. II. Sec. 15—§ 5. The Śâstri seems to have been steeping his mind in Bengal law. *See* H. H. Wilson's Works, vol. V p. 11.

Q. 14.—There were four brothers who divided their moveable property and left the immoveable undivided. The immoveable property consisted of some land given to them in order to keep up a lamp in a temple. One of the four sons died. He left a widowed daughter. Can she obtain her father's share?

A.—She cannot obtain it. It goes to the other undivided relations.—*Rutnagherry, January 7th,* 1853.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p 2, l. 1; (2) f. 46, p. 2, l. 14; (3*) Mit. Vyav. f. 51, p. 1, l. 9 (*see* Chap. I. Sec. 2, Q. 17); (4*) Vyav. May. p. 136, l. 2 (*see* Chap I. Sec. 2, Q. 3).

REMARK.—The Śâstri has not distinguished between the divided and the undivided property.

Q. 15.—There were three brothers. Two lived united and one separate. The one of the undivided brothers had a

son, the other a daughter. The latter lived in the house of her husband. Both the brothers died. Who will inherit the second brother's property?

A.—The first brother's son inherits his uncle's property. But if anything had been promised by the second of the brothers to his daughter, it must be given to her.

Ahmednuggur, November 29th, 1845.

AUTHORITIES.—(1*) Vyav. May p. 136, l. 2 (*see* Chap. I Sec. 2, Q 3); (2) Mit. Vyav. f. 51, p. 1, l. 9 (*see* Chap I. Sec. 2, Q. 17).

REMARK.—The property promised must not have been disproportionately great. Vyav. May. Chap. IV. Sec. X. pl. 5, 6; above, p. 208.

Q. 16.—Three brothers died. One of them left a grandson, the second a son, the third a son's daughter. Will the latter inherit her grandfather's property?

A.—As long as males are living in the family, the son's daughter has no right to her grandfather's share.

Poona, September 10th, 1852.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2*) p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (3*) Mit. Vyav. f. 51, p. 1, l. 9 (*see* Chap. I. Sec. 2, Q. 17)

Q. 17.—A man died and left a daughter. His brother, who was united with him in interests, adopted a son. Will the latter or the daughter inherit the property of the deceased?

A.—The deceased and his brother were undivided. Consequently the latter's adopted son will inherit deceased's property.—*Dharwar, September 29th,* 1849.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2*) p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (3*) Mit. Vyav. f. 51, p. 1, l. 9 :—

"In regard to unmarried sisters, the author states a different rule, giving them as an allotment the fourth part of a brother's own share." (Colebrooke, Mit. p. 286; Stokes, H. L. B. 398.)

REMARK.—The position of all daughters of undivided coparceners is the same as that of sisters. Nephews represent their fathers. *See* cases referred to below. (*a*)

Q. 18.—Two persons, related as uncle and nephew, held an hereditary Watan. The nephew died, and the question is whether the widow of the nephew or the uncle should come in the place of the nephew as his heir?

A.—If the uncle and his nephew were separated members of the family, the widow of the nephew will inherit his share. If the property was not divided, and if it was held as a joint property of the uncle and the nephew, the uncle should come in the place of the deceased nephew.

Broach, May 14*th*, 1855.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4); (2) f. 50, p. 1, l. 7; (3*) Vyav. May. p. 136, l. 4 (*see* Chap. I. Sec. 2, Q. 11.)

Q. 19.—A man's widow and his cousin live together as an undivided family. The widow's late husband had lent money to other people, and the question is who has the right to recover it?

A.—As the deceased and his cousin lived together, the cousin has the right to recover the money due to the deceased. The widow will be entitled to a maintenance.

Rutnagherry, July 13*th*, 1847.

AUTHORITY.—Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3).

REMARK.—The cousin who was united with the deceased, and not the widow, inherits the deceased's share.

Q. 20.—A man died. His first cousin performed his funeral ceremonies. Will he or deceased's half-brother inherit the estate?

(*a*) *Bhagwan Goolabchund* v. *Kriparam Anundram et al*, 2 Borr. R. 29; *Nurbheram Bhaeedas* v. *Kriparam Anundram*, *ibid.* 31. Comp. p. 106, note (*g*) above.

A.—The first cousin was separate from the deceased whilst the half-brother lived with him as a member of a united family. Consequently the half-brother alone inherits.
Tanna, August 12th, 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3).

REMARK.—At 2 Macn. H. L. 66 is an answer to the effect that where a man dies united with a whole and a half-brother, these succeed together to the exclusion of deceased's widow.

Q. 21.—A man died, leaving a daughter. Will the latter or a second cousin with whom the deceased had lived united in interests, inherit the deceased's estate ?

A.—The second cousin inherits the deceased's estate; the daughter will receive only what her father may have given to her.—*Ahmednuggur, January 8th,* 1851.

AUTHORITIES.—(1) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q 3); (2) Vyav. May. p. 140, l. 1; (3*) Mit. Vyav. f. 51, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q. 2).

Q. 22.—A woman has a daughter. Her husband left the country and was not heard of for many years. She receives the proceeds of her share of the estate. The woman and her husband have been living separate from their cousin for about 75 years. The immoveable property has not been divided. The woman has sued her cousin for a division of the immoveable property. The cousin states that the woman should be satisfied only with a share of the proceeds of the property, and that the share would be continued to her during her lifetime. He further states that he would divide the property only on condition of her agreeing never to transfer it in any way. The question is how the case should be decided?

A.—As the woman has received her share of the proceeds separately for many years, and as she has a daughter, she has a right to move for the partition of the immoveable pro-

perty. The objection of her cousin founded on the apprehension of the transfer of the property is not valid. The woman has a right to transfer her property whenever she may find it necessary to do so.

Ahmednuggur, November 25th, 1848.

Authorities.—(1 and 2) Vyav. May. p. 134, l. 4 and 6; (3) p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3.)

Remark.—As the property is undivided, the widow has no right to it. The Śástri seems to have considered separate enjoyment of the proceeds a proof of partition. As to this see Bk. II. Introd. Sec. 4 D. The right which the Śástri ascribes to the woman to alien the property is not generally recognized. (*See* above, pp. 297 ss.)

Q 23.—A woman has instituted a suit against her mother-in-law, and four cousins of her father-in-law, for the recovery of the share of her father-in-law of the ancestral property of the family. Is her claim tenable?

A.—The woman cannot claim any share of the property. She can only claim a maintenance from the defendants.

Ahmednuggur, July 21st, 1856.

Authorities.—(1) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (2) f. 136, l. 4. = Mit. Vyav. p. 55, f. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 24.—Certain members of a family have a right to a house which is their undivided and ancestral property. A son of one of the members died, and his widow claims the share of her husband, the other members of the family, namely, grandsons of her brother-in-law and sons of her father-in-law's brother, are alive. Can the widow claim the share?

A.—The widow of a man who dies while the family of which he is a member is still united in interests, cannot claim a share. She can only claim a maintenance.

Surat, 1845.

AUTHORITIES.—(1*) Vyav. May. p. 136 l. 2 (*see* Chap. I. Sec. 2, Q. 3); (2*) p. 136, l. 4. = Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 25.—A paternal grand-aunt and her grand-nephew lived together as an undivided family. They hold Yardî and Kulkarṇî Watans. Can the paternal grand-aunt claim a share of the Watans, or only a maintenance from their proceeds?

A.—She can claim a maintenance only, and provided she sustains her good character and lives with her grand-nephew.

Ahmednuggur, April 30th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (2) p. 136, l. 4 = Mit. Vyav. f. 55, p. 2, l 1 (*see* Chap. I. Sec. 2, Q. 4); (3) Vyav. May. p. 129, l. 2 and 4; (4) p. 134, l. 4 and 6; (5) p. 137, l. 7; (6) Mit. Achar. f. 12, p. 1, l. 4 and 6; (7) Mit. Vyav. f. 16, p. 1, l 6; (8) f. 69, p. 1, l. 1.

REMARK.—*See* p. 254 *supra*, and Chap. VI. Sec. 3 c, Q. 6, below.

Q. 26.—Two brothers, *A* and *B*, obtained a house as security for a debt. *A* took his wife's sister's son into his house, and brought him up as his own son. The house was in the joint possession of this latter person and of the son of *B*, and after *B*'s son's death in his possession jointly with the sons of the deceased *B*'s grandson. But the wives of these two began to quarrel, and *B*'s grandson sued *A*'s sister's son for the possession of the whole house. The latter has no certificate to show that he was formally adopted. He had merely possession of the house for 20 or 25 years. Is *B*'s grandson's claim admissible under these circumstances, or not?

A.—A's wife's sister's son had not been formally adopted, and can therefore not be considered as *A*'s son. The claim of *B*'s grandson is therefore admissible.

Ahmednuggur, November 1st, 1849.

AUTHORITIES.—(1) Mit. Vyav. f. 53, p. 2, l. 6; (2) f. 51, p. 1, l. 3; (3) f. 50, p. 1, l. 1; (4*) f. 44, p. 2, l. 14 (*see* Chap. II. Sec. 4, Q. 1); (5) Vyav. May. p. 102, l. 4; (6) p. 110, l. 6; (7) p. 100, l. 1; (8) p. 142, l. 8.

CHAPTER II.

HEIRS OF A SEPARATED PERSON.

SECTION 1.—SON BY BIRTH, LEGITIMATE.

Q. 1.—If a man separates from his father and brothers, and acquires property after the separation, who will be his heir? If his son be his heir, should his mother be considered the son's guardian during his minority?

A.—His son will be his heir, and his widow, during his son's minority, will be his son's guardian.

Poona, June 2nd, 1845.

AUTHORITIES.—(1*) Manu IX 185:—

"Not brothers, nor parents, but sons (if living and their male issue) are heirs to the deceased."

"The production of children, the nurture of them, when produced, and the daily superintendence of domestic affairs are peculiar to the wife."

REMARKS.—1. The son would of course not be separated from his father, by the separation of the father from his father and brothers. A new joint family would forthwith commence consisting of the father and son. In every case of partition between a father and sons, a son born after partition is sole heir to the shares reserved for the father and the mother. (*a*)

Sir H. Maine explains the law of Borough-English (*b*) by supposing it originated in a preference given to the youngest unemancipated son who remained under the *patria potestas* over those who were presumably separated. Under the Hindû law the preference arises from the union of interests and sacrifices. It extends to a son remaining joint with his father and to a brother remaining united with another in a general partition, as may be seen in the preceding chapter.

2. Under the Mithila law the mother as a guardian is preferable to the father. (*c*)

(*a*) Mitâksharâ, Chap. I. Sec. VI. para. 1. ss.

(*b*) Early History of Institutions, pp. 222, 223.

(*c*) *Jussoda Kooer* v. *Lallah Nettya Lall,* I. L. R. 5 Cal. 43.

Q. 2.—Should the sons, who are minors, or the widow, or the brothers of a deceased Sûdra, be considered his heirs?

A.—All of them have a right to the property of the deceased, but the sons are his heirs.—*Poona, June 23rd*, 1845.

AUTHORITIES.—(1*) Manu IX. 185 (*see* Chap. II. Sec. I. Q. 1); (2*) Mit. Vyav. f. 69, p. 1, l. 1 :—

"Manu has declared that aged parents, a faithful wife, and an infant son must be maintained, even by performing a hundred improper actions."

(3*) Mit. Vyav. f 51, p. 1, l. 7 :—

"Of heirs dividing after the death of the father let the mother take an equal share" (Colebrooke, Mit. p. 285; Stokes H. L. B 397)

REMARK.—The sons are their father's heirs, and the widow is entitled to maintenance, or, if the sons divide, to one full share of the property, provided she had received no Strîdhana (*See* Book II., Introd, and above, pp. 68, 163)

Q. 3.—A man of the Mâhâr caste expelled his wife from his house. His son went out with her. The husband afterwards died, when a son of his relatives was nominated by his friends as the son of the deceased, and was presented with a turban. Will he be his heir?

A.—The son of the deceased will be his heir and not the person nominated.

AUTHORITIES.—(1*) Dattaka Mîmâṁsâ, p. 1, l. 3 :—

"In regard to this matter Atri says: Only a man who has no son ought to procure a substitute for a son."

(2*) Manu IX. 185 (*see* Chap. II., Sec. 1, Q. 1)

Q. 4.—A Kunbî brought up a son of another Kunbî, and transferred to him his immoveable property. It accordingly passed into the possession of the foster-son. A son was afterwards born to the Kunbî. This son and the foster-son lived separate from each other for many years. The son has now sued the foster-son for the recovery of the immoveable property given to him by the Kunbi. Can he do so? and within what time should the suit be brought? Can the

possession of the property be disturbed after the lapse of 30 years? If the father and his foster-son should have improved, and taken care with trouble and expense of the immoveable property in question, cannot the foster-son have some claim to it?

A.—A son is entitled to three-fourths of the property which his father may have transferred to his adopted son before the birth of his son. The adopted son will only be entitled to one-fourth, provided his adoption has been performed with the due ceremonies and sacrifices by the adoptive father. The Śâstra does not lay down any rule in regard to the limitation of time within which a suit for a share of property should be brought. It is however laid down that when a man has received the income of any immoveable property for 20 years, and of any moveable property for 10 years, without any objection or demand from the owner, he cannot be obliged to pay the income, but the right to the immoveable property is never lost.

The foster-son, mentioned in the question, should be allowed to hold such things as he may have received from his foster-father as tokens of his affection, provided they are becoming his rank in society, and not unjustly oppressive to the son. If the foster-son was born of his father's slave woman, he would be entitled to one-half of the property which is allotted to his son.

AUTHORITIES.—(1) Datt Mîm. f. 1, p. 1, l. 1, 3, and 11; (2) Vyav. May. p. 102, l. 4:—

"He is called a son given (Dattrima) whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water" (Borradaile, p. 66; Stokes, H. L. B. 58.)

(3) Vyav. May. p. 110, l. 6; (4) p. 107, l. 6; (5) p. 112, l. 3; (6) p. 28, l. 5; (7) Mit. Vyav. f. 11, p 2, l. 11; (8) f. 51, p. 1, l. 3; (9) f. 55, p. 1, l. 11; (10) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

REMARK.—It must be noted that the question refers to the relative rights of a son, and a *foster-son*, not an *adopted son*, in which case a different relation of right would arise. (*See* Section 2.)

2. If the father should have parted with ancestral property for valuable consideration, and not for a palpably immoral purpose, the son would be bound by such alienation, according to *Narayanacharya* v. *Narsoo Krishna*. (*a*) This case, and the ones cited in it, are discussed with reference to the Hindû law of Bombay in the Introd. to Book II.

Q. 5.—*A* died, leaving a son, *B*, by his first wife, and a second wife, *C*. Does *A*'s house pass to *B* alone, or can *C* claim a share of it ?

If a portion of the house happen to be in the occupation of *C*, will such occupation give *C* a title to the portion of the house which she is occupying ?

A.—On the death of *A*, his house passes to his son *B*, and although *B*'s step-mother may at the time be in occupation of a portion of the house, she cannot on that account be considered to have any right to such portion.

Surat, April 6th, 1846.

AUTHORITIES.—(1) Mit. Vyav. f. 69, p. 1, l. 1 (*see* Chap. II. Sec. 1, Q. 2); (2) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

REMARK.—The step-mother can, however, claim maintenance, (Auth. I.) and residence. (*See* above, p. 252, and Book II. Introd.)

Q. 6.—*A* had a son *B* by his first wife. *B* separated from his father *A*, who married a second wife *C*. On the death of *A*, if *B* pays *A*'s debts, will *B* or will *C* be *A*'s heir? If *B* is *A*'s heir, then is *C* entitled to a share of *A*'s property, or can she claim only a maintenance out of *A*'s estate ?

A.—*B* will be heir to his father *A* ; but if *A* has assigned to *C* any strîdhana, this strîdhana will belong to *C*, and besides so long as she behaves chastely and lives under the protection of *B*, she should be allowed maintenance.

Ahmednuggur, April 21st, 1848.

AUTHORITIES.—(1) Vyav. May. p. 89, l. 2 ; (2) p. 142, l. 8; (3) p. 181, l. 5; (4) Mit. Vyav. f. 69, p. 1, l. 1 (*see* Chap. II. Sec. 1, Q. 2); (5) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

(*a*) I. L. R. 1 Bom. 282. *See* also above, pp. 206, 207.

REMARK.—A prior separation and renunciation of rights by a son does not deprive him, on his father's death, of his right of inheritance. (*a*)

2. *Ramappa Naicken* v. *Sithammál* (*b*) establishes (reversing the judgment of Mr. Burnell, the District Judge) that a separated son inherits before the father's widow. To the same effect is the judgment in *Advyapa bin Dundapa* v. *Dundapa bin Andaneapa*. (c)

3. *See* Introd. p. 254 ss.

Q. 7.—A Rangâri (dyer) put away his wife and his son by her, after which he lived for several years with a concubine, by whom he had a daughter. On his death, will his widow and her son be his heirs, or will his concubine and her daughter be his heirs?

A.—The son is entitled to inherit his father's moveable and immoveable property, though he may have lived separate from him. The kept woman and her daughter are not the heirs of the deceased.

Poona, September 11*th*, 1849.

Kheḍa, May 18*th*, 1848.

AUTHORITIES.—(1) Manu IX 163:—

"The son of his own body is the sole heir to his estate."

(2) Mit. Vyav. f. 46, p. 2, l. 1; (3) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1.)

Q. 8.—If a "Lingâyat" die, will his widow or his son inherit his house?

A.—The son is the rightful heir to the father's moveable and immoveable property. A widow can only claim that portion of the family property which may have been left for her by her husband at the time he effected a division of his property among his sons, or a share (to be) reserved by the sons when sharing the property among themselves.

Ahmednuggur, September 2*nd*, 1850.

(*a*) *Bálkrishna Trimbak Tendulkar* v. *Sávitribái*, I. L. R. 3 Bom. 54. Comp. Viner's Abridgment, Extinguishment, Co. Litt. 7 *b*, 8 *b*, 237 *b*; *see* above, p. 59.

(*b*) I. L. R. 2 Mad. 182.

(*c*) Bom. H. C. P. J. F. for 1881, p. 48.

Authorities.—(1) Mit. Vyav. f. 46, p. 1, l. 9; (2) f. 20, p. 1, l. 6; (3) f. 33, p. 1, l. 3; (4) Vyav. May. p. 89, l. 2 and 6; (5) p. 108, l. 3; (6) p. 90, l. 2 and 3; (7) p. 94, l. 7; (8) p 95, l. 5; (9) p 151, l. 2; (10) p. 175, l. 3; (11) Manu IX. 185 and 163 (*see* Chap. II. Sec. 1, Q. 1 and Q. 7).

Q. 9.—*A*, a Kunbî, had a son *B* by his first wife. He then married a woman *C* who had been married before. *B* and *C* survived *A*. Has *C* any right to a share of the immoveable property of *A*, and if so, to what share?

A.—As *A* left a son by his first wife, the wife, who was not a virgin when he married her, can have no right to any share of his property.—*Tanna, September* 28*th*, 1852.

Authorities.—(1) Mit. Vyav. f. 54, p. 2, l. 16; (2) f. 55, p 2, l. 1; (3) Manu IX. 163 and 185 (*see* Chap. II. Sec. 1, Q. 7, and Q. 1).

Remark.—As the second marriage of a Hindû female has been legalized by Act XV. of 1856, it seems that the widow can claim maintenance under Mit. Vyav. f. 69, p. 1, l. 1 (*see* Chap. II. Sec. 1, Q. 2; and above, pp. 88, 89).

Q. 10.—A Hindû died, leaving a widow and a son, which of these is the heir?

A.—The son is the heir, but if the property left by the deceased is to be divided, the widow will receive a share equal to that which the son receives.

Broach, July 28*th*, 1848.

Authorities.—(1) Mit. Vyav. f. 51, p. 1, l. 7; (2) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1); (3) Mit. Vyav. f. 69, p. 1, l. 1 (*see* Chap. II. Sec. 1, Q. 2).

Remark.—The widow could not claim such a division, nor any separate share, against the will of the son. (*See* Book II., Introd.)

Q. 11.—A deceased person has left two sons and a widow. Will the widow be entitled to a share of her husband's property in the same manner as the sons?

A.—The widow is entitled to a share of the property equal to that received by one of her sons. The value of the strîdhana which she may have received should be deducted from her share, that is, if a division of property take place.

Dharwar, November 29th, 1850.

Authority.—Mit. Vyav. f. 51, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q. 2).

Q. 12.—A man died, leaving a widow and four sons. Three of these sons are minors and one is an adult. Can each of these sons claim an equal share in their father's property? and can the widow claim any share in her husband's property?

A.—Each of the sons of a deceased father can take an equal share of the patrimony. If their mother or the widow of their father has not received any property in the shape of strîdhana, she should be allowed a share in her husband's property equal to that which is allotted to one of her sons. If she has received Pallu (the Gujarâṭhî word for Strîdhana), her share will be equal to one-half of that which falls to one of her sons.—*Broach, June 3rd,* 1848.

Authorities—(1) Mit. Vyav. f. 51, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q. 2); (2*) Vyav. May. p. 94, l. 8 :—

"If any (Strîdhana) had been given, they are only to get half (a son's share), for, he adds : Or if any had been given, let him assign the half." The half meaning so much as, with what had been before given as separate property, will make it equal to a son's share. "But if her property be (already) more than such share, no share belongs to her." (Borradaile, p. 58 ; Stokes, H L. B. 51)

Remark.—In case the mother possesses separate property, the amount of her share will depend on the amount of her strîdhana. (*See* Auth. 2.)

Q. 13.—Can a widowed sister without male issue claim from her brother a share of her father's property, and has she any right to live in her brother's house?

A.—The sister has no right to any share of the property, nor to a residence in her brother's house.

Ahmednuggur, August 1st, 1847.

AUTHORITY.—Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

REMARK.—Colebrooke recognized a widowed sister's claim in a case of destitution. (*See* above, p. 248.)

Q. 14.—A man died, leaving two sons, one of whom paid all his father's debts. Is he alone, on this account, entitled to inherit the property of his father? or have both sons equal rights of inheritance?

A.—If the son who paid his father's debts has taken possession of the property, with the consent of his brother, he may be considered the owner of the whole. If he has paid the debts and taken possession of the property of his father, without the consent of his brother, then the brother or his son has a right to recover one-half of the property on payment of the amount of one-half of the debts discharged with interest.—*Ahmedabad, June 25th,* 1858.

AUTHORITIES.—(1) Vyav. May. p. 181, l. 5; (2) Mit. Vyav. f. 47, p. 2, l. 13:—

"Let sons divide equally both the effects and debts after (the demise of) their two parents." (Colebrooke, Mit. p. 263; Stokes, H. L. B. 381.)

REMARK.—The sons divide the father's property equally, and are subject to equal shares of his debts. If one of the sons has paid all debts, he will be justified in retaining, besides his own share, as much as covers what he has expended in excess of his proper share of the debts.

Q. 15.—*A* died, leaving his widow *B*, his sons, *C* and *D*, and *C*'s wife *E*. Which of these is his heir? After the death of *A*, and while the property was still undivided, *C* died, leaving no male issue. If *C* had property, which of the above-named persons would succeed to it after the death of *C*? If *D* had property, and, while the family was still undivided, *D* died, which of the two widows, *B* and *E*, would

succeed to it? If *A* left a house as the common property of the family, which of the two widows, *B* and *E*, would be entitled to occupy? *A's* house was sold by *B* without the consent of *E*. Is the sale valid?

A.—*C* and *D* are the heirs of *A*; as *C* died while the family was united in interests, the right of inheritance to the whole of the undivided property of the family will devolve on *D*.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) f. 55, p. 2, l. 10; (3) f. 46, p. 2, l. 11; (4) Vîramitrodaya f. 194, p. 1, l. 4; (5) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1); (6):—

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes." (Colebrooke, Mit. p. 257; Stokes, H. L B. 376.)

REMARK.—The last passage is intended as an answer to the last of the series of questions proposed.

Q. 16.—Are all the sons of a man equally entitled to inherit the immoveable property acquired by their father? and can they, after their father's death, divide such property?

A.—All the sons of a man are equally entitled to inherit their father's immoveable property, and they may divide it after his death.—*Poona, November 5th,* 1851.

AUTHORITIES.—(1) Mit. Vyav. f. 47, p. 2, l, 13 (*see* Chap. II. Sec. 1, Q. 14); (2) Vyav. May. p. 90, l. 2.

Q. 17.—*A* died, leaving *B* a son, *C* the son of another son *D*, and *E* the widow of a third son *F*. How should the real property of *A* be divided among these three?

A.—The property should be divided equally between *B* and *C*; *E* is entitled to a maintenance only.

Surat, September 16th, 1846.

AUTHORITIES.—(1) Vyav. May. p. 94, l. 1:—

"In wealth acquired by the grandfather, whether it consist of moveables or immoveables, the equal participation of father and son is ordained." (Borradaile, p. 57; Stokes, H. L. B. 51.)

(2) Vyav. May. p. 136, l. 4 (*see* Chap. I. Sec. 2, Q. 11). See *infra*, Bk. II. Introd. Sec. 6 B.

REMARK.—As to the maintenance of the widow, *see* the Introduction, Sec. 10; above, p. 246; and Bk. II. Introd. Sec. 6 B.

Q. 18.—A man and his son were united in interests. The son died, and the question is, who should be considered his heir? There are his father, mother, brother, wife, and son.

A.—All have equal right to the deceased's property. The ornaments which might have been given to the wife of the deceased must, however, be considered her exclusive property.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) Vyav. May. p. 54, l. 4; (3) Manu IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

REMARK.—The father being united succeeds according to the authorities cited (*see* above, Bk. I Introd.) if the son of the deceased was separated. Otherwise the son takes his father's place in union with his grandfather.

Q. 19.—A man had two sons. The father divided his property between them, and reserved a portion for himself. He had afterwards a third son born to him. The father subsequently died. The question is, what portion of the property should be given to the third son?

A.—It appears that when the father was alive he divided his property between his sons, and reserved a portion for himself. The father may have acquired some more property after the division took place. All the property which may thus have come into the possession of the father belongs to the son born after the division. The sons who separated cannot claim any portion of this property. The son born after the division will be entitled to it, and will be also liable for such debts of the father as he may have contracted since the separation of his two sons.

Poona, August 20th, 1857.

AUTHORITIES.—(1) Vyav. May. p. 99, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 50, p. 2, l. 6:—

" A son born after a division shall alone take the paternal wealth. The term 'paternal' must be here interpreted 'appertaining to both father and mother." (Colebrooke, Mit. p. 281; Stokes, H. L. B. 394.)

SECTION 2.—ADOPTED SON. (*a*)

Q. 1.—A person adopted his sister's son's son, but became afterwards displeased with him. He made a will bequeathing his property to his adopted son and several brothers. Can he distribute his property in this manner? and is an adopted son liable to his natural father's debt?

A.—No. A man has no right to distribute his property in the manner described in the question, when he has a legal heir in his adopted son. A son given in adoption is not responsible for the debt of his natural father.

Sadr Adálat, May 25th, 1824.

AUTHORITIES.—(1*) Dattakamîmâṁsâ, p. 36, l 10 (*see* Chap. II. Sec 2, Q. 3); (2*) Manu IX 142:—

" A given son must never claim the family and estate of his natural father; the funeral cake follows the family and estate; but of him, who has given away his son, the funeral oblation is extinct." (*See* Vyav. May. Chap IV. Sec V. para. 22.)

REMARK.—As to the will, see Book II. Chap. I. Sec. 2, Q. 8, Remark; and above, p. 219.

Q. 2.—Can a man set aside an adoption duly solemnized?

A.—It cannot be set aside without sufficient grounds.

Poona, October 27th, 1854.

AUTHORITY.—*Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3).

(*a*) An adopted son competing with one begotten takes one-fourth as much, *Ayyávu Muppanár* v. *Niladatchi et al,* 1 M. H. C. R. 45. Adoption causes a complete severance from the family of birth, *Shrînivás Ayyangár* v. *Kuppan Ayyangár,* 1 M. H. C. R. 180; *Narsammal* v. *Balarámáchárlu, ibid.* 420.

REMARK.—"Without sufficient grounds," *i.e.* unless the son shows such physical or moral defects as would make the rules of disinheritance applicable.

Q. 3.—A man adopted a son. The adoptive father afterwards died, leaving a widow. The adopted son wishes to have possession of the whole property of his adoptive father. What is the law on the point?

A.—The widow of the adoptive father should in the above case be allowed a portion of the property, which, together with her "Strîdhana," will make up a share equal to that which the adoptive son receives.

Sadr Adâlat, June 25th, 1827.

AUTHORITIES.—(1) Vyav. May. p. 94, l. 8 (*see* Chap. II. Sec. 1, Q. 12); (2) Mit. Vyav. f. 51, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q. 2); (3*) Datt. Mîm. p. 36, l. 10:—

"Therefore Manu says, 'an adopted son, who possesses all the qualities (requisite for an heir), inherits (his adoptive father's estate), though he may have been adopted from another family (gens).'"

REMARKS.—1. The adopted son inherits his adoptive father's property.

2. The passage quoted by the Śâstri, under Authority 2, prescribes that the mother should receive a son's share, if after the father's death the sons divide the estate. Where no division takes place, the mother receives a suitable maintenance only.

3. The adoption by a widow, according to *Raje Vyankatráv* v. *Jayavantráv,* (a) operates retrospectively, and relates back to the death of her husband. But the Hindû Law does not allow this principle to be made a means of fraud. See next case.

Q. 4.—Can a woman, having an adoptive son, let her land by the contract called "Sarkat" (b) without his consent?

A.—When a son is adopted he becomes the owner of the property of his father. A woman therefore has no right to

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(a) 4 Bom. H. C. R. 191 A. C. J.

(b) "Partnership," a letting on terms of a division of the produce.

let her land by the contract called "Sarkat" without his consent. Any contract entered into before the adoption of an heir will, however, be valid.—*Poona, June 20th*, 1845.

AUTHORITY.—*Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3).

REMARKS.—1. It must be presumed that the land, though called "the widow's," belonged originally to the husband.

2. The adopted son is not bound by an unauthorized alienation. (*a*) But he is bound by one for a recognized necessity (*b*) He is also bound by one made before his adoption to pay off a debt of the widow's deceased husband. (*c*) The widow must be understood as occupying a place similar to that of a manager down to the time of the adoption. Whether before or after the adoption, (the adopted son being a minor,) the person contracting with her should satisfy himself of the propriety of the transaction. *Ram Dhone Bhuttachargee* v. *Ishanee Dabee*; (*d*) *Rajlakhi Debia* v. *Gakul Chandra Chowdhry*; (*e*) *C. Colum Comara Vencatachella* v. *R. Rungasawmy*; (*f*) *Dalpatsing* v *Nanabhai et al*; (*g*) *The Collector of Madura* v. *Mootoo Ramalinga*; (*h*) *Bamandas* v. *Musst. Tarinee*; (*i*) and *Náthâji* v. *Hari*. (*j*) In the last case, a gift made by a widow, before adopting a son, was set aside in his favour. In the case of *Govindo Nath Roy* v. *Rám Kanay Chowdhry*, (*k*) on the other hand, cited in I. L. R. 2 Calc. 307, an

(*a*) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I A. at p. 443.

(*b*) See *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. at pp. 178, 180, 185, 206.

(*c*) *Satra Khumagi et al* v. *Tatia Hanmantrao et al*, Bom. H. C P. J. F. for 1878, p. 121. He takes the duties with the rights of a begotten son. See *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. at pp. 178, 180, 185, and *Manikmulla* v. *Parbuttee*, C. S. D A. R. for 1859, p. 515; *Maharajah Juggernaut Sahaie* v. *Musst. Muckun Koomwar*, Calc. W. R. 24 C. R.; *Râmbhat* v. *Lakshman Chintâman*, I. L. R. 5 Bo. at p. 635.

(*d*) 2 C. W. R. 123 C. R.

(*e*) 3 B. L. R. 57 P. C.

(*f*) 8 M. I. A. at p. 323.

(*g*) 2 Bom. H. C. R. 306.

(*h*) 12 M. I. A. 443.

(*i*) 7 M. I. A. 169.

(*j*) 8 Bom. H. C. R. 67 A. C. J.

(*k*) 24 C. W. R. 183.

alienation for value was upheld; and in the later judgment (*a*) it is laid down that in no case can an estate, vested in possession, be divested by the subsequent adoption of a son, who then claims as a collateral heir of the former owner. In *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (*b*) it was held that where a nephew of a deceased had, by fraud, prevented his widow from adopting, and had thus himself succeeded to the whole instead of the half of the estate left by the widow of another uncle, the subsequent adoption did not relate back so as to divest the nephew of the moiety to which the adopted son if taken in due time would have been co-heir with his cousin by adoption. Whether an adoption by one widow annulled a prior conveyance of her estate by another was a question sent back for trial in *Bábáji* v. *Apáji*. (*c*) In a series of cases in C. S. D. A. R. for 1856, pp. 170 ss., an adopted son who had long received rents under leases granted by his adoptive mother sought to enhance the rents inconsistently with the leases. It was thought he could do this, but now probably his conduct would be deemed a ratification. These cases differ from the case of *Shiddheshvar* v *Rámchandraráo,* (*d*) as in the latter the adoptive mothers after the adopted son had attained his majority had mortgaged the estate in their own names. The adopted son promised to his mothers to redeem the mortgage, and he offered no objection to the mortgagee's paying them an annuity in accordance with the mortgage ; but it was held that there could be no ratification of what had not been done professedly on account of the principal, and that mere quiescence of the owner would not validate unauthorized dealings with his property. The mortgagee, it was said, if he had taken assignments of prior charges valid as against the adopted son, might enforce them in another suit.

In *Bai Kesar* v. *Bai Ganga* (*e*) the question was as to alienation by a father's widow as guardian of a son's minor widow of property of the latter. The transaction was set aside an account of the guardian's not having obtained a certificate of administration under Act XX. of 1864; but as the sale had been made to pay debts reasonably incurred, its rescission was made conditional on the repayment by the younger widow of the purchase-money to the vendee. (*See* further, Book II. Introd.)

(*a*) *Kally Prosonno Ghose* v. *Gocool Chundre Mitter,* I. L. R. 2 Cal. 307.

(*b*) I. L. R. 7 Cal. 178.

(*c*) S. A No. 190 of 1877; Bom. H. C. P. J. F. for 1877, p. 269.

(*d*) I. L R. 6 Bom. 463.

(*e*) 8 B. H. C. R. 31 A. C. J.

3. For the conditions limiting a widow's power to adopt in Bombay, see *Rámji valad Náráyan* v. *Ghaman Kom Jiváji* (a) and Book III. of this work treating of ADOPTION.

Q. 5.—The holder of an Inâm granted for the support of a temple, died, leaving an adopted son. The son and the widow of the holder disagreed and separated. The question therefore is whether the Inâm should in future be entered in the name of the adopted son or of the widow?

A.—The Inâm should be entered in the name of the adopted son.—*Ahmednuggur, October 16th,* 1851.

AUTHORITIES.—(1) Datt. Mîm. p 1, l. 3 and 11; (2*) p 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3); (3) Vyav. May p. 104, l. 7; (4) p. 105, l. 6; (5) p. 107, l. 6; (6) p. 102, l. 4; (7) p 110, l. 6; (8) p. 108, l. 3.

Q. 6.—A deceased man has left a daughter and an adopted son. Which of these has a right to inherit the property belonging to the deceased?

A.—The daughter is entitled to one-eighth of the property. The expenses of her marriage should be defrayed from this share and the rest of the share made over to her. The adopted son should receive the remaining seven-eighths of the property.—*Ahmednuggur, March 14th,* 1856.

AUTHORITIES —(1) Vyav. May. p. 102, l 4; (2) p. 110, l. 6; (3) Mit. Vyav. f. 51, p. 1, l. 9 (*see* Chap. I Sec. 2, Q 17); (4*) Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q 3).

Q. 7.—A Brâhman widow has adopted a son; should he or she have the management of her property during her lifetime?

A.—The adoptive mother's Stridhana should remain in her possession. The adopted son should make a suitable provision for the support of his mother, and the mother should remain under the control (*b*) of her son, who should have

(*a*) Bom H. C. P. J. F. for 1882, p. 141.

(*b*) *See* above, Introd. p. 254 ss.

the management of all the moveable and immoveable property.—*Ahmednuggur, October 17th,* 1845.

AUTHORITY.—* Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3).

Q. 8.—A woman after the death of her husband adopted a son. Can he claim the property of his (adoptive) father during the lifetime of his mother?

A.—Yes, he can claim his father's property, but not that of his mother.—*Poona, November 1st,* 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 54, p. 2, l. 15; (2*) Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q 3.)

Q. 9.—A woman adopted a son, and agreed to put him in possession of his property. The woman afterwards refused to act up to her agreement. Can the adopted son sue his adoptive mother for the possession of the property?

A.—The adoptive mother can be sued on the agreement, but she can still claim a maintenance.

Poona, November 5th, 1852.

AUTHORITIES.—(1) Viram. f. 121, p. 1, l. 10; (2) p. 2, l. 14; (3*) Datt. Mîm. p. 36, l. 10, (*see* Chap. II. Sec 2, Q. 3).

Q. 10.—Can an adopted son of a woman claim the property in her possession? A part of the property was acquired by her and the rest by her husband.

A.—The portion of the property which was acquired by the woman is her "Strîdhana," of which she alone is the owner. The adopted son can claim a half of the property belonging to her husband. The other half must be left with the widow. She is at liberty to enjoy the proceeds of the immoveable property, but not to mortgage or dispose of it.

Rutnagherry, February 20th, 1854.

AUTHORITIES.—(1) Mit. Vyav. f. 51, p. 1, l. 7; (2) f. 60, p. 2, l. 16; (3) f. 61, p. 1, l. 10; (4) f. 61, p. 2, l. 3; (5) f. 60, p. 2, l. 16:—

(Yâjñavalkya.) "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial

fires, or presented to her on her husband's marriage to another wife, or also any other (separate acquisition), is denominated a woman's property." . . . . (Vijñâneśvara) And on account of the word "âdyam" (and the like) property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Manu and the rest, 'woman's property.' (Colebrooke, Inh. p. 364; Stokes, H. L B 458 Translation revised according to note in 1st Edition of this work, *q. v.* *See* above, pp. 268 ss)

REMARK.—The adopted son takes the whole of his adoptive father's property. (*See* Chap. II. Sec 2, Q. 3.)

Q. 11.—A woman has adopted a son. She is possessed of some moveable and immoveable property. Is she or her adopted son the owner of the property?

A.—When a son is adopted by a widow, he becomes the owner of her husband's property. If he should happen to be a minor, the property should be taken care of by the widow, who is the owner of her "Strîdhana" only.

Ahmednuggur, August 18*th*, 1849.

AUTHORITIES.—(1) Datt Mîm. f. 1, p. 1, l. 3 and 11; (2) Vyav. May. p. 102, l. 10; (3) p. 110, l. 6; (4) p. 104, l. 7; (5) p 105, l. 6; p. 107, l. 6; (7) p. 103, l 7; (8*) Datt. Mîm p. 36, l 10 (*see* Chap II. Sec. 2, Q. 3); (9*) Manu IX. 27 (*see* Chap. II. Sec. 1, Q 1).

Q. 12.—A widow of the Mahâr caste adopted a son of her sister. He succeeded to the Watan of his adoptive father. His cousin has sued him for the recovery of the property. How should this case be decided?

A.—The sister's son adopted by the widow is legally entitled to the Watan of his adoptive father. The cousin therefore cannot disturb his possession.

Ahmednuggur, April 12*th*, 1856.

AUTHORITY.—*Datt. Mîm. p. 36, l. 10 (*see* Chap. II Sec. 2, Q. 3).

Q. 13.—A person having lost his first adopted son adopted another, and the wife of the deceased adopted one also. How will the two adopted sons share the family property?

A.—Equally.—*Tanna, June* 12*th*, 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p 1, l. 7 (*see* Chap. II. Sec. 4, Q. 2); (2) f. 50, p 2, l. 3.

REMARK.—The adoption by the widow of the deceased son, it was answered in one case (No 1666 MSS), would hold good notwithstanding a prior adoption by her father-in-law An adoption by her alone is to be preferred (No. 1660 MSS)

Q. 14.—A man adopted a son, but afterwards he had a son born to him. He separated from his adopted son, giving him a share of his property. The man and his son subsequently died. The widow of the son married another husband. The adopted son, and a "Pâṭ" widow of the adoptive father, are the only persons who claim to be the heirs of the adoptive father. Which of these is the heir?

A.—The adopted son.—*Dharwar, January 13th,* 1859.

AUTHORITIES.—(1) Vyav. May. p. 131, l. 4; (2*) Vîram f 191, p 2, l. 4 (*see* Chap. II Sec. 6A, Q 14); (3*) Datt Mîm p 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3).

Q. 15.—A man first adopted a son, and afterwards he had a son born to him. How will they share the man's property?

A.—The adopted son is entitled to one-fourth of the share of the son.—*Dharwar, September 10th,* 1847.

AUTHORITY.—Vyav. May. p 108, l. 2:—

"When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." (Borradaile, p. 72; Stokes, H L. B. 66.)

REMARK.—On the death of an intestate a contest arose between his adopted son and the adopted son of his natural son. The Court held that their rights were equal. *Raghoobanund Doss* v. *Sadhuchurn Doss.* (*a*) This would not be right on the principle of an adopted son fully representing his father in the absence of a natural son, as that would give the adoptive grandson the whole share of his father, in competition with whom the father's adoptive brother would take only half a share.

(*a*) I. L. R. 4 Cal 425.

Q. 16.—If a son is born to a man after he has adopted one, what portion of his property should be given to the adopted son ?

A.—The property should be divided into five shares, one share should be given to the adopted, and four to the begotten son.—*Sadr Adálat, July 2nd,* 1858.

AUTHORITIES.—(1) Datt. Mîm. f. 21, p 2, l. 1 ; (2*) Vyav. May. p. 108, l. 2. (*See* the preceding question.)

Q. 17.—A Pâṭîl adopted a son, afterwards a son was born to him by a wife who had been married before he married her. Which of these will be his heir ? If after he had adopted a son, a son was born to him by his wife who was a virgin when he married her, which of the two sons will be his heir ?

A.—The son of her who was a virgin, when the Pâṭîl married her, has a greater right than the adopted son, and the adopted son a greater right than he who was born of a twice married mother.—*Dharwar, December 3rd,* 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 53, p 2, l 6 ; (2*) f 55, p. 1, l. 11 (*see* Chap II. Sec. 3, Q 1) ; (3*) Vyav May p. 108, l. 2 (*see* Chap. II. Sec 2, Q 15) ; (4*) p. 112, l. 2 (*see* Chap. II. Sec. 3, Q. 16).

REMARKS.—1. If the son born after adoption was born from a Pâṭ wife, he would, in the higher castes, and except by custom in the lower also (being under the Hindû Law considered illegitimate), be excluded. But as the illegitimate son of a Sûdra, he will, according to Authority 3, receive one-third of the property. But *see* also Chap. II. Sec. 3, Q. 16, and Remarks on the same question.

2. If a legitimate son be born after the adoption has taken place, the adopted son receives a fifth of the deceased's estate, according to the preceding question. According to the Mit Ch. I. Sec. XI. p. 24, the adopted son takes a fourth part.

Q. 18.—*A*, an Âgarvâḷî, had no children ; but he brought up one, *B*, as his foster son. *A*'s mistress had a son, *C*, before she was kept by *A*, and *C* accompanied his mother when

she went to live in *A*'s house, and took *A*'s name. On the death of *A*, will *B* or *C* succeed to his property?

A.—*A*'s foster son, *B*, will be his heir. *C*, the son of his mistress, will not be his heir merely because he went with his mother to live in *A*'s house.

Ahmednuggur, September 30th, 1846.

AUTHORITIES.—(1*) Datt Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3); (2*) Vyav. May. p. 102, l. 2:—

"Here we must remark that with the exception of the son given (all other) secondary sons are set aside in the Kali (or present) age." (Borradaile, p. 66; Stokes, H. L. B. 58.)

REMARK.—*B* will inherit only if he was formally adopted; *Bashetti-appa* v. *Shivalingappa*; (*a*) *Nilmadhab Das* v. *Bisswambhar Das et al.* (*b*)

Q. 19.—A Kolî *A*, had nephews, but they were separated from him. He had no son of his own, but he brought up *B*, the son of a relation by a kept woman, either as a foster child, or as his adopted son (it is not known which). On the death of *A*, will his property pass to *B*, or to his nephews?

A.—If *B* was adopted by *A*, he will be his heir. If *B* was not adopted, but only brought up as a foster child by *A*, then his nephews, though separated from him, will inherit his property in preference to *B*.

Ahmednuggur, February 21st, 1846.

AUTHORITIES—(1*) Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 13); (2*) Vyav. May. p. 102, l. 2 (*see* Chap II. Sec 2, Q. 18)

Q. 20.—*A*, a Sûdra, died, leaving first and second cousins, and also a boy, *B*, whom he had either brought up as a foster child, or else bought. *A*, previous to his death, bequeathed a portion of his property to *B*. Is *B* entitled to

(*a*) B. H. C. P. J. F. for 1873, p. 162.
(*b*) 3 B. L. R. 27, P. C.

claim any further share of the property besides that expressly bequeathed to him, and if so, how should the rest of the property be divided between *B* and *A*'s cousins?

A.—If *B* was adopted by *A* with all the forms required by the Śâstras, then he will succeed to the whole of the property left by his adoptive father. If he has not been so adopted, he can claim only so much property as may have been expressly assigned to him by the deceased *A*, and the rest of *A*'s property will pass to his blood relations.

Ahmednuggur, January 17th, 1848.

AUTHORITIES.—(1) Vyav May p 102, l. 2 (*see* Chap II. Sec. 2, Q 18); (2) p 159, l 2; (3) p 142, l 8; (4) p. 7, l 8; (5) Mit. Vyav. f. 54, p. 1, l. 3 and 13; (6) f 53, p 2, l 6; (7) f 54, p 2, l. 13; (8) f. 51, p. 1, l. 3; (9) f. 50, p. 1, l. 1; (10) Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3).

SECTION 3.—ILLEGITIMATE SON.

Q. 1.—Can a son of a Sûdra's female slave be his heir?

A.—The son of a female slave is the heir of a Sûdra.

Ahmednuggur, September 30th, 1846.

AUTHORITY.—*Mit. Vyav. f. 55, p. 1, l. 11:—

"Even a son begotten by a Sûdra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of a moiety of a share; and one who has no brothers, may inherit the whole property, in default of a daughter's son." (Colebrooke, Mit. p. 322; Stokes, H. L. B. 426.)

REMARKS.—See *Rahi* v. *Govind*, (*a*) *Narayanbharti* v. *Lavingbharti*, (*b*) and *Inderun Valungypooly Taver* v. *Ramasawmy*. (*c*)

2. The union of the sexes amongst many of the wilder tribes and the lower castes of India can be called marriage only by courtesy. The word implies a set of relations which amongst them does not really

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(*a*) I. L. R. 1 Bom. 97.

(*b*) I L. R. 2 Bom 140.

(*c*) 13 M. I. A. 141, or 3 B. L. R. 4 P. C.

exist. Thus amongst the Khonds the so-called wife is bought from her father and carried off by force. (*a*) She can leave her husband when she will, her parent being then bound to repay her price. Amongst some classes in Kângra a purchased widow is reckoned a "wife" without further ceremony. (*b*) The custom of some castes in Gujarât allows the woman to leave the man and to form a connexion with another, subject or not to ratification by the caste. Mere incompatibility of temper is with several regarded as a ground for dissolution of the union, and in nearly all the lower castes the man may dismiss the woman at his pleasure with or without reason; the only restraint he feels arises from the necessary expense of a new wife. Parents and brothers habitually encourage young wives to run away from their husbands to induce the latter to divorce them and so leave room for another sale. The Brahmanic law regards a marriage as really indissoluble, (*c*) though the erring wife may be divorced in the sense of being disgraced and kept apart. It could not, therefore, treat with respect connexions in which there was no religious conjunction of sacra, no recognition of an indissoluble bond, no procreation of children to fulfil the sacrificial law. The British Courts give effect to many unions as marriage which are almost entirely wanting in the characteristics of what in England goes by that name, and even apply the provisions of the Penal Code to transgressions of a law which in itself never laid any strict obligations on the spouses. The relations of the sexes in British territory have thus been raised in some degree to a higher level amongst the lower castes, but at the cost of penal inflictions, it may be feared in many instances in which the culprits were wholly unconscious of having committed any offence. (*d*)

Baudhâyana makes mere sexual association a lawful union for Vaiśyas and Śûdras, "for," he says, "Vaiśyas and Śûdras are not particular about their wives" Shortly afterwards he says "A female who has been bought for money is not a wife: she cannot assist at sacrifices offered to the gods or the manes. Káśyappa has pronounced her a slave."—Transl, p. 207. (*See* above, pp 86, 274.)

(*a*) *See* Rowney, Wild Tribes of India, p 103.

(*b*) *See* Panj. Cust. Law, II. 184.

(*c*) *See* above, p. 90, and below, Sec. 6 B Introd. Remarks.

(*d*) See *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. 545, 565, 570; Rowney, *op. cit.* p. 136, 139, 190, 204; Steele, Law of Castes, 32, 33, 170, 171, 172, 173. Lord Penzance in *Mordaunt* v. *Mordaunt*, L. R. 2 P. and D. at p. 126; Lush, L. J., in *Harvey* v. *Farnie*, L. R. 6 P. D. at p. 53.

3. An illegitimate son was preferred to a widow and daughter in *Sadu* v. *Baiza and Genu.* (*a*) (*See* below, Q. 12.)

Q. 2.—Can an illegitimate son of a Brâhman claim a share from his legitimate brother?

A.—No: he cannot have any share. He can only claim that which his father may have expressly given to him.

Ahmednuggur, February 15th, 1851.

AUTHORITIES.—(1) Vyav. May. p. 99, l. 1 (*see* Auth. 3); (2) p. 98, l. 4; (3) Mit. Vyav. f. 55, p. 1, l. 15:—

"From the mention of a Sûdra in this place (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share, even by the father's choice, nor the whole estate after his demise." (*b*) (Colebrooke, Mit. p. 323; Stokes, H. L. B. 426.)

REMARK.—*See* above, p 263.

Q. 3.—A Mârwâḍî has a son by a woman either kept or purchased as a slave. Can the woman or the son be hisheir?

A.—If the Marwâḍî is a Śûdra, his illegimate son will be his heir. If he is not a Sûdra, and if he has not made a gift of his property to any one, the Sirkâr should take his property after paying for his funeral rites and the maintenance of the woman. If the deceased has made a gift of his property to either the son or the woman, it should be made over to her or him.

Ahmednuggur, February 23rd, 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (2) f. 57, p. 1, l. 5:—

(*a*) I. L. R. 4 Bom. 37, S. C.; Bom. H. C. P J. F. 1879, p 509.

(*b*) According to the Sanscrit text as given above, the translation "nor the whole estate after his demise" is not correct. It ought to be "nor half a share, much less the whole."

The English law of Glanville's time allowed a father to give to an illegitimate son a share of the patrimony which he could not give to a younger legitimate son without the consent of the heir. (*See* Glanville, p. 141.) This arose from a preservation of the literal direction of a text while the law to which it was collateral had changed. For an analogous process in the Hindû Law, *see* below, Q. 8.

"It is said by Kâtyâyana that heirless property goes to the king, deducting, however, a subsistence for the females, (a) as well as the funeral charges, but the goods belonging to a venerable priest, let him bestow on venerable priests." (Colebrooke, Mit. p. 335; Stokes, H. L. B. 435.)

(3) Vyav. May. p. 236, l. 61; (4) p. 98, l. 6; (5) Manu IX. 155.

Q. 4.—When a deceased Pardeshi (b) has no nearer heir than a son of his kept woman, can such a person be his heir?

A.—Yes.—*Poona, August 17th,* 1847.

AUTHORITY.—*Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARK.—"Yes," if the son is his own also, and if deceased belonged to the Śûdra caste.

Q. 5.—A person permitted his illegitimate son to live in one of his houses. This person and his descendants occupied the house for several years. They repaired, improved, and divided it among themselves. Can the house be claimed by the legitimate heirs of the original owner, and how many years' possession constitutes a prescriptive title?

A.—A man of the Sûdra caste having legitimate and illegitimate sons, can transfer his real or personal property to the latter. The legitimate heirs cannot cancel such a transfer. The period necessary to constitute a prescriptive title is not fixed in the Śâstras.—*Ahmednuggur, May 26th,* 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (2) f. 55, p. 1, l. 3; (3) f. 11, p. 2, l. 11 and f. 12, p. 2, l. 14. Translated 1 Macn. H. L. 200; (4) Vyav. May. p. 83, l. 3; (5) p. 89, l. 2.

(a) According to Vijñâneśvara, "females" here means "concubines" (avaruddhâ). If a *patni* wife survived, the property would not be heirless.

(b) "Pardeshi," Paradeśî (lit. foreigner) is used in the Dekhan to denote any Hindû who has immigrated from some other part of India, especially from Hindustân, whatever his caste may be.

REMARKS.—1. A Śûdra cannot transfer his entire property to his illegitimate children, if he has legitimate sons. He can only give equal portions to the legitimate and illegitimate heirs. *See* however Book II. Chap. I. Sec. 2; above, p. 209.

2. If the house which the illegitimate son had received was not more than a portion equal to the share of a legitimate son, the latter cannot recover it. If it was more, he would be able to recover it, but be obliged to give to the illegitimate son one-third of the property or one-half of a son's share. (*a*) Even amongst the higher castes, as the illegitimate son is entitled to maintenance, a grant to him by his father for this purpose is valid against the legitimate sons. (*b*) (*See* the Introd p 263.)

3. According to the Mitâksharâ, contrary to Yâjñavalkya and Nârada to which it refers, proprietary rights cannot be acquired by mere occupancy, however long it may last, and though the owner may not remonstrate But *see* now Act 15 of 1877, Reg. V. of 1827, and Book II Introd., "WILL TO EFFECT A SEPARATION."

Q. 6.—Is a cousin who performed the funeral ceremonies of his deceased relative, or a kept woman's son, who is a minor under the guardianship of his sister, his heir?

A.—As the deceased was separate from his relatives, and as he was of the Sûdra caste, his illegitimate son will be heir. But as the illegitimate son is a minor unde[illegible] protection of his sister, she may have the charge of the property on his behalf.—*Nuggur, November* 1*st*, 1845.

AUTHORITY.—*Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

Q. 7.—A man of the Mâlî caste left a son by a kept woman, and this son claims a share in certain land which is in possession of the deceased's nephew. Is the claim of the illegitimate son valid?

A.—As it appears that the man lived separate from his brothers, and that his share is in the possession of his nephew, the illegitimate son can claim it.

Nuggur, September 12*th*, 1845.

(*a*) *Kesaree et al* v. *Samardhan et al*, 5 N. W. P. R. 94.

(*b*) *Raja Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

AUTHORITY.—*Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARK.—If there be no legitimate sons, daughters or daughter's sons, the illegitimate son of a Śûdra succeeds, taking precedence of a legitimate son's daughter. (*a*)

Q. 8.—A Mohatûr-widow of a man of the Mâlî caste, sued his kept woman for a house belonging to her husband. The widow, while her husband was alive, lived separately from him for about 12 years. During all this time she was supported by her own labour. It is not said that her character was bad. The man has two sons by the kept woman. Can the claim of the widow be allowed?

A.—The man's sons by the kept woman are his heirs. They should inherit the whole property, and grant a suitable maintenance to the widow.—*Ahmednuggur, March* 13*th*, 1848.

AUTHORITY.—*Mit Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARKS.—1. A Mohatûr-widow is a widow who had been married twice.

2. For the preference of the illegitimate son to the widow, *see* p. 84 ss.

Q. 9.—A man, deceased, of the Śûdra caste, had two sons, one legitimate and the other illegitimate. The former died, leaving a widow. The deceased had a house, and the question is, who shall inherit it?

A.—The daughter-in-law has a right to a maintenance only. The illegitimate son will inherit the property of his father.—*Ahmednuggur, October* 30*th*, 1856.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (2) f. 12, p. 1, l. 16; (3) Mit. Achâra, f. 12, p. 1, l. 4; (4) Vyav. May. p. 134, l. 6; (5*) p. 136, l. 4 (*see* Chap. I. Sec. 2, Q. 11).

(*a*) *Sarasuti* v. *Mannu*, I. L. R. 2 All. 134.

According to the law of the Lombards the legitimate sons excluded illegitimates, but were compelled to provide them and their own sisters with portions.

REMARK.—The illegitimate son of a Śûdra is entitled to half the share of a legitimate son, *Dhodyela et al* v. *Malanaik*, S. A. No. 243 of 1873, (*a*) in Bombay and Madras, (*b*) if there be a legitimate son, daughter, or grandson. Failing these, he may inherit the whole. Mit. Chap. I. Sec. 12, pl. 1 ss. See *Salu* v. *Hari*, (*c*) *Gopal Narhar* v. *Hunmant Ganesh Saffray*, (*d*) *Sarasuti* v. *Maina*. (*e*)

Q. 10.—A Śûdra, *A*, who was possessed of an open piece of ground suited for building purposes, died, leaving two sons. One of these, *B*, was a legitimate son, and the other, *C*, was either an illegitimate son, or else his foster-son. On the death of *A*, will the piece of ground belong to *B* alone, or will it belong to *C*? If *C* is entitled to a share of it, to what share is he entitled ?

A.—In the Śûdra caste both legitimate and illegitimate sons succeed to their father's immoveable property. Their father may divide it according to his pleasure, and assign what share he pleases to a foster-son. If the property has to be divided after the death of the father, then, according to the Śâstras, the illegitimate son will be entitled to one-third, and the legitimate son to two-thirds of the whole property left by the father.—*Ahmednuggur, March* 14*th*, 1855.

AUTHORITY.—Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARKS.—1. The father may give an equal share to his illegitimate son if he likes. He could not give the bastard a greater portion than the other. (*See* above, p. 194; Mit. Ch. I. Sec. XII. para. 1)

2. If *C* is a "foster-son," and has not been formally adopted, he receives nothing.

Q. 11.—*A*, a Tailor, died, leaving a legitimate son, *B*, and an illegitimate son, *C*. Are *B* and *C* entitled to equal

(*a*) Bom. H. C. P. J. F. for 1874, p. 43.
(*b*) 2 Str. H. L. 70.
(*c*) H. C. P. J. for 1877, p. 34.
(*d*) I. L. R. 3 Bom. 273, 288.
(*e*) I. L. R. 2 All. 134.

shares of the moveable property and of the Watan of *A*, or can *C* claim no share at all? On the death of *B* will *C* be the heir to the Watan, or will it pass to the distant relatives of *A*? Is *B* competent to will away on his death-bed the Watan to distant members of his family, to the prejudice of *C*?

A.—*B* is entitled to three-fourths of the property of *A*, and *C* to one-fourth. If *B* die, leaving neither a widow, nor a son, nor a daughter, his Watan and other property will pass to *C*. If *B* and *C* have separated, then *B* is competent to transfer his property to his other relations, instead of to *C*.—*Ahmednuggur, December 13th,* 1847.

Authorities.—(1) Vyav. May. p. 83, l. 3; (2) p. 99, l. 1 (*see* Auth. 4); (3) p. 196, l. 4; (4*) Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (5) f. 68, p. 2, l. 16:—

"Property, except a wife and a son, may be given without prejudice to (the interest of) the family. But the whole estate may not be given if there is living issue, nor that which has been promised to anybody."

Remark.—According to the Remark to Q. 5, and the Answer to Q. 10, the illegitimate son would be entitled to one-third of the whole estate. It is, however, possible to interpret the expression "half a share," which Yâjñavalkya uses in the passage bearing on this point (Authority 4), in the sense also which has been given to it in the answer to Q. 11. For Vijñâneśvara, when discussing the allotment of a "fourth of a share" to a daughter of a person leaving sons, states that the property is to be divided first into as many shares as there are daughters and sons. Then each daughter is to receive a fourth of such a share, and lastly, the rest is again to be divided equally amongst the brothers. (*See* Colebrooke, Inh. p 287) If the same principle is followed in regard to the "half share" of an illegitimate son, he will, in case there is only one legitimate son living, receive a fourth of the whole estate. The same difficulty presents itself also in regard to the fourth share of an adopted son. (*See* Chapter II. Sec. 2, Q. 15 and 17.)

Q. 12.—A man of the Śûdra caste died, leaving a widow and her son, and a kept woman and her son. The widow and the legitimate son of the man afterwards died, and the question is, whether the property of the deceased should

be taken by a separated legitimate member of his family, or by the illegitimate son?

A.—A woman who has not been married by the "Lagna" or "Pât" ceremony, but is kept by a man as a concubine from her childhood, is called a "Dâsî," and a son of a "Dâsî" can inherit the property of his father when there is no legal widow, son, daughter, or daughter's son. (*a*) In the present case, the illegitimate son appears to be the nearest heir of the deceased. The separated legitimate member of his family cannot therefore claim his property.

Poona, October 9th, 1857.

AUTHORITY —Mit. Vyav. f. 55, p 1, l 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARK.—The illegitimate son would inherit the whole estate of his father according to the Mitâksharâ (*see* Q. 8), even though a widow of the latter might be living, but here the estate having descended to the two sons jointly (*see* Q 10), or to the legitimate son, subject to the illegitimate's right to half a share, the Śâstri was not justified in treating the case as if the father had died leaving only the illegitimate son. In *Baiza et al* v. *Sadu*, S. A. No. 74 of 1876, there was a difference of opinion as to whether legitimate and illegitimate sons could be coparceners In appeal by Sadu it was held that he the illegitimate and his legitimate half-brother were coparceners (*b*) In the same case it was admitted in argument that the widow was entitled only to maintenance. In Madras, Mr. Ellis (2 Str. H. L. 66) thought that illegitimate sons of Śûdras might take equally with legitimate sons, but this does not appear to be the accepted rule even there (*ibid.* 70). Illegitimate sons by the same mother inherit *inter se* as brothers, *Maynabai et al* v. *Uttaram et al*, (*c*) and see *infra*, Section 11, Q 4, and probably, but not quite certainly, from legitimate brothers on the footing of a joint family with rights of survivorship. (*See* Steele, 180) But little difference indeed was at one time recognized between the legitimate and the illegitimate sons of Śûdras. The Brahma Purâna, quoted by the Vîramitrodaya, Tr.

(*a*) This is the doctrine of the Dattaka Chandrikâ, Sec. V. para. 31. For the Mitâksharâ, *see* below, Q. 18.

(*b*) *Sadu* v. *Baiza*, I. L. R. 4 Bom. 37.

(*c*) 2 M. H. C. R. 196.

p. 120, says that Śûdras are incapable of having a son (putra) in the proper sense, as "a slave male or female can have only slave offspring." (*See* above, Introduction, p. 82 ss, and Q 1 and 8) The subsidiary sons in the order of their preference exclude those lower in the scale (Mit. Ch. 1, S. 11; Nârada, P. II. Ch. XIII. pl. 22, 25, 33, 49). In the answer to Q 11 above, the Śâstri assumes that they may form a united family. On the other hand, Macnaghten, 1 H. L. 18, seems to rank the illegitimate as a coheir only with a daughter's son, though he recognizes his right to a half share, where there are legitimate sons. In Bengâl it has been said by Mitter, J., in *Narain Dhara* v. *Rakhal Gain*, (*a*) that only the son of a Śûdra by his (unmarried) female slave has any right of inheritance, and the Mitâksharâ, Ch. I. Sec. 12, is cited in support of this doctrine. A kept woman is for this purpose however regarded as a slave. (*See* Datt. Mimâm. S. 4, pl. 76; Steele, L. C 41; 2 Str. H L. 68.) In the case of *Rahi* v. *Govind*, (*b*) the position of the illegitimate son is learnedly discussed, but not with reference to this particular question.

Q. 13.—A Śûdra, who held a Pâtilkî Watan, died. He had a daughter by his "Lagna" wife, and a son by his kept woman. Which of these is the heir ?

A.—The property of the deceased should be divided between the daughter and the illegitimate son in the proportion of two-thirds to the daughter, and one-third to the son.

Poona, September 4th, 1852.

AUTHORITY.—Mit. Vyav. f. 55, p 1, l. 11 (*see* Chap. II. Sec 3, Q. 1; Stokes, H. L. B. p. 426).

Q. 14.—A Râjput brought a woman into his house. It is not known whether she was legally married to him or not, either by way of "Lagna" or "Pâṭ." She has two sons and a daughter. The Râjput and she quarrelled; the consequence of which was that she was allowed to live separately from him, he continuing to support her. He subsequently brought another woman into his house. It cannot be ascertained whether this woman either was married to him or not.

(*a*) I. L. R. 1 Cal. 1, 5.
(*b*) I. L. R. 1 Bom. 97.

He had three sons and a daughter by this woman. Some people say that up to the time of his death, he expressed his will that the property should be given to one of the sons of the first woman, but the others affirm that his last wish was to give the whole property to all the sons of the second woman. Who should be considered the heir in such a case?

A.—Two slave women of the Śûdra caste have equal rights, and when both of them have sons, the property should be equally divided among the sons and mothers. If the woman first kept by the deceased was, together with her sons, dismissed by him owing to suspicion regarding her character, she cannot claim any share of the property. The second woman and her sons should be treated as heirs.

Ahmednuggur, February 21st, 1847.

AUTHORITIES —(1) Mit. Vyav f. 55, p. 1, l. 11 (*see* Chap II. Sec. 3, Q. 1); (2) f. 5, p. 1, l. 5; (3) f. 51, p. 1, l 3 and 7; (4*) Vîramitrodaya f 172, p. 2, l. 13:—

" But when the father divides his estate during his life-time, he ought not to give a greater share to one of his sons, nor should he disinherit any one of them without sufficient reason." (*See* the Commentary below, Book II. Chap. I Sec. 2, Q. 5.)

REMARKS.—1. The two kept women themselves have no right to inherit from the deceased, but can only claim maintenance. *See* Q. 4.

2. Their sons inherit equally after the father's death, but only in case he was Śûdra. *See* Q 1 and 2.

3. There is no passage in the law books which proves that a concubine's sons lose their rights on account of their mother having connexion with other men than their father after their birth.

4. In case the deceased was a Śûdra, he had no right so to bestow his property as to exclude any of his sons from the inheritance, if they were not disabled to inherit by " physical or moral defects." Auth. 4. *See* also Ch. VI.

Q. 15.—A Sûdra has a grandson, the son of his legitimate son. He has also an illegitimate son. The Śûdra, when he was alive, bestowed a house and some other pro-

perty on the illegitimate son. Should this be considered a legal gift?

A.—A father may allow his illegitimate son a share equal to that which he assigns to his legitimate son. If the partition takes place after the father's death, the illegitimate son can claim only one-half of that which the legitimate son receives. This is the established rule of the Sástra. The illegitimate son therefore should be allowed to enjoy whatever his father may have bestowed upon him.

Khandesh, September 24th, 1852.

AUTHORITY.—Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

REMARK.—The gift will, however, be valid only if the illegitimate son has not received more than the legitimate son's child did.

Q. 16.—A Pâṭîl adopted a son. Afterwards a son was born to him by a wife who had been married before he married her. Which of these will be his heir? If after he had adopted a son, a son was born to him by his wife who was a virgin when he married her, which of the two sons will be his heir?

A.—The son of her who was a virgin when the Pâṭîl married her, has a greater right than the adopted son, and the adopted son a greater right than he who was born of a twice-married mother.—*Dharwar, December 3rd,* 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 53, p. 2, l. 6; (2*) f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (3*) Vyav. May p. 108, l. 2 (*see* Chap. II. Sec. 2, Q. 15); (4*) p. 112, l. 2:—

"From this text of Vasishṭha: When a son has been adopted, if a legitimate son be afterwards born, the given son takes a fourth part (of a share)." Borradaile, p. 76; Stokes, H. L. B. 66.

REMARKS.—1. If the deceased was a Śûdra, his son begotten on a Punarbhû (twice-married woman) will, according to the Hindu Law, inherit one-half of a son's share (*see* Auth. 2), since a second marriage is null, and the offspring consequently illegitimate, according to the Śâstras. Manu, V. 162, says "Nor is a second husband allowed to a virtuous woman." She must not "even pronounce the name of another man," *ibid.* 157. According to Manu IX. 65, "Nor is the

marriage of a widow even named in the laws." To the same effect are the passages in the General Notes I. and VI. That a remarriage is not allowed by the Mitâskharâ is stated by Colebrooke, 2 Strange, H. L. 399; and Strange himself pronounces against its legality, 1 Strange, H. L. 242. The Nirṇayasindhu quoted beneath (Ch. II. Sec. 8, Q. 6) declares that the remarriage of a once-married woman is not allowed. The Vîramitrodaya quotes the Adipurân to the effect that the remarriage of a woman once married is along with the killing of kine, the partition with specific deductions, and the niyoga, disallowed in the present (Kaliyuga) age (*a*)

But that remarriages, though disapproved, were practised at the time of the composition of Manu's Code, is plain from Manu IX. 175, 176. A woman thus associating with a second husband is distinguished by Yâjnavalkya (I. 68) from the *svairiṇi* who deserts her husband and cohabits adulterously with another man. The son of the twice-married woman was indeed under the older law assigned a place in the scale of sons above that of the adopted son (Yâjn. II. 129 ss, cited in Mit. Ch. I. Sec. 11, pl 1), but re-marriage having become illegal amongst the higher castes, the illegitimacy of the offspring followed, until legislation restored the widow's capacity. Amongst the lower castes the remarriage of widows and divorced wives has always been common. The Śâstri, in answer to Q. 37 of Sec. 4, has even said that the Śâstras sanction a pâṭ marriage. This is contradicted in the next answer, but caste custom might itself be regarded as approved by the Śâstras according to the often repeated formula (Manu VIII 41), and on this ground probably it has been recognized in most cases, as may be seen in Sec. 6 B below In Ch. IV. B, Sec. 4, there is a case in which the Śâstri pronounces a woman's son, by her first marriage, heir to the property which she had inherited from her second husband. The children by a pâṭ marriage are generally regarded as legitimate, where the marriage is allowed (*See* Steele's Law of Caste, 169 *See* also Manu V 162, 157; IX. 175, 176; General note at the end of translation of Manu, I and VI.)

2. By Act XV of 1856, the son of a Punarbhû is legitimized by the sanction given to the second marriage of his mother. The offspring of an adulterous intercourse even amongst Śûdras has no right of inheritance. See *Datti Parisi Nayudu et al* v. *Datti Bangaru Nayudu et al* (*b*) and the case of *Rahi* v. *Govind* (*c*) in which

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(*a*) Tr. p. 61.
(*b*) 4 M. H. C. R. 204
(*c*) I. L. R. 1 Bom. 97.

the law is fully discussed; *see* also *Viramuthi Udayana* v. *Singaravélu*, (*a*); *see* too *Narayan Bharthi* v. *Laving Bharthi*. (*b*) The same cases however show that the illegitimate son is in all cases entitled to maintenance. Nor has the offspring of an incestuous intercourse between a father-in-law and daughter-in-law any rights of inheritance. (*c*)

3. If legitimate sons are born to a man after he has adopted a son, the adopted son inherits a fourth of a son's share on the demise of the father (Auth. 3).

Q. 17.—A deceased person has some relations who are separate in interest. He has also a daughter by his "Lagna" wife, and a son by his "Pâṭ" wife. Who will be the heir of the deceased ?

A.—The relations, whose interests are separate, have no title whatever. The daughter and the son should be allowed equal shares of the property.—*Dharwar*, 1846.

AUTHORITY.—*Mit. Vyav. f. 55, p 1, l. 11 (*see* Chap. II. Sec. 3, Q 1).

REMARKS.—1. According to the Hindû law, apart from customary exceptions, the son of a Punarbhû (remarried widow) is illegitimate, and consequently inherits, if there be living legitimate issue of his father, half a share. *See* Kâtyâyana in Smṛti Chandrikâ, Ch. V. p. 10; 2 Str. H. L. 68, 70; Coleb. Dig. Bk. V. Text 171.

2. Regarding the legalization of widow's remarriages, *see* Q. 16.

3. Children by pâṭ are equally legitimate with those by marriage, according to Col. Briggs, Steele 169. See *infra*, Ch. II. Sec. 8, Q. 6.

Q. 18.—A man married a woman, who had been previously married, and by her had a son. At his death, can the son of such a wife inherit his immoveable property ?

A.—If a man died leaving neither son nor daughter by the wife whom he married as a virgin, nor the son of such a daughter, the son of the previously married wife will succeed to his immoveable property.—*Dharwar, July 26th*, 1850.

(*a*) I. L. R. 1 Mad. 306.
(*b*) I. L. R. 2 Bom. 140.
(*c*) 4 M. H. C. R. 204, *supra*.

Authority.—Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

Remarks.—1. This stamps him as illegitimate in the opinion of the Śâstri; and Bâlambhâtta, commenting on Mit. Ch. II., Sec. 1, p. 28, speaks of twice-married women and others not considered as wives espoused in lawful wedlock.

2. According to the Hindû Law, the son being illegitimate, will succeed only in case the deceased was a Śûdra. *See* 2 Str. H. L. 65, 68.

3. Regarding the legalization of the marriage of a Hindû widow, *see* Act XV. of 1856. *See* also Q. 16.

SECTION 4.

GRANDSONS.—LEGITIMATE, NATURAL OR ADOPTED.

Q. 1.—A man's son died, leaving a son. The man himself also died afterwards, leaving a widow. The question is, whether the widow or the grandson is the heir? If the widow is the heir, another question is, whether she can dispose of the property during the lifetime of her grandson?

A.—A grandson has an unquestionable right to the property of the grandfather. This right is termed in law the "Apratibandha dâya" As there is a grandson, the widow cannot claim the property of her husband, and she has no right to sell it.—*Surat, June 5th*, 1857.

Authorities.—(1) Mit. Vyav f. 41, p 2, l. 13:—

"The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons: and that is an inheritance not liable to obstruction." (Colebrooke, Mit p. 242; Stokes, H. L. B. 365.)

(2) Mit. Vyav. f. 50, p. 1, l. 7.

Q. 2.—A father-in-law caused his daughter-in-law to adopt a son, and afterwards he died. Who should be considered the heir of the deceased, the adopted grandson or the widow?

A.—The adopted grandson.—*Tanna, November* 15*th*, 1851.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 7 :—

"For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels (which belonged to him)." (Colebrooke, Mit. p. 277; Stokes, H. L. B. 391.)

(2) Mit. Vyav. f. 53, p. 2, l. 6 ; (3) Manu IX. 141.

REMARK.—A great-grandson in the male line precedes a daughter's son, *Gooroogobindo* v. *Hurreemadhab.* (a)

SECTION 5.

ILLEGITIMATE SONS' SONS.

Q. 1.—A man of the Śûdra caste has a daughter, a separated nephew, and a grandson, who is son of his illegitimate son. Which of these is the heir?

A.—The daughter will have one-half, and the other half should be given to the illegitimate grandson. The separated nephew is not entitled to anything at all.

Ahmednuggur, September 11th, 1849.

AUTHORITIES.—(1) Mit Vyav f. 55, p. 1, l. 11 (*see* Chap. II. Sec 3, Q. 1); (2*) f. 44, p. 2, l. 13 (*see* Chap. II. Sec. 4, Q. 1).

REMARK.—The grandson inherits the half of a share to which his father was entitled.

SECTION 6.—WIDOW. (b)

A.—MARRIED AS A VIRGIN.

Q. 1.—A man, who used to receive from Government an allowance called "Toḍa Grâs," died without issue. He has left a widow. Should the allowance be paid to her as it was

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(a) I. Marsh. 398.

(b) The Smṛiti Chandrikâ, Ch. XII. para. 31, relying on a passage of Śankha (*see* Dâya-Bhâga, Ch. XI. Sec. 1, para. 15), places the widow of a reunited coparcener after the brother, father, and mother. The Vyav. May. Ch. IV. Sec. 9, p. 24, adopts the same construction, but in this case it follows Madan in giving to the mother precedence over the father. These rules seem to be arbitrary. Bṛihaspati (Smṛiti Chan. Ch. XII. S. 5, para. 38), quoted on the same subject, places the widow next after the children.

paid to her husband? Can she claim any property in addition to the Pallu or Strîdhan which she may have received at the time of her marriage?

A.—When the deceased man is a separated member of a family, and when he has left no children, his widow will be the heir to his property. If she has received any Strîdhana or Pallu on the occasion of her marriage, it cannot be considered a part of her husband's property. It is a separate and peculiar property, and its possession can form no obstacle to any right of receiving a share in her husband's property.

Surat, February 26th, 1848.

AUTHORITIES—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4).

REMARK.—See *Pranjiwandass* v. *Devkuvarbai,* (*a*) and the Introduction, Sec. 3 B (4), and Sec. 11, pp. 88, 299, 295.

As to payment of debts to the widow empowered or directed to adopt, see *Bamundass* v. *Musst. Tarinee,* (*b*) and for the case of a widow, the real heir, and another person holding a certificate of administration, see *Purshotam* v. *Ranchhod.* (*c*)

That a widow represents the estate as between her successors and strangers, *see* the Introd p 95, and *Nand Kuvar* v. *Radha Kuari.* (*d*)

A money decree having been obtained against a man and executed against his widow as his representative, it was held that after the widow's death the daughter could not recover the property sold in execution from the purchaser. (*e*)

The presumptive heir cannot maintain a suit for a declaration of his right. See *Greeman Singh* v. *Wahari Lall Singh,* (*f*) where it is

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(*a*) 1 Bom. H. C. R. 130

(*b*) 7 M. I. A. 169.

(*c*) 8 Bom. H. C. R. 152, A. C. J

(*d*) I. L. R. 1 All. 282.

(*e*) *Hari Vydianáthâyanna* v. *Minakshi Ammal,* I. L. R. 5 Mad. 5, referring to *The General Manager of the Râj Durbhunga* v. *Maharaja Coomar Ramaput Singh,* 14 M. I. A. 605 and *Isham Chunder Mitter* v. *Buksh Ali Soudagur,* Marsh. R. 614. In a note to the report reference is made to *Zalem Roy* v. *Dal Shahee, ib.* 167.

(*f*) I. L. R. 8 Cal. 12.

said that the Specific Relief Act (I. of 1877) § 42, makes no difference, as it refers only to vested rights.

A widow's refusal to adopt, according to her husband's directions, is no ground of forfeiture of her rights of inheritance. *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Calc. 288.

In Gujaráth caste custom in some cases gives the mother precedence over the widow, as *ex. gr.* in the cases in Borr. C. Rules, MS. Bk. G, Sheets 42, 50. *See* above, Introd. p, 157.

Careful provision is made by the rules of most of the castes in Gujeráth for securing at marriage the Pallu of the bride, whether consisting of gifts from her own family or from her husband.

As to a family custom of excluding childless widows from inheritance differing from the general custom of the country, see *Russic Lal Bhunj et al* v. *Purush Munnee*, 3 Morl Dig. 188, and note 2. (*a*)

Q. 2.—Four brothers became separate. The youngest of them was a minor. The eldest brother therefore took charge of the minor's share. The minor subsequently died, leaving a widow. Can she claim her husband's share? The minor has passed an agreement to the eldest brother that he (the eldest brother) should take charge of his, the minor's, share, whenever he should live separate from him. Does this operate in any way against the right of the widow?

A.—The share of the minor was set apart, and his widow is therefore entitled to it. The minor must be considered as separated, though he chose to live with his eldest brother.

Dharwar, August 28th, 1855.

AUTHORITIES.—(1) Vyav. May. p 134, l. 4 (*see* Auth. 2); (2*) f. 55, p. 2, l. 1 (*see* Ch. I. Sec. 2, Q. 4).

REMARK.—A wife is, under the Hindu Law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance. Held therefore where a husband, in his lifetime, made a gift of his entire estate, leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance. (*b*)

(*a*) With this may be compared the privilege allowed to the noble class in Germany of making special laws by a family compact.

(*b*) *Jamna* v. *Machul Sahee*, I. L. R. 2 All. 315. *See* also *Narbadabai* v. *Mahadeo Narayan*, I. L. R. 5 Bom. 99. Comp. above, p. 208.

Q. 3.—A woman's husband and father-in-law are dead. She has possession of their property. Should her right of inheritance be recognized?

A.—Yes.—*Dharwar,* 1845.

AUTHORITY.—*Mit. Vyav. f. 55, p. 2, l. 1 (*see* Ch. I. Sec. 2, Q. 4).

REMARK.—The widow inherits under the text quoted above, only in case her father-in-law died before her husband. Regarding the other alternative, *see* Ch. II Sec. 14; and Introd. p. 125 ss.

Q. 4.—A man died. His property is in the possession of another man. The deceased has left a widow and a daughter. The former has filed a suit for the recovery of the property, omitting the name of the latter. Can she alone claim the property?

A.—The widow has the right to the property of her husband. She can therefore claim it on her own account, omitting the name of her daughter.—*Surat, January 24th,* 1853.

AUTHORITIES —(1) Vyav. May. p. 134, l. 4; (2) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Ch I Sec. 2, Q. 4).

Q. 5.—A man, named Bhagavândâs Devakar, separated from his brother. He received his share of the landed property, and had his name registered in the records of Government as the owner of it. On his death, his wife, named Amṛitâ, got her name registered in the records of Government as the owner of the land. She then leased 8¾ Bigâs of land to her nephew, Khushâl Raghunâtha. He accordingly obtained possession of the land. He subsequently set up a claim to the land, alleging that it was in his possession because he was the nephew of Bhagavândâs. The widow, Amṛitâ, wishes to recover the land from her nephew. Can she do so?

A.—The widow of the deceased Bhagavândâs has a right

to the land. Her nephew cannot claim it. Amṛitâ may recover it from him.—*Broach, September 8th,* 1855.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Ch. I. Sec. 2, Q. 4).

Q. 6.—There were four brothers. They divided their ancestral property among them, and separated. Afterwards one of the brothers died. His property passed into the hands of his widow. A brother of the deceased has filed a suit against the widow, and wishes to impose the following conditions upon her:—That she should not dispose of or waste the property in her possession, and that if she desires to have a maintenance settled upon her, she should give up all her property in consideration of an allowance. What are the rules of the Śâstra on the subject?

A.—If the brothers had not separated, the widow would have been entitled to a maintenance only. The husband of the widow having separated, before his death, from his brother who has filed the suit against the widow, his widow is the heir. The brother cannot claim the right of inheritance. The widow cannot dispose of her immoveable property unless she be placed under a great necessity.

Rutnagherry, January 11th, 1848.

AUTHORITIES.—(1) Vyav. May. p. 136, l 4; (2) p. 135, l. 2:—

"As for this text of Kâtyâyana:—After the death of the husband, the widow, preserving (the honor) of the family, shall obtain the share of her husband so long as she lives; but she has no property (therein to the extent of) gift, mortgage, or sale: it is a prohibition of a gift of money, or the like, to the Vandî, (*a*) Chârana, (*b*) and the like (swindlers). But a gift for religious objects (not visible, *i.e.* the attainment of spiritual benefits) and mortgage, or the like, suitable (*i.e.* with a view) to those objects, may be even made." (Borradaile p. 101; Stokes, H. L. B. 84).

(3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Ch. I. Sec. 2, Q. 4).

REMARKS.—*See* Introd. p. 299. A Hindu widow must, if she can,

(*a*) A Vandî is a wandering minstrel (Bhâṭa).

(*b*) Chârana, a juggler (Kolambi).

pay a debt of her deceased husband even though barred by limitation. She is justified in aliening part of the estate for this purpose: *Bahala Nana* v. *Parbhu Hari*. (a) A widow's needless alienation will subsist during her own life. *Pragdas* v. *Harikishen*. (b)

At Allahabad it has lately been said that a widow's power of alienation for spiritual purposes is limited to those by which her husband, as distinguished from herself, will benefit. (c) For this reference is made to *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*. (d) In Bombay her right, though limited, is not so narrowly restricted by the Vyav Mayûkha, Chap. IV. Sec. VIII. para. 4; and the Courts have allowed her a reasonable liberty of disposal for pious objects. (e)

In *Kameshwar Pershad* v. *Run Bahadur Singh* (f) the Judicial Committee say the principle laid down in *Hunooman Persaud* v. *Mt. Babooee Munraji* is applicable to—*a*, alienations by a widow of her estate of inheritance;—*b*, transactions in which a father, in derogation of the rights of his son, under the Mit. law has made an alienation of ancestral family estate.

Q. 7.—Two persons, *A* and *B*, inherited a house in equal shares from a common relation. *A* then mortgaged his share of the house, and died. After his death, *B* redeemed the mortgage, and transferred the whole house to his creditor, as security for a debt. After some time, *B* paid off this debt, and regained possession of the house. *C*, the widow of *A*, then demanded her husband's share of the house from *B*, who objected to give it up, on the ground that he had paid off the debt with which *A* had left the house, and on the ground that *C* had for many years lived separate from her husband *A*. *C* has made over her share of the house to a person, in consideration of money advanced by him for her support. She has no male issue. Is she, under these circumstances, entitled to recover a half of the house from *B*?

(a) I. L. R. 2 Bom. 67.

(b) I. L. R. 1 All. 503.

(c) *Puran Dai* v. *Jai Narain*, I. L. R. 4 All. 482.

(d) 8 M. I. A. 520.

(e) *See* above, Introd. pp. 99, 300.

(f) I. L. R. 6 Cal. 843; S. C. L. R. 8 I. A. 8.

A.—*C*'s husband was possessed of one-half of the house which he mortgaged. When *B* redeemed *A*'s half of the house, *C* did not object to his doing so. Her present claim, therefore, is inadmissible. If her conduct is good, and if she was abandoned by her husband, and if she is desirous of recovering her husband's share of the house, she must pay to *B* whatever he has paid on account of the half of the house, with interest. According to the Sâstras, *C* has no right to make over the half of the house, even for her own maintenance, without paying her husband's debts. (*a*) *C*'s right of inheritance cannot be set aside during her lifetime, even though *B* may have performed the funeral rites of the deceased *A.*—*Ahmednuggur, July 9th,* 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 20, p. 1, l. 2; (2) f 20, p. 2, l. 11; (3) f. 45, p. 1, l. 5; (4) f 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (5) f. 55, p. 2, l. 8; (6) f. 69, p. 1, l. 15; (7) f. 12, p. 2, l. 14; (8) f. 20, p. 2, l. 11:—

"He who takes the inheritance must be made to pay the debts (of the person from whom he inherits)." (Stokes, H. L. B. 56.) (*b*)

(9) Vyav. May. p. 183, l. 8.

REMARKS.—1. If the house was divided, the widow inherits her husband's share. *See* Authority 4.

(*a*) So in *Lakshman* v. *Satyabhâmâbâi*, I. L. R. 2 Bom. 499, per Sir M. R. Westropp, C. J.

(*b*) See *supra*, Introd. p. 252; and *infra*, Bk II Introd. Sec. 7 A. 1 *a* (2). By the 11th Article of Magna Charta the widow's dower was freed from chargeability for the husband's debts, the payment of which out of his estate is further postponed to the maintenance of minor children according to the father's condition, and to the fulfilment of the service or terms on which the property was held by the deceased. The dower was looked on as secured by a contract prior to the debts, giving to the widow an independent interest in the husband's lands. Under the Mahomedan Law the doweress ranks *pari passu*, it is said, with other creditors; see *Mir Mahar Ali* v. *Amani*, 2 Ben. L. R. 307, and *Musst. Bebee Bachun* v. *Sheikh Hamid Hossein*, 14 M. I. A. 377. She has not a special lien constituting an interest in immoveable property; *Mahabubi* v. *Amina*, Bom. H. C. P. J. F. for 1873, p. 34. A Jewess claiming under a deed was preferred to subsequent creditors in *Sookhlal* v. *Musst. Raheema*, 2 Borr. R. 687.

2. Her silence, at the time when her brother-in-law paid off the mortgage, does not affect her rights, according to the Mitâksharâ.

3. She will have to refund the money which her brother-in-law paid.

Q. 8.—An Inâmdâr died without male issue. Is the Inâm-land which he held continuable to his widow, according to the Hindû Law? If a Hindû should die, without a son, leaving descendants only through his daughter, will his private property fall to them, or to his other relations, or to his widow? Are the rules on these subjects applicable to all castes?

A.—If a man dies without male issue, and if he is not a member of an undivided or reunited family, his faithful wife becomes his heir. The property of a deceased person will fall first to the widow, and when there is no widow, to the deceased's daughter. The widow has a preferable claim to all other relatives. These rules are applicable to all castes of the Hindûs.—*Poona, October 6th,* 1849.

AUTHORITIES —(1) Vyav May p 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f 55, p 2, l 1 (*see* Chap I. Sec. 2, Q. 4).

REMARKS —There are no special rules about Inâm-land in the Hindû Law Books. The Privy Council, in *Bodhrav Hanmant* v. *Narsingrav,* (*a*) held that Inâm villages granted to a man and his male heirs are not distinguishable, according to the law of the Southern Marâṭhâ Country, from ordinary ancestral estate, and are divisible amongst the grantee's heirs See below, Sec. 13, Q. 10, as to the construction of grants. The same was held as to a dêśgat watan in *Kâdapâ* v. *Adrashyapâ,* (*b*) and that a vṛitti or hereditary office is generally partible, *see* Steele, L. C. p. 41.

2. The inamdar in relation to the tenants of the property may occupy the position of a complete proprietor, or of a mere alienee of the land tax, or of a grantee of a lordship over mirâsdârs holding rights of permanent occupancy subject only to reasonable rates or rents. And in different parts of his manor he may have different rights under the same grant or prescriptive title, owing to the exist-

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(*a*) 6 M. I. A. 426.

(*b*) R. A. No. 30 of 1874; Bom. H. C. P. J. F. for 1875, page 182.

ence of rights (as to hold at an invariable rent) known or presumed to have been prior in origin to his own. (a)

3. The Vatandar Joshi (astrologer holding an hereditary office) of a village may recover damages from an intruder who usurps his functions and takes his fees. This is so even though the fees be not precisely fixed in amount, provided only that some reasonable fees must be paid by those entitled to the Joshi's ministrations. (b) The presumption is that a Vatandar Joshi is entitled to officiate in the case of any particular family; but though damages may be awarded for an intrusion an injunction will not be granted such as to prevent a family from using the services of a rival functionary. The position of a village priest or astrologer being thus recognized as one of public interest to the Hindu community, the holder of it can of course be constrained if necessary to perform the duties of it when properly called on. In the case of religious or charitable trusts, too, any devotees or beneficiaries may take proceedings for enforcing the duties resting on the incumbent or the trustees, subject to the consent of the Advocate General or his substitute (usually the Collector of the district) under Sec. 539 of the Code of Civil Procedure. (c)

4. In *Narain Khootia* v. *Lokenath Khootia* (d) it was apparently held by the Deputy Commissioner that a religious grant made by a former Mahárájá of Chhota Nagpore could be resumed at will by his successor in the exercise of a royal or quasi-royal authority. The resumption of grants by native rulers was very common, as Sir T. Munro shows; (e) though not of religious grants in Western India. (f) The decree of the Deputy Commissioner, however, was reversed by the High Court of Calcutta on the ground that impartibility of the

(a) *Prataprav Gujar* v. *Bayaji Námáji*, I L. R. 3 Bom 141, referring to *Lakshman* v. *Ganpatrav*, Special Appeal No. 344 of 1876, and *Vishnubhat* v. *Babaji*, B. H. C. P J. 1877, p. 146. (At p. 142 of the Report the last case is twice mentioned by mistake for the former.) *See* also *Parshotam Keshavdás* v. *Kalyán Rayji*, I L. R. 3 Bom. 348.

(b) *Vithal Krishna Joshi* v. *Anant Ramchander*, 11 Bom. H. C. R. 6, quoting *Sitarámbhat* v. *Sitaram Ganesh*, 6 Bom. H C. R 250, A. C. J.; *Raja valad Shevappa* v. *Krishnabhat*, I L. R. 3 Bom. 232.

(c) See *Radhabai* v. *Chimnaji*, I L. R. 3 Bom. 27.

(d) I. L. R. 7 Cal. 461.

(e) Sir T. Munro, by Sir A. Arbuthnot, vol. I. p. 152, 154.

(f) *The Collector of Thana* v. *Hari Shitaram*, I. L. R. 6 Bom. 546; Elph. Hist. of Ind. Bk. II, Ch. II. p. 75, 78 (3rd ed.)

râj did not make it inalienable as to grants of land in perpetuity. (*See* Introd. pp. 159, 185, 192.)

Q. 9.—A man of the Burûd caste (*a*) had received a house as a mortgage, before his death. He lived separate from his father. Should the house be made over to his widow or his father ?

A.—Whatever was gained by the man without making use of his father's property will pass to his widow. If the father and his sons are not separate, then the common property will pass into the hands of the father.

Ahmednuggur, August 21st, 1848.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 and 6 (*see* Auth. 4); (2) p. 136, l. 4 ; (3*) p. 153, l. 2 (*see* Chap. I. Sec. 2, Q. 1); (4*) Mit. Vyav. f 55, p. 2, l. 1 (*see* Chap I. Sec 2, Q. 4).

REMARK.—Regarding the definition of 'separately acquired property,' *see* PARTITION, Book II

Q. 10.—Has the father or the widow of a deceased person a preferable title to succeed to his property ?

A.—If the deceased lived separately from his father, his widow is his heir; but if he had not separated, his father will succeed.—*Poona, June 5th*, 1846.

AUTHORITY.—*Mit Vyav. f. 55, p 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—But the wife inherits, also, property which the deceased may have acquired separately. *See* the preceding question.

Q. 11.—Two brothers separated. One of them and his son, after separation, died. Does the property of the deceased pass by right to his daughter-in-law or the surviving brother ? If it goes to the latter, can the former have a claim to maintenance ?

A. Should the daughter-in-law be a woman of good character she will succeed to her husband's, and consequent-

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(*a*) The Burûds are basket-makers.

ly to her father-in-law's, estate. If she be not a woman of good character, her father-in-law's brother takes the whole property of his deceased brother, and gives his daughter-in-law a reasonable sum for maintenance.

Ahmednuggur, September 7th, 1848.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) Vyav. May. p. 134, l. 4 (*see* Auth. 1); (3) p. 133, l. 2; (4) p. 134, l. 6; (5) p. 137, l. 3; (6) p. 136, l. 7; (7*) p. 133, l. 7:— .

. . . . by reason of this text of Kâtyâyana:—" Let the widow succeed to her husband's estate provided she be chaste; and in default of her, the daughter inherits, if unmarried."

" Among the married ones, when some are possessed of (other wealth) and others are destitute of any, these (last) even will obtain the estate)." (Borradaile, p. 103; Stokes, H. L B. 86).

REMARK.—The daughter-in-law will inherit only if her father-in-law died before her husband. If she be unchaste, her issue next inherit in her stead, and on failure of issue, the father-in-law's brother. *See* below, Bk. I. Ch. VI. Sec. 3.

Q. 12.—Two uterine brothers lived as an undivided family. One of them died, leaving a widow. Afterwards the other also died, leaving a widow. Can both these widows inherit the property of their respective husbands?

A.—As the property was acquired by the ancestors of the deceased men, and as the family was undivided, the widows can inherit the shares of the property belonging to their respective husbands.—*Surat, March 31st,* 1845.

Authority not quoted.

REMARK.—The widow of the brother who died last inherits; the other has a claim to maintenance. *See* the next Question, and the Authorities there quoted.

Q. 13.—Two brothers are either united or separated in interests. When one of them or both die, will their widows be entitled to their property?

A.—If the family was united in interests, the property of a deceased brother falls to the surviving brother. Upon

the death of the latter, his wife becomes his heïr. The wife of the one who died first is only entitled to a maintenance. If the brothers were separated before their death, their wives inherit the property of their respective husbands.

Tanna, December 11th, 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4; (2) Vyav. May. p. 136, l. 4 (*see* Chap. I. Sec. 2, Q. 11).

Q. 14.—Two Hindû brothers lived together. The elder of them died, leaving a widow. The younger also died, leaving a widow. The question is whether the widow of the brother who died first or the widow of him who died afterwards should be considered the heir?

The widow of the younger brother is a minor, and there are her sister-in-law and mother; which of these will be her guardian?

A.—The widow of the last deceased brother is the heir. The mother has the right to be the guardian of the widow of the younger brother, who is a minor.

Surat, October 22nd, 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) f. 12, p. 1, l. 4; (3*) Vîramitrodaya, f. 194, p. 2, l. 4:—

"And thus Nârada says:—After the death of the husband (the nearest relation belonging to) his family has power over his childless wife; such a person is competent to appoint her (to a kinsman), to protect and support her. If the husband's family is extinct, no male, no supporter has been left, and no Sapiṇḍa relations (of the husband) remain, in that case (the nearest relation) belonging to the widow's father's family has power over her."

REMARK.—According to the passage quoted under Auth. 3, it would seem that the sister-in-law, as belonging to the family of the widow's husband, has a better right to the guardianship than the widow's mother.

Q. 15.—A man died, and left two sons. The elder of these died, and left a widow. Afterwards the younger brother also died, and left a widow. The two brothers had

were [un]divided in interests, nor that the father had given them the house in gift. From this omission it may be inferred that the brothers were separated. The portion of the house which belonged to each of the separated brothers, becomes, on his death, the property of his wife.

Surat, January 20th, 1855.

AUTHORITY.—Mit Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The passage quoted refers only to the right of the widow to inherit, in case her husband has separated from the family.

Q. 18.—A man died, leaving two wives. The elder wife died leaving one son, and the younger died leaving two sons. The son of the elder wife had separated from the other two. The two uterine brothers died. The elder of these has left a widow. Besides this widow there is the separated half-brother. The question is, which of them is the heir of the last deceased brother ?

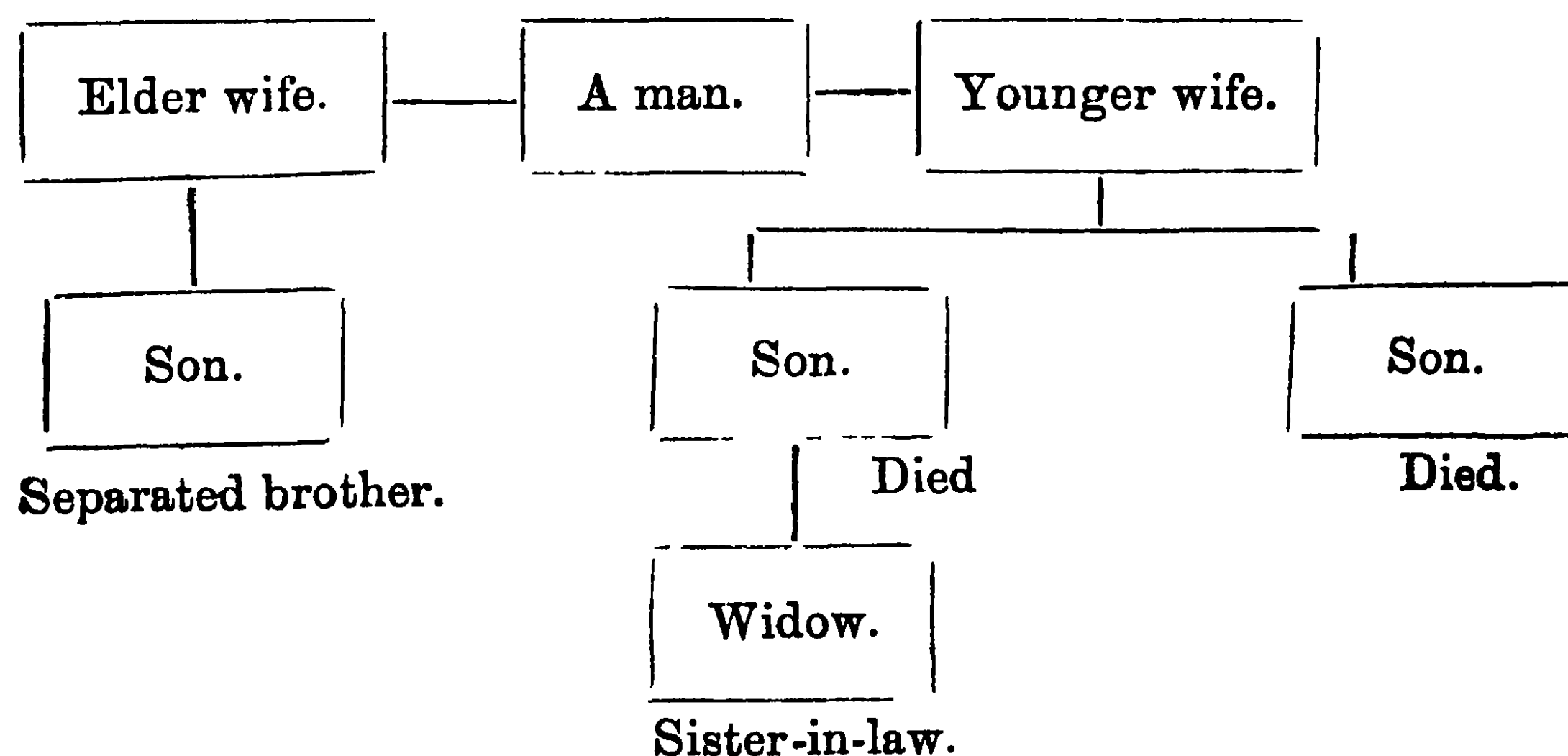
A.—The sister-in-law of the deceased, having lived with him as a member of an undivided family, is his heir.

Dharwar, August 17*th,* 1854.

The following is the Genealogical Table showing the family spoken of in the question :—

Elder wife. — A man. — Younger wife.

Son. (Separated brother.) | Son. Died | Son. Died.

Widow. (Sister-in-law.)

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3).

REMARK.—If, of the two undivided uterine brothers, the married one dies first, his brother will inherit from him (*see* Auth. 2); and after his death the half-brother will succeed. The widow will then be entitled to claim maintenance only. If the married brother died last, his widow inherits from him.

Q. 19.—A man, his wife, his son, and his son's wife lived together as an undivided family. The man died first, and his death was followed by that of his son. Can the son's wife claim from her mother-in-law a half of the family property as her share?

A.—If the family is undivided, the mother-in-law becomes the heir of her deceased son, and in such a case the possession of the property by the mother-in-law need not be disturbed. If the family is divided, the daughter-in-law is the heir.—*Poona, February 5th,* 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 7; (2*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4).

REMARK.—If the father died before his son, the daughter-in-law is the legal heir, since her husband inherited from his father, and she is, on failure of issue, the nearest heir to her husband. If, on the contrary, the son died before his father, the mother-in-law inherits the family property from the latter. *See* the next question. The preference of the mother to the widow by some caste-laws has been noticed above, Q. 1.

Q. 20.—A man died, leaving a widow; subsequently his son also died, leaving a widow. The daughter-in-law sued her mother-in-law for the ancestral property. Can she do so?

A.—In default of male issue, a man's widow is his heir. The daughter-in-law, therefore, has rightly sued her mother-in-law.—*Tanna, February 14th,* 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 7; (2*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (3) Vîramitrodaya, f. 195, p. 2, l. 4 (*see* Auth. 2); (4*) Manu, IX. 185 (*see* Chap. II. Sec. 1, Q. 1).

Q. 21.—A man died without issue, leaving a widow and mother. The deceased's property consists of an ancestral house. It is in the occupation of the widow and the mother. Are both heirs ? or if only one, which of them is heir of the deceased ?

A.—If the deceased was separate and had received his share of the family property, his widow inherits his property. If the deceased was not separate, both his mother and widow are his heirs. If the wife conducts herself virtuously, supports and serves her mother-in-law, she will have the better right of the two to inherit the property; but if the wife does not behave in this manner, the right of the mother will be superior.—*Ahmedabad, September* 12*th*, 1851.

AUTHORITIES.—(1) Vyav. May. p 134, l. 6 :—

"Let the widow succeed to her husband's wealth, provided she be chaste." (Borradaile, p. 100 ; Stokes, H. L. B. 84.)

(2) Vyav. May. p. 136, l. 7 ; (3) p. 136, l. 4 (*see* Chap. I. Sec. 2, Q. 11).

REMARKS.—1. If the deceased was separate, the widow is his heir.

2. If he was undivided, and male members of the family are alive, she can only claim maintenance.

3. The mother has in either case only a claim to maintenance.

Q. 22.—A widow adopted a son, who died after his marriage. The questions are: Who will be his heir, his adoptive mother or his widow ? Which of the two can adopt a son ? and if each of them adopt a son, how shall the property be divided between the sons ?

A.—The deceased, though adopted by the widow, became heir of her husband. On his death his widow is the last heir. She, therefore, has the right to adopt a son, and her adopted son can perform the funeral rites for his mother, as well as for his grandmother. The mother-in-law, therefore, cannot, unless there is a good reason for it, adopt a son.

Sadr Adálat, April 12*th*, 1850.

AUTHORITIES —(1*) Manu, IX. 141 (*see* Auth. 2); (2*) Datt. Mîm. p. 36, l. 10 (*see* Chap. II. Sec. 2, Q. 3); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 23.—There are a daughter-in-law and her mother-in-law. The husband of the former died, and the question is, who should collect the debts due to him?

A.—It is enjoined in the Śâstra that the property of a person who died without issue, and who had declared himself separate from the other members of the family, goes to the widow, and that the property of a person who died without issue, but had not declared himself separate, goes to his mother. In the case under reference the debt should be recovered by the mother-in-law.

Rutnagiri, October 14th, 1847.

AUTHORITIES.—(1) Vyav. May p. 136 l 4 (*see* Chap. I. Sec. 2, Q. 11); (2) Mit. Vyav. f. 51, p 2, l. 5; (3*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (4) Manu, IX. 217.

REMARK.—The widow of the last deceased member of an undivided family inherits, in preference to the widows of all pre-deceased members. (*See* Questions 18, 19 and 24.)

Q. 24.—A man died, leaving a widow and mother. The widow is a minor of about eight years. The mother declared herself to be the heir, and took charge of the banking business of the deceased. The question is, whether the mother or the widow has right to the man's property?

A.—When a man has separated from other members of his family, his wife alone has a right to inherit his property after his death. As, however, the deceased had not separated from his parents, his mother has rightly assumed the possession of his property. On the death of the mother-in-law, her daughter-in-law will succeed her as heir.

Ahmedabad, March 26th, 1850.

AUTHORITIES.—(1) Vyav. May. p. 95, l. 5; (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (3) Vîram. f. 194, p. 2, l. 4 (*see* Chap. II. Sec. 6A, Q. 14).

REMARK.—The deceased person's wife inherits. But as she is a minor, she will be under the guardianship of her mother-in-law, if the latter is a fit person, and if no male blood relatives of the husband are living. (*See* Act No. XX. of 1864; Act IX. of 1861.)

Q. 25.—A man of the Gavalî (milkman) caste left at his death some money to be recovered from a debtor. His mother obtained a decree, and attached some property belonging to the debtor. There is a widow of the deceased, who, though a "Lagna" wife, did not live with her husband during his life-time. The mother-in-law on this ground contends that her daughter-in-law has no right to the property of the deceased. What is the law on this point?

A.—If the daughter-in-law, though living in her mother's house, has maintained her good character, and is of a proper age, she can recover the debt. If she has a bad character, or has married another husband, she cannot claim any property of her husband.—*Sholapoor, March 27th,* 1854.

AUTHORITIES.—(1) Vyav. May. p. 134, l 4 (*see* Auth. 4); (2) p. 134, l. 6 (*see* Chap. II. Sec. 6A, Q. 21); (3*) p. 137, l. 7 (*see* Chap. II. Sec. 6A, Q. 11); (4) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 26.—A man died, leaving a widow, a son, and a daughter-in-law. They all lived as an undivided family; afterwards the son died. The right of inheritance is contested between the mother and the daughter-in-law. The question is, which of these is the heir?

A.—According to the Śâstra a man's son and widow have a right equally to share his property. If the son is dead, his wife has a right to inherit her husband's share of his father's property. The mother-in-law has no right to it. If the father's property has not been divided between his widow and son, the daughter-in-law cannot claim her share. If, however, she pleases her mother-in-law and induces her to assent to a division of her property, she may obtain a share.

If the daughter-in-law cannot please and induce her mother-in-law to consent to a division, and if the mother-in-law withholds her consent, the daughter-in-law cannot get her share. The mother-in-law will, however, be bound in such a case to maintain her daughter-in-law. On the death of the mother-in-law the daughter-in-law will inherit her property.—*Ahmedabad, October 21st,* 1845.

AUTHORITIES.—(1) Vyav. May, p. 136, l. 7; (2) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—A mother receives a share of her husband's property only if either there are several sons, and these divide after the father's death, or if a son assigns some of his father's property to his mother instead of giving her maintenance. Neither the one nor the other condition seems to exist in this case. The mother has, therefore, after her son's death, only a right to maintenance. The daughter-in-law on the other hand, inherits her husband's property.

Q. 27.—When a man dies after the death of his son, will the man's or his son's widow be his heir?

A.—The father's widow is the heir. Her daughter-in-law is entitled to a maintenance only.

Khandesh, September 7th, 1858.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3; (2) p. 136, l. 4 (*see* Chap I. Sec. 2, Q. 11); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec 2, Q. 4).

Q. 28.—A mother-in-law and her daughter-in-law live together as a family united in interests. They possess some ancestral property. The question is, how the women should share it?

A.—Each of the women should take a half of the property. If the property was acquired by the husband of the mother-in-law, she must be considered his heir, and entitled to all his property. In this case the daughter-in-law can claim a maintenance only from her.

Sadr Adálat, September 11th, 1852.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The widow whose husband died last is the lawful owner of the property. The other is entitled to maintenance only. As to the Śâstri's opinion that the daughter-in-law is entitled to naintenance, *see* the Introd. pp. 246, 248.

Q. 29.—A man died, leaving a widow and mother. The question is, which of these is the heir?

A.—If the widow is a chaste woman, she is the legal heir of her husband. If her character is not good, she will be entitled to maintenance only.—*Surat, November 7th,* 1845.

AUTHORITY.—Mitâksharâ, f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 30.—A man died. His young wife is under the protection of her father. A separated uncle and cousin of the deceased state that they are the heirs to the property of the deceased, and that they would support the widow till she should marry another husband. The question is, who is the heir? The father of the girl has passed an agreement to the uncle and the cousin of the deceased, that they should take one-half of the deceased's property, and permit the widow to take the other half. Has the widow's father a right to pass such an agreement?

A.—The widow is the heir to the deceased's property. The other relatives have no right to contest her heirship on the ground that she is likely to be remarried. Her father has no right to pass any agreement of the kind described in the question.—*Khandesh, October 20th,* 1849.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 31.—A representative of a branch of a family passed an agreement to one of two individuals of another branch of the same family, whereby he stipulated that he should have his name entered on the records of Government in regard to certain lands. Of these two individuals, one died, and the

other left the country and was not heard of. The widow of the former represents the branch. The question is, whether the widow or the person who passed the agreement is the heir of her deceased husband?

A.—Those who take meals and carry on their transactions separately, must be considered members of a divided family. According to this description, the person who passed the agreement and the two individuals of another branch appear to be separate in interest from each other. The widow will therefore be the heir of the deceased.

Ahmednuggur, April 26th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 7); (2) p. 129, l. 2; (3) p. 129, l. 4; (4) p. 140, l. 1; (5) p. 134, l. 6; (6) p. 137, l. 7; (7*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 32.—A man held the Watan of a priest, called the "Yajamâna-vṛitti." He died, leaving a widow and a sister. A person, of whose family the deceased was the priest, made a "Dâna," or religious gift, of a bed. The sister received it. The question is whether the widow or the sister has the right to the emoluments of the office of the priest? Can a man make a "Dâna" of a bed to any other person besides his priest, and if he cannot, is the giver or the receiver responsible for it?

A.—In this case the widow is the heir, and so long as she is alive the right of receiving gifts belongs to her. The sister has no such right, but she cannot be prosecuted for receiving that which a man chose to give her. The man may, however, be sued on that account.

Ahmedabad, July 24th, 1856.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 140, l. 1; (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—*See* Book I. Chap. II. Sec. 7, Q. 1. As to the customary laws governing the relations between such classes or persons as priests and astrologers and those entitled to their ministrations,

reference may be made to *Damodar Abaji* v. *Martand Abaji*, (a) and to *Vithal Krishna Joshi* v. *Anant Ramchandra*. (b) In some cases, though the amount of the fee payable by the layman is not fixed by law, yet a parting with some property is essential to the efficacy of the ceremony performed. (c) The right to the fees and offerings thus becoming due from particular families or classes is regarded as a family estate, inalienable usually to persons outside the family, but transferrable within the family, and a subject for inheritance and partition like other sources of income. Thus it is that even a widow may be entitled under the customary law to the offering by which on a particular occasion a client of the priestly family has to obtain a spiritual sanction to some secular transaction, or simply to acquire religious merit. The requisite ceremonies have in such cases to be provided for by the appointment of a qualified officiating substitute. An intruder subjects himself to an action for damages, as the reported case shows. Whether a suit lies by the representative of the priestly family against an individual who fails to make the proper offering, depends on the particular legal relation subsisting in each case. (d)

Q. 33.—To whom does the ancestral property of the deceased go by the right of inheritance, to his wife or his daughter-in-law?

A.—If a father dies first, his son becomes his heir, and after the death of the latter his wife succeeds him. If, however, the son dies before his father, the father becomes his heir, and on his decease the father's wife succeeds him.

Poona, July 10th, 1858.

AUTHORITY.—*Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 34.—Two men, *A* and *B*, of the Vâṇi caste, lived together. *A* died, leaving a widow and a daughter. Can the widow have a claim to recover her husband's share of the moveable and immoveable property?

(a) H. C. P. J. 1875, p. 293.

(b) 11 Bom. H. C. R. 6.

(c) See Coleb. Lett. and Ess. vol. II. p. 347.

(d) See *Khondo Keshav Dhadphale* v. *Babaji bin Apaji Gurrav*, H. C. P. J. 1881, p. 337, in which it was said that a temple servant had not a right enforcible against a particular worshipper.

A.—As the property was acquired by both, each has a right to an equal share of it. The widow can therefore claim a moiety of the property.—*Broach, June 18th,* 1859.

AUTHORITIES.—(1) Mit. Vyav. f. 83, p. 2, l. 5:—

"If (one of the partners) emigrate or die, his heirs (*i. e.* sons, grandsons, &c.) or paternal or maternal relations, if they appear, may take his property; on failure of these, the king."

(2) Mit. Vyav. f. 82, p. 2, l. 5; (3*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (4) Manu VIII. 210.

REMARK.—The decision is right only under the supposition that the two Banias were not members of a united family, but only partners in trade.

Q. 35.—A deceased person has left two widows, one of whom is an elderly woman, and the other of 16 years only. How should they divide the deceased's property between them?

A.—Each of them should take a half.

Poona, April 30th, 1849.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2*) p. 137, l. 5:—

"But if there be more than one (widow) they will divide it and take shares." (Borradaile, p. 103; Stokes, H. L. B. 86.)

REMARK.—*See* also the note at page 52 of Stokes' H. L. Books. It would seem that they take jointly according to the cases in Norton's Leading Cases, page 508. *See* the Introd. p. 103. *See* also *infra,* Chap. IV. B. Sec. 6, II. *c,* Q. 1; and *Bhagwandeen Doobey* v. *Myna Baee.* (*a*) The Śástri at 2 Str. H. L. 83, 90, agrees with the view taken above, p. 103.

Q. 36.—A deceased man has left two widows, the elder of them has two daughters, and the younger has no child whatever. The property of the deceased has passed into the hands of the elder widow. Can the younger widow claim a share of the property? And who has the right to adopt a son?

(*a*) 11 M. I. A. 487.

A.—The younger can claim a share. The right of adoption belongs to the elder.—*Poona, March* 31*st*, 1852.

AUTHORITIES.—(1) Vyav. May. p. 137, l. 5 (*see* Chap. II. Sec. 6A, Q. 35); (2) Saṁskâra Kaustubha. (See Bk. III. ADOPTION.)

Q. 37.—A deceased husband has left two wives, one married by the "Pâṭ" and the other by the "Lagna" ceremony. Which of these wives will be his heir?

A.—According to the Śâstra, both are wives and heirs.

Poona, August 7th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—According to the strict Hindû law of the higher castes, the remarriage of widows is null, and, apart from caste custom, nothing more than concubinage, and consequently the Lagna-wife alone can inherit. But as by Section I. Act. XV. of 1856, the remarriage is legalized, a Pâṭ-wife has perhaps the same rights as the Lagna-wife under Section V.

2. The Pâṭ-wife's son is legitimate and capable of inheriting, but in 1858 the Dharwar Śâstri assigned to him a place below the previously adopted son, who was himself postponed to the son by a 'Lagna' wife, though born after the adoption. The parties seem to have been Lingayats. R. A. 26 of 1873, *Basanagaoda* v. *Sunna Fakeeragaoda.*

Q. 38.—Is a man's Pâṭ-wife or the Lagna-wife his heir?

A.—The Lagna-wife is the heir. The Pâṭ-wife is not. A Pâṭ is not a legal and ceremonial marriage. It is performed without reference to the appearance of the planets Venus and Jupiter, and in defiance of the situation of other stars, and of the prohibition of certain days for the performance of marriage.—*Dharwar, September* 21*st*, 1855.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Question 39, with reference to which the answer would be wrong as to members of a caste recognizing Pâṭ marriages.

Q. 39.—A deceased person has left two widows, one by "Lagna" and another by "Pâṭ." The latter has a daughter who is married. Is the "Pâṭ" widow entitled to the whole or a portion of the deceased's property, or to a maintenance only?

A.—Both the widows are equally entitled to the husband's property, which should therefore be divided between them.

Poona, December 28th, 1848.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Question 35.

Q. 40.—A deceased man has two wives, one by "Lagna" (the first marriage), and the other by "Pâṭ" (remarriage as respects the woman). The former has daughters, to whom the man has transferred his property as a gift. The question is, whether the daughters or the "Pâṭ" wife will be his heirs?

A.—The "Pâṭ" wife is the nearer relation and better heir of the deceased than his daughters. There is scarcely any difference between a "Pâṭ" and "Lagna" wife.

Khandesh, February 6th, 1848.

AUTHORITIES —(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2*) Mit Vyav. f. 68, p. 2, l. 16 (*see* Chap. II. Sec. 3, Q. 11); (3*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—If the deceased kept back enough of his property to maintain his widow, the gift of the rest to his daughters is valid. But if he left his widow unprovided, the gift is ineffectual, and as according to Section I. of Act. XV. of 1856 the Pâṭ marriage is legal, his widow will be his heir, provided that the mother of his daughters be dead. Should she be still alive, both the widows will inherit.

2. A widow remarrying remains personally liable on a bond executed by her. (*a*) A married woman contracting jointly with her husband is responsible only in her strîdhana. *Narotam Lalabhai* v. *Nanka Madhav*, Bom. H. C. P. J. 1882, p. 161; *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. 121; *Govindji* v. *Lakmidas*, Ib. 4 Bom. 318.

(*a*) *Náhálchand* v. *Bái Shivá*, I. L. R. 6 Bom. 470.

Q. 41.—A man had two wives, one by "Lagna" and the other by "Pâṭ." He married a third by "Pâṭ." This last-mentioned woman had not taken the leave of her first husband to contract a "Pâṭ" marriage with the man. She gave birth to a daughter. Can this daughter succeed her father after his death ?

A.—It is not legal for a woman to enter into a "Pâṭ" marriage without having previously obtained permission of her husband, unless he is dead. The daughter, therefore, can have no share in the property of the deceased father. But as she was the result of the "Pâṭ" marriage, the heirs who will take the assets of the deceased must support her. The "Lagna" and the first "Pâṭ" wives will be the heirs of the deceased, entitled to take all his property.

Sholapoor, October 19th, 1852.

AUTHORITIES.—(1) Manu V. 147; (2) Vîramitrodaya, f. 157, p. 2, l. 11; (3) Mit. Âchâra, f. 12, p. 1, l. 4; (4) Vyav. May. p. 239, l. 3; (5) p. 137, l. 5; (6*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (7*) f. 57, p. 1, l. 5 (*see* Chap. II. Sec. 3, Q. 3).

REMARKS.—(1) As the husband of the second "Pâṭ-wife" is still alive, the woman cannot be called correctly a "Pâṭ-wife," but is an adulteress and concubine. As a concubine she has no right to inheritance, but only to maintenance for herself and her daughter from the heirs of the man under whose protection she lived. The concubine of a late proprietor is entitled to maintenance from his heirs, (*a*) and a sufficient portion of the estate may be invested in order to provide the requisite income during her life. (*b*)

2. The recognition of a natural son by his father confers on him that status, though he was not born in the father's house or of a concubine having a peculiar status therein. (*c*)

3. Illegitimate children of the Śûdra caste inherit the estate of their putative father, in default of legitimate children. (*d*)

(*a*) *Khemkor* v. *Umiashankar,* 10 Bom. H. C. R. 381.

(*b*) *Vrindavandas* v. *Yamunabai,* 12 Bom. H. C. R. 229.

(*c*) *Muthusawmy Jagavera Yettappa* v. *Vencataswara Yettaya,* 12 M. I. A. 220.

(*d*) *Inderun Valungypooly* v. *Ramasawmy Pandia et al,* 13 M. I. A. 141.

Q. 42.—A man died. His Lagna-wife had lived separate from him. The man kept a woman. His property has passed into the hands of his mistress. The question is, which of the two women has the right of inheritance?

A.—If the deceased has left no sons, grandsons, or other nearer heirs, the Lagna-wife has the right to inherit the property of the deceased. The mistress cannot lay any claim to it.

Poona, March 20th, 1855.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 134, l. 6; (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 43.—A Kunabî died, leaving two widows, *A* and *B*, one of whom, *A*, he had married as a virgin, and *B* as a widow. Can *A* mortgage her husband's Mirâs land?

A.—According to the Sâstra, *A* is the heir of her husband, and she can therefore mortgage his Mirâs land.

Poona, September 22nd, 1860.

AUTHORITIES.—(1) Vyav. May. p. 137, l. 7 (*see* Chap. II. Sec. 6A, Q. 17); (2*) Nirṇaya Sindhu (*see* Chap. II. Sec. 8, Q. 5).

Q. 44.—A Lingâyat married a virgin *A*, and a widow *B*. Which of them has the power of selling his immoveable property?

A.—*A* has the chief power of disposing of his property.

Dharwar, December 3rd, 1856.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) Vyav. May. p. 137, l. 7 (*see* Chap. II. Sec. 6A, Q. 11); (3*) Nirṇaya Sindhu. (*See* last Question.)

REMARK.—The marriage of the widow *B* to the deceased would be perfectly valid, the Lingayats ranking only as of the Śûdra caste. (*a*) (*See* Q. 35, 40.)

(*a*) *See* next Section, and *Gopâl Narhar* v. *Hanmant Ganesh*, I. L. R. 3 Bom. 273.

SECTION 6.—WIDOW.

B.—RE-MARRIED.

Introductory Remarks.

The remarriage by Pâṭ is so foreign to the purer Hindû notions, that the simple ceremony (Nâtrâ) cannot be performed for a woman who has not been married before. The same rule applies in some castes to males; in others a mere symbolical marriage of a man to a Sami tree or a cotton image qualifies him, though a bachelor, to take a previously married woman to wife. Such is the rule amongst the Surat Soothar Panchalis, Lohars, Mâlis, Khumbars, Dhobis, Mochis, and others who answered Mr. Borradaile's inquiries.

In some of the Dekhan castes, on a widow's marriage she has to give up to her first husband's family all her property except a prîti-datta or gift from her own family (a) The nature of this property is discussed under the head of Strîdhana Property in a wife is argued against by Nîlkantha (b) in terms which imply that by some of the learned even it was asserted. Such property would of course imply the wife's incapacity for property except a *peculium* in the proper sense. It would account too for the rule of some castes, that he who takes the widow, a part of the *familia* of a deceased, becomes thereby responsible for all his debts See Introd pp. 165, 271, 282.

Amongst the Jâts of Ajmir, custom requires that the member of the community who marries a widow shall repay to the family of the deceased husband the expenses of his marriage. (c) We have here a trace of a joint interest of the family in the wife or widow of each member of it which has been found to prevail in widely separated parts of the world Without discussing the causes of this custom, we may perhaps gain a clearer view of the position of the widow, especially amongst the lower castes, by a consideration of the various social conditions through which she has reached her present capacities of freedom, complete or qualified, to dispose of herself, and of succession to property.

The levirate was at one time an institution generally recognized in India (d) "It is declared," says Âpastamba, "that a bride is given

(a) Steele, L C. 169.

(b) Vyav. May. Chap. IV. Sec I. para. 10.

(c) *Madda* v. *Sheo Baksh,* I. L R. 3 All. 385.

(d) Gaut. XXVIII 22, 23, 32. As to the Vedic period, Muir, S. T. vol. V. 459.

to the family (of her husband, not to the husband alone)." (*a*) Hence the husband could once procure children by the agency of a blood relative, (*b*) but that "is now forbidden on account of men's weakness," (*c*) "the hand (of a gentile relative like that of another is as) that of a stranger; " "the marriage vow is not to be transgressed;" and "the eternal reward to be gained by submitting to the restrictions of the law is preferable to obtaining offspring in this manner." (*d*) In Manu again (*e*) it is said that connection by one brother with the wife of another is degrading, "even though authorized, except when such wife has no issue"; but in that case it is approved. (*f*) Next follows a qualification of the rule limiting it to the procreation of one child on a widow by a kinsman, and lastly a prohibition of the practice to the twice-born classes. It is placed on a level with the marriage of a widow; (*g*) and the only remnant of the earlier law preserved by Manu is that commanding a man to take his brother's betrothed on the death of her

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(*a*) Âpast. Pr. II Pat 10, Kh. 27. Compare the existing customs described in Tupper, Panj. Cust. Law, Vol. II. pp. 118, 131, 189.

The *pallu* or dower of a widow is resumed in Gujarât by the deceased husband's family on her remarriage. They may in some castes escape from the liability to maintain her by giving her a formal license to remarry, without which she cannot, according to the caste usage, form a second union. In most instances a payment must be made to the family and in some to the caste.

(*b*) Gaut. XVIII. 4, 11. The Athenian heiress taken to wife by an aged husband was directed to supply his defects, should he prove unequal to his responsibilities, by the services of one of his agnatic kindred. *See* Petit, Leges Attic. p. 444. Baudhâyana, Tr. p. 226, might seem not to limit the choice of a subsidiary father to the family of marriage, but this appears from p. 234. Vasishṭha XVII. 56 ss. 80, seems to intend that one of the family assembly shall be chosen.

(*c*) *i. e.* their incapacity now to resist the demoralizing effect of practices which would have left the higher sanctity of their predecessors unharmed. Comp. Âpast. Tr. p. 131.

(*d*) Âpast. *loc. cit.*

(*e*) Chap. IX. 58 ss, 120, 121, 143-147; Chap. III. 173. Nârada does not impose this condition. Pt. II. Chap. XII. Sec. 80 ff.

(*f*) *See* too Mit. Chap. II. Sec. 1, paras. 10-12, 18, 19.

(*g*) On this comp. Âpast. Transl. p. 130, and Viram. Tr. p. 61.

(intended) husband, in order to procreate one child (a) A similar rule is found in Nârada, Pt. II. Chap. XII. 80, 81, 85, 86, with the condition of authorization by the relatives, failing which the offspring will be illegitimate. (b) Provision is made by Yâjñavalkya (c) for the son thus begotten (kshetraja) next to the son of the appointed daughter as heir to the nominal father (d) By Vasishṭha he is made to precede the appointed daughter. (e) The idea of a woman's leaving her family of marriage and of sacrifice by marrying into another was one that to a Brâhman would appear far more monstrous than a simple succession of a brother or kinsman to the right of one deceased over his wife. (f)

The custom, softened as we have seen and gradually discredited amongst the higher castes, has been preserved amongst the less civilized tribes down to our own day. Many instances of it are given in Mr. Rowney's book on the Wild Tribes of India. It seems itself to have sprung (g) from an even coarser usage of polyandry (h) which still subsists amongst the aborigines of India. (i) The wife at one time held in common, passes on her sole owner's death as

(a) *See* Viram Tr p. 106 ss.

(b) The viniyoga, or disposal of the widow by the husband's family, provided for in Nárada, Pt. II Ch XIII para. 28, is a disposal of her to another lord

(c) II. 128 ss ; Mit. Chap. I. Sec XI. paras 1, 5.

(d) *See* Mit Ch. I. Sec. X.

(e) Vasishṭha XVII. 14, 15,

(f) Comp. Tupper. Panj Cust. Law, Vol. II. p. 125, 131, 174. It seems that some Brâhmans have adopted or retained the levirate, *ib.* 132.

(g) *See* M. Müller's Hist. Sansk. Lit. p. 46 ss.

(h) *See* as to Seoraj, Lahoul and Spiti, Mr. Tupper's Collection, Panj. Cust. Law, vol. II. 186-188. To this custom perhaps may ultimately be referred the passage of Manu IX. 182: "If among several brothers one have a son born, all are by his means fathers of a son." Though this is referred by Kullûka and other comparatively recent writers to adoption as prevented by the existence of a nephew, such could not have been the purpose when it was first uttered. For the polyandrous customs of the Tothiyars and Nairs, *see* Dubois, Manners, &c., p. 3; and above, p. 289.

(i) As once in Britain. *See* Cæsar De B. G. V. 14.

property to his brother. (*a*) In many cases she is a valuable property, as by tribal custom she has to do all or nearly all the agricultural work, (*b*) sometimes even the son has to take all his father's widows as his own wives, with the exception of his own mother. There is probably some mixture of humane feeling in such rules, as they provide a home for old widows, while they give the heir the benefit of the younger ones, (*c*) but they belong to a constitution of society in which women are not yet regarded as fully the subjects of rights. Amongst the Jews the leviiate was part of a system in which a man's wife was regarded as his property, and he might sell his family, subject to return at the jubilee year. The capacity of daughters as heirs was grafted on to this system by a special revelation, and accompanied by a necessity of marrying within their own tribe (*d*) In India their right grew out of the developed system of ancestor worship through their capacity to produce sons who could sacrifice to their fathers' manes. The widow's right grew out of her participation in her husband's domestic sacrifices (*e*)

Such rights as these imply progress beyond the stage at which women were mere chattels, and when the law made no provision for them except by handing them over to a second master on the death of the first; (*f*) but the traces of the earlier system are

(*a*) Amongst the Thiyens in Malabar an unseparated brother takes to wife the widow whose favours as wife of his brother he previously had a right to share.

In Spiti a brother even leaves a monastery to take his brother's widow and other property. No ceremony is thought necessary. Here however Thibetan influences are to be recognized. *See* Panj. Cust. Law, II. 189. For the semi-Afghans of Peshawar, *ib* 228. *See* McLennan's Studies in Anc Hist. p. 158 ss In Rohtak the only Karewa or widow's remarriage recognized as proper is that to her late husband's brother *See* Rohtak Settlement Report, p 64.

(*b*) See Panj. Cust. Law, p. 194.

(*c*) *See* Tylor, Anthropology, 404; Tupper, Panj Cust. Law. Vol. II. p. 125.

(*d*) Numbers XXVII. 1, 7; XXXVI; Lev. XXV 10; Milman's Hist. of the Jews, Bk. V.

(*e*) *See* Manu IX. 45, 86, 87; III 18, 262; Mit. Chap. II. Sec 1, para. 6.

(*f*) Comp. the idea of the Vazirs that a woman is a chattel as much as a cow. Panj. Cust. Law, II. 236.

The Chundavand or patnîbhâg, prevalent alike though not general (*a*) in Madras and in the Panjâb, by which the property is distributed equally to each wife and her offspring, has probably descended from a state, of which there are still instances, of combined polygamy and polyandry coupled with a distinct recognition of women as the subjects of rights, a respect for them as the sources of families, and a tracing through them of all heritable rights in males. This was adopted into the Brâhmanical system so far that the estate was first divisible according to the mothers of the different classes, but the later development which forbade the inter-marriage of different classes (*b*) has deprived the rules in the present day of any practical application except under some special custom of which the instances are rare if not unknown Some other traces of female gentileship remain, (*c*) which are noticed elsewhere (*d*)

Amongst the lower tribes of the Bombay Presidency, the tribal ownership of property which in one form or another subsists in Malabar and in the Panjâb, is not to be found, owing chiefly perhaps to the absence of external pressure forcing the members into close aggregation rather than to a progress beyond the stage of common proprietorship. The advanced Brâhmanical law has had so much influence that the levirate in any form is not admitted as it still is in

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(*a*) Panj. Cust. Law, vol. II. p. 202.

(*b*) With this prohibition may be compared the expulsion from his tribe to which a man is still subject for marrying out of it in the Panjâb (Tupper, Panj. Cust Law, vol. II. p. 111, 122) and elsewhere; the penalty of death imposed by the Theodosian Code on a Jew who should marry a Christian, and that of burning alive for the Christian who should take a Jewess as his mistress. *See* Lecky, Hist. of Rationalism, vol. II. 13, 275; Milm. Hist. Lat Christ. Bk. III. Chap V.; Döllinger, First Age of the Church (Eng. Trans.) vol. II. p. 235; and comp. Âpastamba, Pr. II. Pat. 10, Kh. 27, 8, 9; Gautama, XXIII. 14, 15, 32; Steele, L. C. 170, 33; Dubois, Manners, &c., p. 18.

(*c*) Perhaps the succession of a daughter to a son of the same mother (Coleb. Dig. Bk. V. T. 225) may be referred to this. Comp the converse case, *supra* p. 285.

(*d*) See above, p. 284 ss. Inscriptions, giving the names of the mothers of princes, are not necessarily indicative of a rule of female gentileship, since, where polygamy prevails, some are still surnamed as of such and such a mother for the sake of distinction without any variation of the ordinary law.

the North of India, (*a*) but purchase is common and a simulated capture is not unknown. The communal right of the family of marriage in women (*b*) having given way to the notion of wedlock as a really connubial relation, but one arising in strictness only from a connection by means of the family sacrifices not allowed to the lower castes, the quasi-matrimonial union in those castes is easily dissolved, and at the same time the pâṭ marriage of a widow is allowed amongst Śûdras to have full validity, (*c*) though so strongly condemned by the Brâhmanical law.

A husband may generally dismiss a wife at will, giving a "writing of divorcement" (*d*) which none of the higher castes are allowed to do; mere incompatibility of tempers is a recognized ground of separation; (*e*) and a paramour buys the husband's rights for money. (*f*) These rules show with sufficient plainness that those amongst whom they subsist have never risen to the Brâhmanical conception of marriage as a sacred and inseparable union. (*g*) Among some tribes and castes in Gujarât a mere agreement dissolves the union; (*h*) a fine may be paid as the price of renunciation (*i*) by either party or by the husband only (*j*) Custom allows a woman to abandon her husband and take another, (*k*) subject only to the sanction of the caste. (*l*)

(*a*) *See* Tupper, Panj Cust. Law, vol II. p. 93 ss; C. S. Kirkpatrick in Ind Antiq. for March 1878, p. 86; *Kesari* v. *Samardhan*, 5 N. W. P. R.

(*b*) *See* Tupper, *op. cit.* p. 101. In some instances it is not (except subordinately) recognized, and the wife set free by her husband is again sold by her father or her brothers.

(*c*) Ahmednagar Śâstri, 6th February 1850 MS; Steele, L. C. 166, 168.

(*d*) *Ib.*

(*e*) *Op. cit.* 169, 173.

(*f*) *Op. cit.* 172.

(*g*) Comp. Dubois, Manners, &c., p. 136; and *see* Baudhâyana quoted above, p. 86.

(*h*) Borr. MS Bk. F. sheet 39, 57; G. Lohars, Khalpa Pattuni 40, 47.

(*i*) *Ib.* sheet 52. Koombar 6, Vaghree 23.

(*j*) *Ib.* sheet 56, 57, MS. G. Lohars, Sootars, G. sheet 40.

(*k*) Comp. p. 104 above, as to the Khonds. Amongst the Jâts of the Panjâb it is said a woman may desert her husband and live with another man, her offspring by whom are regarded as legitimate, *see* Panj. Cust. Law, vol. II. 160.

(*l*) *Reg.* v. *Dahee* in *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. at p. 569.

The High Court has refused to recognize this authority in the caste, (*a*) but the usage itself shows how slight is in such cases the tie to which we give the name of marriage. The penalties of adultery are so trivial, (*b*) that the connexion guarded by them cannot be regarded as of a very sacred character. It is the injury to caste by carnal association with an inferior (*c*) rather than the loss of chastity which is looked on as a serious delinquency (*d*) Even amongst the Brâhmans of the Dekhan simple adultery entails only a penance, after which the wife " may return to her husband's embraces." (*e*) This is a corruption, though one not without venerable authority, (*f*) supposing the connexion has not been with a man of a lower caste, but for adultery with a low caste man the husband may repudiate his wife, (*g*) while he himself incurs only a penance by keeping a low caste concubine. (*h*) Adultery by a wife is generally atoned for by penance

(*a*) *Ib.*, and *Reg.* v. *Sambhu Raghu*, I. L R 1 Bom. 347. Under the Greek and Roman laws a divorce might always be had by the will of the wife as well as of the husband, unless amongst the Romans she had come " in manum." Christian feeling was strongly opposed to this laxity *See* Smith's Dict. Ant., Art. Divortium; Milman, Hist. Lat. Ch. Bk. III. Chap. V.

(*b*) Thus in Borradaile's Collection, Bk G, under Durgee Meerâsee Soorti there is an entry that a woman who deserts her husband and marries another may be divorced, and the second must pay Rs. 10 to the caste (punchâyat) and take the woman. *See* too *Kally Churn Shaw* v. *Dukhee Bibee*, I. L. R 5 Calc. 692. In the Gurgaon District, Panjâb, it appears that a wife cannot under any circumstances claim a divorce, *see* Tupper, P. C. L vol II p. 130.

(*c*) Comp. Gaut XXI. 9; XXIII. 14; Vasishtha XXI. 1, 8, 10; Baudh. Tr. p. 232, 233; Nárada, Pt. II. Chap. XII. para. 112.

(*d*) Amongst the Nâyars a woman, it is said, may not cohabit with a man of lower caste, and therefore must not marry one. *See* letter quoted above under Strîdhana, p 284 note (*b*); and Buch. Mysore, vol. II. p. 418, 513. Comp Manu VIII. 365 ; Yajñ. II. 288, 294.

(*e*) Steele, L. C. 33, 172 . Comp. Dubois, Manners, &c., 118, and Baudh. *loc. cit* ; Nárada, Pt. II Chap. XII. paras. 54, 62, 78, 91, 98.

(*f*) *See* Âpast. Tr. p. 164, and the Vîramit. Tr. p. 153. But as to the evil of an adulterine son, Manu III. 175.

(*g*) Steele, L. C. 171, 172 ; Vyav. May. Chap. XIX. paras. 6, 12.

(*h*) *Ib.* 170. Baudhâyana, Tr. p. 218, pronounces a man outcaste who begets a son on a Śûdra woman, but for mere intercourse the penance is no more than some suppressions of the breath, *ib.* 313, *see* too p. 319. Comp. Manu VIII. 364 ; Yajñ. II. 286.

unless the husband chooses to discard her, (*a*) which he can equally do, though at the cost of some discredit, without any reason at all. (*b*)

A wife however who deserts her husband without sufficient cause is not entitled to separate maintenance, (*c*) and he who harbours her is liable to a suit by the husband. (*d*) The marriage of a second wife by the husband affords no excuse. (*e*)

Repudiation in practice seldom occurs except when the husband's patience has been worn out, or he has received a reward for setting his wife free. She is generally valuable to him as a servant; some mutual affection naturally grows up; and the children must be tended. But the whole system of association between the sexes is as far removed from the higher Brâhmanical conception (*f*) as on the other side from the rudest sexual communism. The texts of the Smṛitis, and for the most part the commentaries also, have no real application to wives and widows and remarried women under the dominion of usages which the Hindû law admits as governing those amongst whom they prevail, but at the same time utterly rejects as part of its own developed system. It recognizes no second marriage of a widow, which yet amongst the lower orders is common ; and now is legalized for all classes by Act XV. of 1856. It could not be expected under such circumstances that the answers of the Śâstris should be perfectly consistent ; they were not called on to expound caste custom, and had no particular acquaintance with it. They answered the questions put to them either by mere reference to the received texts against remarriage, without discrimination of whether these could be applicable to the particular cases, or by admitting the 'pâṭ' wife, and widow to the same position as the 'lagna' wife according to analogy, or an assumed caste

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(*a*) Steele, L. C. 172.

(*b*) So amongst some low castes in Gujarât, Borr. MS. Bk. F. sheet 57, &c., and the Nâyars. This laxity brings a discredit on marriage which raises concubinage by comparison, and makes open licentiousness amongst the lower castes in no way disgraceful The same effect followed amongst the Romans from the same cause *See* Milm. Hist. Lat. Christ. Bk. III. Chap V.

(*c*) *Sidalingappa* v. *Sidava*, I L. R. 2 Bom. 634.

(*d*) *Yamunabai* v. *Narayan*, I. L. R. 1 Bom. 164.

(*e*) *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. at p. 122.

(*f*) The High Courts naturally take the higher view as far as possible. Thus in a suit for maintenance between Lingayats it was said that the right and duty do not rest in the ordinary way (merely) on contract but spring from the jural relation of the parties, *Sidalingappa* v. *Sidava*, I. L. R. 2 Bom. 624.

custom. This custom has been greatly acted on by that of the superior castes, and the process of assimilation is hastened by every improvement in the material condition of the people. As they gain wealth they naturally strive to imitate their betters. (a) It is on custom that the rights of the widow in all the lower castes must really rest, (b) custom modified amongst them as in all cases, by the Act of the Legislature above referred to, and the equally important Act XXI. of 1850, which prevents loss of caste from affecting the right of inheritance. (c) An important provision (Sec. 5) of the former Act is, that a widow remarrying, while generally forfeiting her rights through her first marriage, shall otherwise have the same rights of inheritance as if her subsequent had been her first marriage. (d) This extends the favour conceded to the pâṭ wife only in particular castes to every widow remarrying. Another is that (Sec. 7) which gives the disposal in marriage of the minor widow to her father and his family instead of her husband's. (e)

The relation may or may not be created by contract, but once created it cannot, like ordinary contractual relations, be dissolved by contract, but constitutes a status itself the origin of special rights and duties imposed by the law.

(a) A striking instance of this is the decay of the polyandrous customs of the Nâyars under British rule. These have changed from an indulgence at will on the part of the women after a mere ceremony, to such strictness that even two husbands are now thought discreditable, a brother may not marry his sister-in-law either during his brother's life or after his death (Letter quoted above, p. 284, note b). Still however the Nâyar marriage is dissoluble at will, which places it in an entirely different category from the Brâhmanical or Christian marriage.

(b) Comp. Sarasvatîvilâsa, § 118.

(c) Mit. Chap. II. Sec. X.; Steele, L. C. 61, 26, 159.

(d) But it seems a marriage between persons of different castes is still generally impossible without a specific allowance by the caste law. See *Narain Dhura* v. *Rakhal Gain,* I. L. R. 1 Calc. 1 There is a *jus connubii* between many pairs of castes. See *ex. gr.* below, Sec. 7, Q 6.

(e) The prevailing idea of marriage is that of a transfer of a woman as property to the family of her husband, who on his death have a right to dispose of her, even by sale, as in Gurgaon in the Panjab, and other districts. Pan. Cust. L. vol. II. p. 118. *See* Nâr. Pt. II. Chap. XIII. para. 28, referred to above.

Q. 1.—How far can a woman, married by "Pâṭ" ceremony, have a claim to her husband's property?

A.—She can claim a maintenance only.—*Dharwar,* 1846.

Authority not quoted.

REMARK.—For this and the following seven cases, *see* the Remarks subjoined to Chap. II. Sec. 6A, Q. 37, and Sec 3, Q. 16.

Q. 2.—A man of the Marâṭhâ Kuṇabî caste died. He had no near relation except his "Pâṭ" wife. Can she inherit his immoveable property?

A.—If the deceased husband had declared himself separate from the other members of his family, and if he has not left a son, his widow can succeed to all his property.

Rutnagiri, May 22*nd,* 1849.

AUTHORITIES.—(1) Vyav. May. p 134, l. 4 (*see* Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav f 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 3.—A man, not being on amicable terms with his first Pâṭ-wife, took another wife by the Pâṭ ceremony. The first Pâṭ-wife lived for 18 years with her daughter. The man is now dead. His second Pâṭ-wife having performed his funeral ceremonies and liquidated his debts, married another husband. The first wife has filed a suit against the second for a moiety of the property of the deceased. The question is, whether the claim is admissible, and whether the first or the second Pâṭ-wife has a right to dispose of the property left by the deceased husband?

A.—The widow has a right to prosecute her fellow-widow for the recovery of the property belonging to her husband, because he had not passed a deed of separation to her. according to the usage of his caste. As the second wife has married another husband, her right to the property of the deceased has become extinguished.

Khandesh, March 2*nd,* 1855.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Act XV. of 1856.

Q. 4.—Is the brother or a "Pâṭ" wife the heir to the property of a deceased man ?

A.—His brother is the heir.

Dharwar, December 20th, 1850.

AUTHORITY.—* Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap I Sec. 2, Q. 4).

Q. 5.—A deceased man of the Berada (*a*) caste has left a "Pâṭ" wife, her daughter, and a son of his brother. Who will be his heir ?

A.—If the deceased and his brother were separate, the widow will be the heir. If they were united in interests, the brother's son will be the heir.

Dharwar, July 12th, 1851.

AUTHORITIES —(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 6.—There are two persons who claim the right of inheritance, viz. a "Pâṭ" wife, and a son of a separated brother. Which of these is the heir ?

A.—The "Pâṭ" wife.—*Dharwar, March 27th,* 1856.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 7.—Is a Pâṭ" wife or a cousin the nearer heir to a deceased individual ?

A.—If the cousin was separate in interest from the deceased, the "Pâṭ" wife is the nearer heir.

Dharwar, December 27th, 1851.

AUTHORITY.—Mit. Vyav. f. 55, p 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

(*a*) A caste of cultivators in the Southern Marâṭhâ Country.

Q. 8.—A woman had a son by her first husband. On the death of the husband, she took her son to the house of the second husband, to whom she was married by the "Pâṭ" ceremony. The second husband died. Can the son and the widow be his heirs?

A.—The "Pâṭ" wife will be the heir of the deceased, and not the son of her first husband.

Ahmednuggur, January 4th, 1849.

Q. 9.—*A woman married by the "Pâṭ" ceremony to a Gujarâṭhi of the Bhanga-Sâlî caste, (a) twice went on a pil*grimage without his leave. When he died without issue, the wife returned and claimed his property. Should it be given to her, or to a cousin who lived separately, but performed the funeral rites of the deceased?

A.—The wife, who disregarded her husband during his life, can have no claim to his property after his death. It will go to the cousin who lived separately from the deceased.

Rutnagiri, February 14th, 1846.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—It is nowhere mentioned that simple disobedience of the husband's orders disables the wife from inheriting. The wife, therefore, will be her husband's heir.

SECTION 7.—DAUGHTER. (*b*)

Q. 1.—A man died, leaving a widow and a daughter. His property consists of a house. The widow married another husband. Which of these should be considered the heir to the house?

(*a*) Bhanga-Sâlîs are shopkeepers.

(*b*) Some commentators have thought that the daughter came in only as a putrikâ. The Śmṛiti Chandrikâ contradicts this (Chap. XI. Sec. 2, p. 16). So too the Mitâksharâ, Chap II. Sec. 2, p. 5.

A.—The widow, having married herself to another husband by the " Pâṭ " ceremony, has forfeited her right of heirship. The daughter therefore is the heir.

Poona, April 3rd, 1850.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 137, l. 6; (3*) p. 137, l. 7 (*see* Chap. II. Sec. 6A, Q. 11); (4*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. According to the Hindû Law, as interpreted by some authorities, the widow loses her right to the estate of her first husband on account of her unchastity. (*See* Chap. II. Sec. 3, Q. 16. But *see* Chap. VI. Sec. 3 *c*, Q. 6.)

2. Though the re-marriage of a widow is legalized by Act XV. of 1856, a remarried widow is debarred from inheriting from her first husband by Sec. 2 of the same Act. (*a*)

3. In a divided family, the daughter excludes remoter relatives, (*b*) as divided brothers and their sons, (*c*) the son's widow, (*d*) not so in an undivided family with surviving members. (*e*) See *infra*, Questions 4 and 10.

The custom subsisting in some Narvadári villages of excluding a daughter from succession to the village lands rests on a recognized inseparable connexion between the original proprietary families and their holdings. So "in the Panjâb where women do not transmit the right of succession to village lands; this is because they marry outsiders......The exclusion......is the means of keeping the land within the clan and within the village (community)" Panj. Cust. Law, vol. II. p. 58. Daughters are generally but not always excluded, *ib.* 145, 175, 177. In the same collection may be noticed a gradual growth of the right of the father to provide for his daughter out of tribal lands and to take her husband into his family very like what

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(*a*) So as to the Maravers in Madras, though remarriage is allowed by the caste law, *Muragayi* v. *Viramakál,* I. L. R. 1 Mad. 226.

(*b*) *Gorkha* v. *Raghu,* S. A. No. 216 of 1873, Bom. H. C. P. J. F. for 1873, p. 181.

(*c*) *Laxumon* v. *Krishnabhat,* S. A. No. 342 of 1871, *ibid.* for 1872, No. 23.

(*d*) 2 Macn. 43; and Coleb. in 2 Str. 234.

(*e*) *Vinayek Lakshman et al* v. *Chimnabái,* R. A. No. 44 of 1876; Bom. H. C. P. J. F. for 1877, p. 170.

occurred in Ireland and probably in other European countries in early times. (*a*)

A custom of male in preference to female inheritance to bhâgdâri lands in Gujarât was recognized in *Pranjivan* v. *Bai Reva.* (*b*)

4. There is no general usage of the Marâthâ Country excluding females from succession to ordinary inam property. A priestly office and the vṛitti or endowment appendant to it may stand on quite a different footing. (*c*) *See* above Chap. II. Sec. 6A, Q. 32. A widow may alien a vṛitti to provide for her necessary sustenance, Q. 689, MS. Surat, 19th March 1852.

5. As to the nature of the estate taken by a daughter, reference may be made to *Amritolal Bhose* v. *Rajonee Kant Mitter,* (*d*) quoted in the Introduction, p. 105. According to the Bengal Law, on the daughter's death, the property goes to her father's heirs, to the exclusion of her husband and daughter, (*e*) and she cannot alien to their detriment. (*f*) In Madras and Bengal indeed even under the Mitâksharâ the daughter is held to take only an estate similar to that of the widow. (*g*) In Bombay the doctrine of the Mitâksharâ and of Jagannâth has been maintained except as to widows. It was said that a daughter succeeds to an absolute and several estate in the immoveable property of a deceased father, and has full right over such property of disposal by devise. (*h*) In Bombay, a daughter succeeds to an absolute and several estate in the immoveable property of a deceased father, and has full right over such property, as to the share which she takes as one of two or more sisters. (*See* above, Introd. p. 106, 109, 330, 337.) The property descends as

(*a*) *See* Sullivan's Introd. to O'Curry's Lectures, Vol. I. p. 170 ss.

(*b*) I. L. R. 5 Bom. 482.

(*c*) *Vyankatrâv* v. *Anpurnâbâi*, R. A. No. 44 of 1874, Bom. H. C. P. J. F. for 1877, p. 302; *Duneshwur* v. *Deoshunkur*, Morris' Reports, Part I. p. 63.

(*d*) L. R. 2 I. A. 113.

(*e*) *See* Coleb. Dig. Bk. V. T. 420, Comm ; 2 Macn. Prin. and Prec. 57.

(*f*) *Doe dem. Colley Doss Bose* v. *Debnarani Koberanj*, 1 Fulton, R. 329; *Musst. Gyan Koowar et al* v. *Dookhurn Singh et al*, 4 C. S. D. A. R. 330; 2 Macn. H. L. 224; *Chotay Lall* v. *Chunnoo Lall et al*, 22 C. W. R. 496, C. R.

(*g*) *Chotay Lall* v. *Chunno Lall*, L. R. 6 I. A. 15; *Mutta Vaduganâdha Tevar* v. *Doraesinga Tevar*, L. R. 8 I. A. 99.

(*h*) *Haribhat* v. *Damodarbhat*, I. L. R. 5 Bom. 171, and cases there referred to; *Bábáji bin Náraуan* v. *Báláji Gannesh*, I. L. R. 5 Bom. 660.

strîdhana to the daughter's heirs, not the husband's. (*a*) *See* Question 21. The Privy Council declined to pronounce on this in *Hurrydoss Dutt* v. *S. Uppoornath Dossee et al.* (*b*) But in *Mutta Vaduganádha Tevar* v. *Dorasinga Tevar* (*c*) the Judicial Committee say definitively that the Mitâksharâ is not to be construed as conferring on any "woman taking by inheritance from a male a Strîdhana estate transmissible to her own heirs." It would seem, therefore, that the heritage taken by daughters must in future be regarded as but a life interest, whether with or without the extensions recognized in the case of a widow, except in cases governed by the Vyavahâra Mayukha, Chap. IV. Sec. 10, para. 25, 26ss (*d*) *See* 2 Macn. H. L. 57.

6. Many replies of the Śâstris pronounce an illegitimate daughter incapable of inheriting, but whether that would be so amongst Sûdras seems at least doubtful *See* Steele, 180. She is entitled to maintenance and marriage expenses as a charge on the shares of both legitimate and illegitimate sons, according to *Sâlu* v. *Hari* (*e*)

Q. 2.—A widow married a second husband. She has a daughter by her first husband. The question is whether the moveable and immoveable property of the first husband should be given to his daughter, who is a minor, or to the son of his separated cousin.

A.—The daughter is entitled to the property of her father as his legal heir.—*Tanna, July 20th,* 1857.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec 2, Q. 1).

REMARKS.—*See* the preceding Question.

Q. 3.—A deceased person has left a daughter and another daughter's son. How will they inherit the deceased's property?

A.—If the daughter is not married, or if she is in poor circumstances, she will take the property of her father, and perform his funeral rites. The deceased daughter's son, who

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(*a*) *Navalram* v. *Nandkishor,* 1 Bom. H. C. R. 209.

(*b*) 6 M. I. A. 433.

(*c*) L. R. 8 I. A. 99, 109.

(*d*) *Sengamalathammal* v. *Valayuda Mudali,* 3 M. H. C. R. 312.

(*e*) S A. No. 315 of 1876 (Bom H. C. P. J. F for 1877, p. 34).

is a minor, is entitled to one-fourth of his grandfather's property. When both the daughters are married, and are in similar circumstances with regard to their means of livelihood, the surviving daughter and the deceased daughter's son will be equally entitled to the property. Each of them should therefore take a half of it.

Ahmednuggur, June 16th, 1848.

AUTHORITIES.—(1) Vyav. May. p. 134, l 4 (*see* Auth. 4); (2) p. 134, l 6; (3) p. 156, l. 1; (4*) Mit Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK —The daughter alone inherits, as the daughter's son is one degree further removed. He would however share the inheritance with his aunt, if his mother died after her father.

Q. 4.—A man's grandson died, leaving a widow. The man died afterwards. There are sons of his daughter. The question is, whether the daughter or her sons, or the widow of the grandson, will be the heir entitled to inherit the Watan of the deceased grandfather ?

A.—If the grandfather was a member of an undivided family, his grandson's wife cannot be his heir. The right of inheritance therefore belongs to his daughter and her sons.

Sadr Adálat, September 25th, 1838.

AUTHORITIES —(1) Mit. Vyav. f. 55, p. 2, l 1 (*see* Chap. I. Sec. 2, Q. 4); (2) f. 58, p. 1, l. 5 and 9; (3) Vyav. May. p. 136, l. 4.

By undivided, the Śâstri means without partition having taken place between the grandfather and his son or grandson.

REMARK.—The deceased person's daughter alone inherits the estate. In the case at 2 Macn. Prin and Prec. of H. L. 43, a daughter is preferred to a daughter-in-law. *See* also Q. 10, and *Musst. Murachee Koour* v. *Musst. Ootma Koour.* (*a*)

Q. 5.—A deceased person has left a step-mother and a daughter. Which of these is the heir ?

(*a*) Agra S. Reports for 1864, p. 171.

A.—If the step-mother is a separated member of the family, the daughter should be considered the nearest heir of the deceased.—*Ahmednuggur, May 19th,* 1859.

AUTHORITIES.—(1) Vyav. May. p. 129, l. 3; (2) p. 20, l. 3; (3) p. 28, l. 2; (4) p. 140, l. 1; (5) p. 137, l. 5; (6) Mit. Vyav. f. 46, p. 2, l. 11; (7) f. 15, p. 2, l. 16; (8*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 6.—A Tapodhana (*a*) died, leaving a son. He had also nominated his sister's son as his son. The son and the foster-son are both dead. The son has left a daughter. The foster-son has left a son. The daughter has been married to a Brâhman, whose caste is called Taulkîya Audîchya. It appears to be customary for the Tapodhana to intermarry with this caste. The question under these circumstances is, whether the right of inheritance belongs to the daughter of the son, or the son of the foster-son ?

A.—A man who has a son has no right to nominate any other person as his son. It is further to be observed that a man of the Bráhman, or Kshatriya, or Vaiśya caste, cannot adopt a sister's son. The sister's son, therefore, is not the legal heir. The daughter, however she is married, in a Brâhman family, is the proper heir. Her right is not affected by her marriage into a higher caste.

Ahmedabad, October 17th, 1857.

AUTHORITIES.—(1) Vyav. May. p. 105, l. 8:—

"But a daughter's son and a sister's son are affiliated (*i. e.* allowed to be adopted) by Śûdras." (Borradaile, p. 70; Stokes, H. L. B. 61.)

(2) Vyav. May. p. 104, l. 7; (3) p. 134, l. 4 (*see* Auth. 5); (4) p. 137, l. 5; (5*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—But see *Gunpatrav et al* v. *Vithobá et al.* (*b*) It is not clear, however, that the parties in that case were, as the headnote

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(*a*) The occupation of this person is the same as that followed by Guravas in the Dekhan. It is washing idols, and having charge of a temple.

(*b*) 4 Bom. H. C. R. 130 A. C. J.

says, Vaiśyas, see *Gopál Narhar Sáfray* v. *Hanmant Ganesh Sáfray*, (a) and *Narsain* v. *Bhutton Lall* (b) referred to therein.

Q. 7.—There were two brothers who lived separate from each other. One of them died, leaving a daughter only. She did not spend any money for the funeral ceremonies of her father. The brother of the deceased incurred some expense on that account. The deceased has left a will, bequeathing a portion of the property to his daughter. Can she claim more than the bequest, on the ground of her being an heir of the deceased, or should the rest pass into the hands of his brother as heir ?

A.—A brother who lived separate from the deceased cannot be his heir merely because he performed his funeral rites. The daughter is the heir to the whole property; but if the deceased has left a will specifying the portion to which her claim should be confirmed, and transferring the rest to his brother, the brother will inherit according to the will of the deceased; otherwise the daughter should take the whole property, paying the expenses incurred on account of the funeral rites.—*Ahmednuggur, January 10th*, 1848.

AUTHORITY.—* Mit. Vyav. f 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—A daughter succeeds in preference to a separated brother. (c)

Q. 8.—Two brothers lived separately from each other. One of them died. Will the daughter, brother, or step-brother of the latter succeed to his property ?

A.—If the deceased was separate, his daughter will be his heir; but if he had not separated, his brother or (if there be no brother) his half-brother will be his heir.

Poona, October 23rd, 1846.

(a) I. L. R. 3 Bom. 273.

(b) C. W. R. Sp. No. for 1864, p. 194.

(c) *Laxumon Guneshbhat* v. *Krishnabhat*, S. A. No. 342 of 1871 (Bom. H. C. P. J. F. for 1872, No. 23).

AUTHORITY.—* Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—See *C. Hureehur Pershad Doss* v. *Gocoolanund Doss.* (a)

Q. 9.—There were two or three brothers, one of whom lived at the distance of three kos from the others. He was there for about 20 years. His daughter and son-in-law also lived with him as the members of the family. He is now dead, and the question is, whether his brother or daughter is his heir?

A.—As the deceased lived in a different village, and as he has not left a better heir, or adopted a son, his daughter will be entitled to his property.—*Dharwar, November 18th,* 1850.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l 1 (*see* Chap. I. Sec. 2, Q. 4); (2) Vyav. May. p. 134, l. 4 (*see* Auth. 1); (3) p. 131, l. 8:—

"Nârada . . . . Gift and acceptance; cattle, grain, houses, land, and attendants must be considered as distinct among separated brethren; as also the rules of gift, income, and expenditure. Those by whom such matters are publicly transacted with their co-heirs may be known to be separate, even without written evidence." (Borradaile, p. 97; Stokes, H. L. B. 82.)

Q. 10.—The son of a man died while his father was alive. The father died afterwards. His daughter-in-law is alive. He has also a separated brother, and a widowed daughter. The question is, which of these is the heir?

A.—The rule of succession laid down in the Śâstra provides that when a man, separated from his brother, dies without leaving male issue, his widow becomes his heir; that in her absence, his daughter; and that in the absence of the daughter, some other relatives have a right to inherit in succession. A daughter-in-law is not mentioned in the rule. She cannot, therefore, have any right to inherit the deceased's property. The daughter is the heir. A suitable provision must, however, be made for the support of the daughter-in-law.—*Surat, June 19th,* 1850.

(a) 17 C. W. R. 129 C. R.

AUTHORITIES.—(1) Vyav. May. p. 137, l. 7 (*see* Chap. II. Sec. 6A, Q. 11); (2) Vîramitrodaya, f. 203, p. 1, l. 13; (3*) Mit. Vyav. f. 55, p. 2, l 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Remark to Question 4, *supra*; and Introd. p. 128.

Q. 11.—A man, who was himself adopted, died, leaving a daughter. There is a brother of the deceased, *i. e.* a son of his natural father, who belongs to the same family, but he is a distant relation of the branch represented by the deceased, being a cousin of five removes. Who will be the heir to the deceased's property, the daughter or the cousin?

A.—When a separated member of a family dies without leaving any male issue, his daughter is the heir. If the deceased had not separated from the other branch, his cousin is the heir.—*Poona, March 27th,* 1850.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3); (2) p. 136, l. 2 (*see* Chap I. Sec. 2, Q. 3); (3) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4).

Q. 12.—A person has died, leaving a daughter who is under age. Should the certificate of heirship be given to the daughter, or to the cousin of the deceased, with instructions to protect the property and the heir, and to get her duly married?

A.—If the cousin is united in interests with the deceased, he may be granted a certificate, but if he be separate, the daughter of the deceased should be declared the heir, and placed under the protection of her cousin.

Ahmednuggur, October 12th, 1846.

AUTHORITIES.—(1*) Mit. Vyav. f. 51, p. 1, l. 10:—

"But sisters should be disposed of in marriage, giving them, as an allotment, the fourth part of a brother's share." (*a*) (Colebrooke, p. 286; Stokes, H. L. B. 393.)

(*a*) Regarding the explanation of the passage, *see* Colebrooke on Inheritance, p. 286. (Mit. Ch. I. Sec. VII. paras. 4, 5.) Though the passage does not expressly prescribe that the unmarried sisters should receive maintenance, this of course follows from the injunction to marry them, and to give them a dower.

(2*) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I. Sec. 2, Q. 4).

REMARKS.—1. If the deceased belonged to an undivided family, the son or sons of his brother or brothers will inherit, and not his daughter. But she has to be kept by her relations up to the time of marriage, and to be married at their expense.

2. If the deceased was divided from his relations, the daughter inherits. As she is a minor she must have a guardian till she is married, which guardian will be the next paternal relation. 1 Str. H. L. 72.

Q. 13.—A man died. There are his male cousin and a daughter of 10 years. Which of these is the heir? If the cousin be heir, who should be entrusted with the protection of the deceased's daughter?

A.—When a man, who has separated from his family, dies, his daughter becomes his heir. When a man, who is a member of an undivided family, dies, his daughter, as the nearest relation, is his heir. The cousin, however, will be the heir entitled to inherit the deceased's Watan and land, paying revenue to Government. The heir will be burdened with the obligation of getting the deceased's daughter married. If the daughter has already been married, the heir must afford her such protection as she would have received from her deceased father.—*Surat, December 29th*, 1846.

AUTHORITIES.—(1*) Mit Vyav. f. 55, p 2, l. 1 (see Chap. I. Sec 2, Q. 4); (2*) f. 51, p. 1, l. 10 (see Chap. II. Sec. 7, Q. 12).

REMARK.—The doctrine of the Śâstri as to an undivided family is incorrect. *See* the preceding case. He gives the Bengal rule as laid down in the Dâya Bhâga, Chap. XI. Sec. II. para. 1. But as Mitramiśra points out in the Vîramitrodaya, Transl. p. 181, Jîmûta Vahâna in another place (Dâya. Bhâg. Ch. III. Sec II. para. 37) says that in a partition portions are not taken by daughters as having a title to the succession, though the quotation from Devala is not there relied on as Mitramiśra supposed.

Q. 14.—A Kulakaraṇi died. There are his daughter, some second cousins, and their sons. Which of them will inherit the deceased's Watan? These relations of the deceased

lived separate from him. The deceased received his share separately. When he and his wife died, his property was considered heirless, and sold as unclaimed. Who will be the heir to this property?

A.—If the deceased had declared himself separate, and had received his share of the property, including the Watan, separately, his daughter alone will be his heir. If the Watan was not divided, his cousins will be the heirs of the deceased.—*Ahmednuggur, June 30th,* 1848.

AUTHORITIES.—(1) Vyav. May, p. 83, l. 3; (2) p. 137, l. 5-7; (3) p. 157, l. 3; (4) p. 159, l. 5; (5) p 156, l. 5; (6) p. 155, l. 5; (7) Mit. Vyav. f. 46, p. 2, l. 4; (8) f. 55, p 2, l 1 (*see* Chap. I. Sec. 2,

Q. 15.—A daughter of a person, having orally renounced her right to her father's property, refused to perform his funeral rites. A cousin of the deceased, therefore, performed the rites. The daughter now asserts that she did not renounce her claim to the inheritance, and wishes to have it recognized. Who will be the heir under these circumstances, the daughter or the cousin?

A.—It appears that the deceased has left a will to the effect that his property should be given to him who should perform his funeral rites, whether it were his daughter or the cousin. If it could be proved that the former renounced her claim, and directed her cousin to perform the rites, and take the property of the deceased, her claim would be inadmissible; but if no proof of this be forthcoming, the daughter by law is the heir, and entitled to the inheritance. In this case the daughter would be obliged to pay the cousin the expenses which he might have incurred in performing the ceremonies.—*Tanna, December 29th,* 1848.

AUTHORITIES.—(1). Vyav. May. p. 134, l. 4 (*see* Auth. 4); (2) p. 137, l. 5; (3) p. 138, l. 3; (4*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 16.—Will a man's property descend to his married daughters or to his brother's wife?

A.—If the deceased was a member of an undivided family, and has left no sons, his brothers will be his heirs, and in the absence of brothers their wives; but if the deceased had separated [from his brothers] his daughters will be his heirs.—*Poona, December* 31*st,* 1845.

AUTHORITIES.—(1*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The brother's widow inherits only in case the deceased (*A*) and his brother (*B*) were united in interests, and *A* died before *B*. For in this case the share of *A* would fall first to *B* (Authority 1), and next to B's wife (Authority 2).

Q. 17.—An inhabitant of Gujarâth had a daughter-in-law, who was pregnant at his death. He therefore transferred his property by a deed of gift to his son-in-law, on condition that if the result of the pregnancy should prove a son, the whole of his property should be given to him; that if a daughter, her marriage expenses should be defrayed from the property, and his daughter-in-law supported during her lifetime from the same source. After having made a deed of gift to this effect, the man died. His death was followed by that of his daughter-in-law without issue, and of his son-in-law. There is only a daughter of the man, *i. e.* the widow of his son-in-law, who obtained the gift. Can she be considered the legal heir to the property?

A.—When a man makes a gift of any thing, and at the same time retains his proprietary right to it, the transaction cannot be considered a gift. This is one of the rules of the Śâstra; and another is, that when a man dies without leaving male issue, and wife, his daughter is his legal heir. In the case under reference, the man who made the gift of his property retained his right to it, as shown by the condition of the grant, that the property was wholly to pass to the

son of his daughter, in case he should come into existence. The deed of gift is therefore illegal; and when it is set aside, the daughter of the man succeeds.

Khandesh, January 4th, 1853.

Authorities.—(1) Vyav. May. p. 196, l. 5; (2) p. 134, l. 4 (*see* Auth. 4); (3) p. 121, l. 2; (4*) Mit, Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Remark.—The gift may, however, be accompanied by a trust or duty to be fulfilled by means of it or in return for it. (*a*) It must be completed by possession; (*b*) at least as against a subsequent transferee from the donor. (*c*) When the purpose of a gift is not fulfilled, as by non-execution of the trust or other annexed duty, the Hindû Law annuls the donation, and this is so though the proposed consideration (for so it is regarded) fail but in part. (*d*) The gift is thus attended with a kind of condition subsequent of defeasance. Under the Roman law, as under the codes derived from it, a gift was revocable by the donor for ingratitude. (*e*) For non-satisfaction of charges it could be revoked by his successors. (*f*) The Indian Courts do not now cancel the gift: they enforce the annexed duty according to the equitable doctrine of trusts, (*g*) subject to the limitations noticed above, pp. 178 ss.

(*a*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 630.

(*b*) *Ib.*, *Vithalrao Vasudev* v. *Chanaya*, B. H. C. P. J. F. for 1877, p. 324; *Lallubhái* v. *Bái Amrit*, I. L. R. 2 Bom. 299; *Harjîwan Anandrám* v. *Náran Haribhái*, 4 Bom. H. C. R. 31 A. C. J.

(*c*) 2 Macn. H. L. 207; 2 Str. H. L. 427.

(*d*) *See* Coleb. Dig. Bk. II. Chap. IV. T. 56, Comm.

(*e*) *See* Coleb. Obl. § 657 ss.

(*f*) Goud. Pand. p. 201.

(*g*) See the Transfer of Property Act, IV. of 1882, Secs. 126, 129; Indian Trusts Act, II. of 1882, Secs. 1, 45, 56, 61; Specific Relief Act, I. of 1877, Sec. 54; Acts XXVII. and XXVIII. of 1866; *Ram Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76. Acts II. and IV. of 1882 are not in force in Bombay, and where Act II. is in force its operation amongst Hindûs is much limited by Sec. I., which reserves the classes of trusts which most frequently form the subjects of litigation.

Q. 18.—Can the daughter of a deceased Mahâr dedicated as a Muralî, as well as her son, be considered heirs to his property?

A.—The Śâstras are silent as to the practice of dedicating females as Muralîs. The Muralî and her son would, however, according to the custom of the caste, succeed to the property left by her father.—*Dharwar, August 11th*, 1857.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 19.—A deceased person has left no male issue, but has left four daughters. One of them became a widow when she was a child, and therefore lived in her father's house, making herself useful to him as a servant. The deceased has a nephew, who lived separate from him. Which of these two persons will be the heir?

A.—When a deceased person has no widow, his daughters are his heirs. Of these, the one who is not married has a superior claim; and when all are married, the one in poor circumstances has a superior claim. Those who are in good circumstances are, however, entitled to a small share of the property. Small shares of the property should be given to the wealthy daughters, and the rest to the one in poor condition. The nephew, whose interests are separate, has no right whatever.—*Ahmednuggur, September 21st*, 1847.

AUTHORITIES.—(1) Vyav. May. p. 137, l. 6:—

"If there be more daughters than one, they are to divide (the estate), and take each (a share). In case also where some of them are married and some unmarried, the *unmarried ones* ALONE (succeed), by reason of this text of Kâtyâyana:—'Let the widow succeed to her husband's estate provided she be chaste, and in default of her, the daughter inherits, if *unmarried*.'

"Among the married ones, when some are possessed of (other) wealth and others are destitute of any, these (last) even will obtain (the estate). From this text of Gautama:—'A woman's property goes to her daughters, unmarried, unprovided for. Unprovided, destitute of wealth. Those acquainted with traditional law, hold that the word

woman's (wife's) includes the father's also.'" (Borradaile, p. 103; Stokes, H. L. B. 86.)

(2) Vyav. May. p. 83, l. 3; (3) p. 157, l. 5; (4) p. 159, l. 5; (5) p. 156, l, 5; (6) p. 155, l. 5; (7) Mit. Vyav. f. 46, p. 2, l. 14; (8*) f. 58, p. 1, l. 5 (*see* Auth. 1).

REMARKS.—1. Comparative poverty determines the preference of married daughters to succeed. (*a*) Failing a maiden daughter, the succession devolves on an indigent married daughter though childless. (*b*)

2. The different position of daughters in relation to each other as heirs of their father's property in Bombay and elsewhere is considered in the Introd. above, p. 106-109.

3. In *Amritlal Bose* v. *Rajoneckant Mitter*, (*c*) (a Bengal case), it is said that a heritable right vested in one of two sisters at her father's death is not extinguished by her becoming a childless widow, in whom as such the right could not have vested. She may therefore succeed to her sister who took at first as the preferable heir, and so exclude that sister's son, contrary to the law in Bombay. The Hindû law does not deprive, on account of supervening defects (not amounting to an incapacity for holding property), of an inheritance once actually taken or "vested in possession": see the case of the incontinent widow, below. But where successive heirs are provided to the same person, the analogy of the widow's estate and those following it, would seem to point to the temporary estate being regarded as a prolongation of the original one, and the claims of alleged heirs being estimated according to their condition at the end of the derived interest immediately preceding. The judgment therefore may be regarded as a substantial extension of the rights of those having latent interests at the death of a father.

Q. 20.—A man of the Sûdra caste has left two widowed daughters. Which of them will be his heir?

A.—The one who is wealthy cannot claim the property. The poor one will be his heir. If both are in similar circumstances, each should receive half the property.

Sholapoor, September 26th, 1846.

(*a*) *Bakûbâi* v. *Manchhabâi*, 2 Bom. H. C. R. 5; *Poli* v. *Nârotum Bapû et al*, 6 Bom. H. C. R. 183, A. C. J.

(*b*) *Srimati Uma Deyi* v. *Gokoolanund Das*, L. R. 5 I. A. 40.

(*c*) L. R. 2 I. A. 113.

AUTHORITY.—*Vyav. May. p. 137, l. 6 (*see* Chap. II. Sec. 7, Q. 19).

REMARK.—*See* the Remark to Q. 19.

Q. 21.—A deceased person has left two daughters, one of whom has applied for a certificate that she is his heir. Should it be given to her?

A.—The two daughters have equal right to the property of the deceased, and one of them may therefore have a certificate stating her right to one-half of it.

Poona, October 12*th*, 1846.

AUTHORITY.—Vyav. May. p. 137, l. 6 (*see* Chap. II. Sec. 7, Q. 19).

REMARK.—In the cases of *Kattama Nachiar et al* v. *Dorasinga* alias *Gaurivallaba*, (*a*) and *Radhakishen* v. *Rajah Ram Mundul et al*, (*b*) different views are taken of the devolution of the property inherited by daughters. *See* the Section on Strîdhana, p. 265 ss, and above, Q. 1.

SECTION 8.—DAUGHTER'S SON.

Q. 1.—A man died. There is a widowed daughter of his daughter, and a son of his other daughter. Which of these is the heir? And if both are heirs, in what proportion should they share the property?

A.—The daughter's son is the heir.

Surat, June 14*th*, 1853.

AUTHORITIES.—(1) Vîramitrodaya, f. 205, p. 2, l. 2 (*see* Auth. 2); (2*) Mit. Vyav. f. 58, p. 1, l. 9:—

"By the import of the particle 'also' (Section I. § 2), the daughter's son succeeds to the estate on failure of daughters. Thus Vishṇu says, 'If a man leave neither son, nor son's son, nor (wife, nor female) issue, the daughter's son shall take his wealth. For in regard to obsequies of ancestors, daughter's sons are considered as son's sons.'" (Colebrooke, Mit. p. 342; Stokes, H. L. B. 441.)

(*a*) 6 M. H. C. R. 310.

(*b*) 6 C. W. R. 147.

REMARKS.—1. Daughters' sons take *per capita*. (a) They are excluded by the survival of any daughter. (b) But in *Radhakishen* v. *Rajnarain*, (c) a Bengal case, it was held that the son of a daughter, who was unmarried at the time of her succession, succeeds to the paternal estate, to the exclusion of her married sisters.

2. According to the Mitâksharâ, a daughter's son takes his maternal grandfather's estate as full owner, and on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather. (d)

Q. 2.—A man, having survived his son, died, leaving a daughter-in-law, and a daughter's son. Which of the two succeeds to his property ?

A.—The daughter-in-law, by virtue of her heirship to the son of the deceased, will be his heir. The daughter's son will not be the heir. His right is not superior to that of the daughter-in-law, because it is declared in the Śâstras that no son should be recognized as heir in the Kali age, other than the begotten and the adopted.—*Khandesh*, 1848.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 ; (2*) Mit. Vyav. f. 58, p. 1, l. 9 (*see* Chap. II. Sec. 8, Q. 1).

REMARKS.—1. The daughter's son inherits, according to Auth. 2, if the grandfather died after his son. Otherwise the daughter-in-law is to be preferred, as in *Mahalaxmi* v. *Grandsons of Kripa Shookul*; (e) contra *B. Shen Sulrac Singh* v. *Balwunt Singh.* (f) In *Ambawow* v. *Rutton Krishna et al*, (g) it was held that a daughter's son precedes a grandson's widow. *See* Sec. 7, Q. 4.

2. The Śâstri's remark refers to "the putrikâ-putra," the son of an appointed daughter, who according to the ancient law was reckon-

(a) *Ram Swaruth Pandey et al* v. *Baboo Basdeo Singh*, 2 Agra H. C. R. 168 ; *Ramdhun Sein et al* v. *Kishenkanth Sein et al*, 3 C. S. D. A. R. 100.

(b) *Musst. Ramdan* v. *Beharee Lall*, 1 N. W. P. H. C. R. 114.

(c) 2 Wyman's R. Civil and Cr. Reporter, 152.

(d) *Sibta* v. *Badri Prasad*, I. L. R. 3 All. 134.

(e) 2 Borr. 557.

(f) Calc. S. D. A. R. for 1838, p. 490.

(g) Reports of Selected Cases (1820-40), 1st Ed. p. 132, 2nd Ed. p. 150.

ed amongst the "twelve sons," but whose heirship in that character would not now be recognized.

Q. 3.—A man died. There are a son of his daughter, and a second cousin. Which of these is the heir ?

A.—If the deceased was a separated member of the family, his daughter's son is the heir. If he and the second cousin have lived as members of an undivided family, the cousin will be his heir.—*Khandesh, August* 25*th*, 1853.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 ; (2) p. 138, l. 2 (*see* Auth. 4); (3*) Vyav. May. p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (4*) Mit. Vyav. f. 58, p. 1, l. 9 (*see* Chap. II. Sec. 8, Q. 1).

Q. 4.—A Brahman died without male issue. Whilst the funeral rites, including the ceremony of "Sapiṇḍî," were performed from the first day by his brother's son, in conformity with the deceased's direction, his daughter's son performed them from the eleventh day. Which of these will be the heir of the deceased ? If the brother's son is entitled to the property, can the costs of the funeral ceremonies performed by the daughter's son be paid to her ?

A.—When a person who had separated from his family dies without male issue, his first heir is his widow. In her absence his daughter, and if a daughter is not in existence, her son is the heir. In the case under reference the daughter's son, who performed the funeral rites, is the heir. The nephew, who had separated from the deceased and who performed the rites in accordance with the written directions left by the deceased, cannot be considered the heir, though he is entitled to the costs of the rites.

Tanna, September 6*th*, 1847.

AUTHORITIES.—(1) Vyav. May. p. 138, l. 2 :—

(Vishṇu) :—" If a man leave neither son nor son's son, nor (wife, nor female) issue, the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered son's sons." (Borradaile, p. 103 ; Stokes, H. L. B. 87.)

(2) Manu IX. 136 :—

"By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son; let that son give the funeral oblation and possess the inheritance." (Colebroke, Inh. p. 343; Stokes, H. L. B. 441.)

Q. 5.—Can the male offspring of a Śûdra woman by her second husband succeed to her father's property ?

A.—As there is no prohibition in the Śâstra against remarriage by a woman of the Śûdra caste, it is generally resorted to. The male offspring by a remarriage will therefore be the legal heir to his maternal grandfather's property.

Sadr Adâlat, November 17*th,* 1838.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 58, p. 1, l. 9 (*see* Chap. II. Sec. 8, Q. 1); (3) Manu. IX. 132; (4*) Nirṇayasindhu, Par. III. Pra. I. fol. 63, p. 2, l. 7 :—

Since (the following passage) is quoted in the Hemâdri :—

"The remarriage of a married woman, the (double) share given to an elder brother, the killing of cows, the (appointment of a brother to cohabit with the) brother's wife, and (the carrying of) a water pot, these five (actions) ought to be avoided in the Kali (age)."

REMARKS.—1. The Hindû Law of the Śâstras forbids the remarriage of widows of all classes. (*See* Auth. 4.) Consequently the son of a remarried woman is to be considered illegitimate, and as such not qualified to inherit except under caste custom. *See* Ch. II. Sec. 3, Q. 16.

2. As the marriage of widows is legalized by Act XV. of 1856, the Pâṭ wife's son inherits. *See* above, p. 413.

SECTION 9.—MOTHER.

Q. 1.—A person executed a bond and a deed of separation in the name of a woman and her son. Can the woman sue on the bond after the death of her son ?

A.—The mother, being the heir of her son, can do so.

Poona, August 11*th,* 1845.

AUTHORITY.—*Mit. Vyav. f. 58, p. 1, l. 11:—

"On failure of those heirs, the two parents, meaning the mother and the father, are successors to the property.

"Although the order in which parents succeed to the estate do not clearly appear (from the tenor of the text, Section I. § 2), since a conjunctive compound is declared to present the meaning of its several terms at once, and the omission of one term and retention of the other constitute an exception to that (complex expression), yet as the word 'mother' stands first in the phrase into which that is resolvable, and is first in the regular compound 'mother and father,' when not reduced (to the simpler form, pitarau, 'parents') by the omission of one term and retention of the other; it follows from the order of the terms and that of the sense which is thence deduced, and according to the series thus presented in answer to an inquiry concerning the order of succession, that the mother takes the estate in the first instance, and on failure of her the father." (Colebrooke, Mit. p. 344 ; Stokes, H. L. B. 441-2.)

REMARKS.—1. On the mother's death the succession goes to the then next heir of the son, according to *P. Bachirajee* v. *V. Venkatappadu*. (*a*) *See* above, pp. 110, 328, 338.

2. Manu gives apparently contradictory directions as to the precedence of the two parents. (*See* Manu IX. 185, 217.) Vijñâneśvara's argument is controverted by Nîlakaṇṭha, Vyav. May. Chap. IV. Sec. 8, p. 14. The Smṛiti Chandrikâ too rejects it. *See* Chap. XI. Sec. 3. (*b*)

3. In Gujarâth the father is preferred to the mother as heir to their son. (*c*)

4. A mother of a Girasia was held entitled to receive the Girasi haks from Government, upon the death of her son. (*d*)

(*a*) 2 Mad. H. C. R. 402.

(*b*) In the oldest form of the Salic law the inheritance is given to the mother next after the sons. After her came the brother and sister on equal terms, and after them the mother's sister. In the next stage we have "if there be no mother or father"; then "if no father or mother." The "sorores patris" in like manner acquire precedence in the later law over the "sorores matris." But female succession, first to land at all, and then to the "terra salica" (probably the estate of the Hall *i. e.* for maintenance of the household) is throughout excluded. *See* Hessels and Kern, Lex. Sal. 379-386.

(*c*) *Khodhabhai Mahiji* v. *Badhar Dala*, I. L. R. 6 Bom. 541.

(*d*) *Bai Umedha* v. *The Collector of Surat*, R. A. No. 24 of 1867. Decided 30th November 1870 (Bom. H. C. P. J. F. for 1870).

Q. 2.—A son of 7 years of age, of a man of the Parît caste, died. His father is in prison. The son's mother has applied for a certificate of heirship. Can it be granted to her?

A. The father is the heir of his son if he should die before his marriage, and in the absence of the father, his mother is the heir.—*Poona, April 13th,* 1857.

Authorities.—(1) Vyav. May. p. 138, l. 3; (2) Mit. Vyav. f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

Remarks.—1. There are no special rules regarding the succession to the property of an infant.

2. If the property of the deceased son is separate property, as the context of the question seems to indicate, consisting in presents from relations or friends, it falls under the general rules which regulate the succession to the property of a separated person who has no male issue, and consequently the mother inherits before the father. *See* the case of *Narasapá Sakhárâm,* (*a*) and the Introduction, Section on Strîdhana. The estate which the mother takes in the property of her deceased son is according to the case similar to that which a widow takes in that of her deceased husband. *See* also *P. Bachiraja* v. *Venkatappadu.* (*b*)

Q 3.—In the case of some money being due to a deceased person, who has a right to claim the payment, his mother or his widow? the latter being notoriously adulterous, and pregnant by illicit intercourse.

A.—The mother has the right to recover the money, even if she be separate. The widow has forfeited her right in consequence of her bad conduct.

Ahmednuggur, September 25th, 1849.

Authorities.—(1) Vyav. May. p. 136, l. 8:—

"But a wife who does malicious acts injurious to her husband, who acts improperly, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of separate property." (Borradaile, p. 102; Stokes, H. L. B. 86.)

(*a*) 6 Bom. H. C. R. 215 A. C. J.

(*b*) 2 M. H. C. R. 402.

(2) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (3*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

REMARK.—"Even if she be separate." It does not matter whether the mother lived with her son or not, since she inherits, on the exclusion of deceased's widow, as the nearest heir to a "separate, not reunited, person, who has no male issue."

Q. 4.—A man died, leaving two widows. One of them had a son, who also died afterwards. Which of the survivors is entitled to the property of the deceased as his heir?

A.—The son became heir of the deceased father, and when the son died, his mother became his heir. The step-mother is not his heir.—*Dharwar, October* 13*th*, 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) f. 55, p. 2, l. 7; (3) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1); (4) Vyav. May. p. 83, l. 7.

Q. 5.—A man died, leaving two sons by two different wives. The son of the younger wife was a minor, and his share was therefore deposited by the father with a banker. The son afterwards died. Has his mother or his step-mother the right to inherit his property?

A.—The mother of the deceased.

Ahmednuggur, April 3rd, 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 8; (2) f. 51, p. 1, l. 3; (3) f. 46, p. 1, l. 9; (4*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1); (5) Vyav. May. p. 2.

Q. 6.—On the death of a man his estate was entered in the public records in the name of his son. The son subsequently died, and there remained two claimants, namely, the son's mother, who was married by "Pâṭ," and his step-mother, who was married by "Lagna." In whose name should the estate be entered?

A.—If the widows live together, the one who by age and abilities appears superior, should be considered entitled

to have the property registered in her name. If they are separate the mother of the deceased son should have a preference to the other.—*Dharwar, May 5th,* 1858.

AUTHORITIES.—(1) Mit. Vyav. f. 20, p. 1, l. 16; (2*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

REMARK.—The Śâstri seems to have thought of the case of two widows who after their husband's death became co-owners of his property. (a) In this case the land must be entered in the name of the deceased son's mother, since she is the sole heir of his property.

Q. 7.—A man died, leaving a widow and a son. He held a Desâigiri Watan, which was his ancestral property. The mother and the son used to manage the Watan conjointly. The son afterwards died, leaving a widow and a male child. The latter died subsequently. The question is, whether the mother or the grandmother of the male child is entitled by right of inheritance to take the Desâigiri and other property? Are both of them entitled as heirs?

A.—The mother is the nearest relation of the child. She is entitled to inherit the property of her son. She cannot, however, transfer the Desâigiri, &c., to others by sale, gift, or mortgage. She should live upon the proceeds of the property.—*Surat, July 20th,* 1854.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 13 (*see* Auth. 2); (2*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1); (3) Vyav. May. p. 138, l. 5 (*see* Auth. 2); (4) p. 135, l. 2 (*see* Chap. II. Sec. 6 A, Q. 6); (5) Manu IX. 187.

REMARK.—In *Narsappa* v. *Sakharam,* (b) it was held that a mother inheriting from a son takes the same estate as a widow from her husband. In *Sakharam* v. *Sitaba* (c) this is said to be settled law. The Śâstris in such cases as Q. 3, agreed with the answer here given that the mother inheriting becomes herself the *proposita* for any further descent. *See* further above, Introd. p. 330 ss. The Mitâksharâ

(a) *Bhugwandeen Doobey* v. *Myna Baee,* 11 M. I. A. 487. Above, p. 103.

(b) 6 Bom. H. C. R. 215.

(c) I. L. R. 3 Bom. 353.

Chap. I. Sec. 1, paras. 12, 13, says that where there is heritage there is ownership, and in Chap. II. Sec. 1, paras. 12, 39, that the widow, and failing her the parents, take the heritage of a separated sonless man. The daughter's absolute right is recognized as arising under the same rule as applies to the widow and the parents. (a) The mother's estate therefore like the widow's must, according to the recent decisions, be regarded as anomalous, and limited by principles foreign to the Mitâksharâ. (*See* above, p. 328, 332, 336.)

Q. 8.—A man possessed a house, and held some cash allowances called Desâigiri, Muglai, Sirpâva Chirdê, and Vazîfa. He died leaving a widow and a son. The latter, who was a minor, died subsequently. The paternal uncle of the man received the Watan allowances. The house was also in his possession. He received a certificate declaring him to be the heir of his nephew. The man's widow has obtained a certificate declaring her to be the heir of her son. On the strength of this certificate, she claims the Watan allowances. These allowances are the ancestral property of the family. Supposing the deceased son's grandfather had divided his property between himself and his brother, to whom will the right of claiming the house and the allowances belong? and if the division has not taken place, to whom will the same right belong?

A.—On the death of a man, his son becomes his heir. His right is not affected by the separation or union of the father and other members of the family. According to this rule, the son in the question became heir of his father. On his death, his mother can claim to be the heir of her son. She therefore has a right to the Watan, house, and other property of the deceased.—*Surat, July 30th*, 1865.

Authorities —(1) Vyav. May. p. 83; (2) Vîramitrodaya, f. 193, p. 1, l. 2; (3) Manu, IX. 137; (4) 163; (5) Mit. Vyav f 58, p 1, l. 11 (*see* Chap. II. Sec. 9, Q 1).

Remark.—The mother inherits only in case her husband or son had separated from the rest of the family.

(a) See *Haribhat* v. *Damodharbhat*, I. L. R. 3 Bom. 171.

Q. 9.—A woman of the "Śûdra" caste had a son by her first husband. She married herself by the "Pâṭ" ceremony to another husband, with whom she and her son lived. When the son came to age he was married at the house of his mother's second husband. A few years afterwards the son and his wife died without issue. The question is who should be considered his heir ?

A.—The mother is the heir, and not her second husband.
Poona, November 26th, 1851.

Authorities.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

Remark.—According to Act XV. 1856, Section II. the remarried mother cannot, it might seem, inherit from her first husband's son; but the decisions recognize her heritable right. (*See* also Bk. I. Chap. VI. Sec. 3 *c*, Q. 7.)

SECTION 10.—FATHER.

Q. 1.—Should the younger brother or the father of a deceased person receive the certificate of heirship ?

A.—The father is the proper heir, but the younger brother may obtain the certificate if his father has no objection to it.
Rutnagherry, June 11th, 1846.

Authorities.—(1*) Mit. Vyav. f 55, p. 2, l. 1 (*see* Chap. I Sec. 2, Q. 4) ; (2*) Mit. Vyav. f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).
Remark.—Vide *Bajee Bapoojee* v. *Venoobai,* quoted in Section 11,

Q. 2.—A man brought up a son of another man and got him married. At the time of the marriage he bestowed certain necessary jewels and articles of dress on the bride. The son died subsequently without issue. His widow contracted a "Pâṭ" marriage with another man. It has therefore become necessary for the woman to restore the jewels and the clothes. The question is, whether the property should be taken by the father of the boy, or the widow of the man who brought him up ?

A.—The son was not adopted, but was simply brought up and protected by the man. His father therefore has a right to the property mentioned in the question.

Surat, April 11th, 1850.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

SECTION 11.—BROTHERS.

Q. 1.—Two brothers lived separately from each other for 32 years. One of them, who had brought up a girl and got her married, died. The question is, who should be considered his heir?

A.—The surviving brother is the heir, and not the foster-daughter.—*Rutnagherry, March 8th,* 1851.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The brother inherits before the widow of a pre-deceased son. (*a*) A separated father would exclude a separated full brother, as well as half-brothers, who again, being united with their father, would exclude the full brother of the original proprietor. (*b*)

Q. 2.—A Paradeśî kept a woman, by whom he had some daughters. There are also his brothers. The Paradeśî is dead, and the question is, who should be considered his heir?

A.—The brothers.—*Tanna, June 4th,* 1852.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 3.—A man had three sons and a nephew (brother's son), whose father died when he was only three days old. The man had brought the young child up with his sons. Two sons separated themselves from the rest of the family,

(*a*) *Venkapa* v. *Holyava,* S. A. No. 60 of 1873 (Bom. H. C. P. J. F. for 1873, No. 101).

(*b*) *Bajee Bapoojee* v. *Venoobai,* S. A. No. 282 of 1871; (*Ibid.* for 1872, No. 41).

while the third and the nephew lived as an undivided family. The nephew died, and his widow remained with the third son, who also afterwards died. The question is, whether the widow of the nephew or the two separated sons should succeed to the property of the deceased person ?

A.—The wife of the nephew has a better claim, in case the nephew and the third son had an identity of interest.

Dharwar, September 30th, 1857.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The facts of the case appear to be these One (*C*) of three brothers *A*, *B*, *C*, was united in interests with a married first cousin (bhrâtṛivya) *D*. The other two brothers had separated from the third. The first cousin *D* died. After his death, his share became the property of the brother *C*, as women cannot inherit in an undivided family. After *C*'s death his brothers, *A*, and *B*, will therefore inherit, and not *D*'s wife, because she is only a Sapiṇḍa relation excluded by co-owners.

Q. 4.—A person divided his property between his legitimate and illegitimate sons. One of the (illegitimate) brothers died without issue. Will the legitimate or illegitimate members of the family be his heirs ?

A.—The relatives of the illegitimate branch will be the heirs.—*Nuggur,* 1845.

AUTHORITIES.—(1*) Mit. Vyav f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) f. 58, p. 2, l. 5 :—

"Among brothers, such as are of the whole blood take the inheritance in the first instance, under the text above cited ; 'to the nearest sapiṇḍa the inheritance next belongs ;' since those of the half-blood are remote through the difference of mothers." (Colebrooke, Mit. p. 347; Stokes, H. L. B. 445.)

REMARK.—It is not clearly stated whether the surviving relations of the deceased are all his brothers, or some brothers and some nephews, and it is therefore impossible to say whether the Śâstri's answer is correct. The order of inheritance is this—brothers of the whole blood, half-brothers, sons of brothers of the whole blood, sons of brothers of the half-blood. (*a*) (*See* above Sec. 3, Q. 12, and Introd. pp. 111, 112.)

(*a*) So in *Burdum Deo Roy* v. *Punchoo Roy*, 2. C. W. R. 123.

Q. 5.—A Mârwâḍî had three wives, of whom the first had two sons, and the second and the third one each. The husband and two wives died. The widow who survived was the mother of the two sons. One of these sons died before marriage. The question is, who will be his heir, the uterine brother or the half-brothers ?

A.—The order of heirs laid down in the case of death of a person who has no male issue, and who is a "Vibhakta," or a member of a divided family, is as follows :—The widow, daughter, daughter's son, father, mother, uterine brothers, and half-brothers; when one fails, the other succeeds. If the deceased had separated and was unmarried, his immediate heir will be his father, and in his absence, his mother. If he had not separated, his uterine and half-brothers, who would be entitled to equal shares of the deceased's property.

Khandesh, October 20th, 1849.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (*see* Chap. II. Sec. 9, Q. 1).

REMARKS.—*Father, Mother.*—It should be mother, father. (*a*) See Introd. p. 109.

In the case of *Gavuri Devamma Garu* v. *Ramandora Garu,* (*b*) there is an exposition of the law relating to impartible property belonging, as an undivided estate, to a Hindû family, or to one branch of such a family, jointly as to the members of the branch, but separately as to the other branches, with which a community of interests exists as to other property. The Court say (page 109) :—

"We are of opinion, therefore, that the sound rule to lay down with respect to undivided or impartible ancestral property is that all the members of the family who, in the way we have pointed out, are entitled to unity of possession and community of interest according to the Law of Partition, are coheirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapiṇḍas in the male line, the family heritage, both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was

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(*a*) See *Musst. Pitum Koonwar* v. *Joy Kishen Doss et al,* 6 Calc. W. R. 101 C. R.

(*b*) 6 M. H. C. R. 93.

the last survivor, the widow's position, as heir relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self- and separately-acquired property."

2 A brother of the whole blood has precedence in succession over a half-brother in Bengal (a) *Gavuri Devamma Garu* v. *Ramandora Garu* is discussed by the Judicial Committee in *Periasami* v. *Periasami* (b) Their Lordships thought that the property, by the elder brother's renunciation, became that of the younger brothers as if it had fallen to them in an ordinary partition *See* p. 75 of Report.

Q. 6.—A Sannyâsî is dead. There are his brother, a grandson of his other brother, and a widow of the third. Which of these will be his heir?

A.—That person will be the heir to whom the property might have been transferred previous to the man's becoming a Sannyâsî. But if the property was not transferred to any one, and if it constitutes what the man possessed before he became a Sannyâsî, it will be inherited by his brother, and in the absence of a brother by a brother's son; and when there is no such son, the widow of a brother. The property which may have been acquired during the time the man was Sannyâsî, such as his books, wooden sandals, maṭh, &c., will be inherited by his virtuous disciple.

Ahmednuggur, September 2nd, 1849.

AUTHORITIES —(1) Vyav. May. p 134, l. 4 (*see* Auth. 4); (2) p. 140, l. 1; (3*) Mit. Vyav. f. 58, p. 2, l 5 (*see* Chap II. Sec. 11, Q. 4; (4*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec 2, Q 4).

REMARKS.—1. Nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer. (c) *See* also Mit. Chap II. Sec. 4, p. 8.

2. But it should be borne in mind that by the Mitâksharâ law the rules of inheritance come into operation only as to the sole estate or

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(a) *Sheo Sundri* v. *Pertheo Singh*, L. R. 4 I. A. 147.

(b) L. R. 5 I. A. 61.

(c) *Rampershad Tewary* v. *Sheochurn Doss*, 10 M. I. A. 504.

the separate estate of the *propositus*. In a united family there is no room for the succession of "brothers and their sons," the joint estate is theirs already; it is only a participator who is removed. Even the widow, the first in the series of heirs to a sonless man, succeeds only if he was separate. *See* Mit. Chap. II. Sec. 1, paras. 2 and 39. Much less can the daughter or brother succeed to the same estate. (*a*)

SECTION 12.—HALF-BROTHERS. (*b*)

Q. 1.—There were two half-brothers of the Rajput caste. One of them died, leaving his property in the possession of his widow. She contracted a "Pâṭ" marriage with another man. The question is, whether the widow or the half-brother has right to the property of the deceased?

A.—The widow of the deceased, having remarried by the rite of "Pâṭ," has forfeited her claim to her former husband's property. The nephew has right to inherit it.

Broach, June 29th, 1852.

Authorities.—(1) Mit. Vyav. f. 55, p. 2, l. 8; (2) f. 58, p. 2, l. 5 (*see* Chap. II. Sec. 11, Q. 4).

Remarks.—Regarding the loss of the widow's rights, *see* also Act XV. 1856, Section 2.

2. According to the Vyav. May. a full sister inherits in preference to a half-brother. (*c*) Much more therefore in preference to remoter relatives. (*d*)

(*a*) *See* above, Chap. I. Sec. 2, Q. 6, Remark; and *Rajhubanand Doss* v. *Sadhuchurn Doss*, I. L. R. 4 Calc. 425.

(*b*) As to the precedence of half-brothers over full brothers' sons, the Smṛiti Chandrikâ, Chap. XI. Sec. 4, para. 5, follows the Mitâksharâ, while the Vyav. May. Chap. IV. Sec. 8, p. 16, reverses the order. Macn. vol. 2, p. 11, says that representation does not extend to collaterals, but the case of which he intends to give the effect goes only so far as to say that half-brothers take after full brothers and exclude half-brothers' sons.

(*c*) *Sakharam Sadáshiv Adhikari* v. *Sitabai*, I. L. R. 3 Bom. 353.

(*d*) *Ib.* 368 (note), 369.

SECTION 13.—BROTHER'S SON. (*a*)

Q. 1.—A person died, and there is his brother's son as well as a widow of another brother's son. Will the widow be the heir in preference to the nephew?

A.—No.—*Tanna, October* 11*th,* 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 2.—A man died. His surviving relatives are four nephews and a wife of a nephew. The question is, which of these is the heir?

A.—The four nephews are heirs. The widow of a nephew cannot be the heir of the deceased.

Ahmedabad, July 18*th,* 1857.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 4); (2) p. 140, l. 1; (3) p. 140, l. 6; (4*) Mit. Vyav. f 55, p 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—In default of brothers, brothers' sons succeed, taking *per capita.* (*b*) They succeed directly as nephews, not by representation of their fathers. (*c*)

Q. 3.—Who will be the heir to a deceased person, a brother's son or a brother's daughter?

A. —The brother's daughter cannot be the heir.

Dharwar, 1845.

AUTHORITY.—* Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—Nandapaṇḍita and Bâlambhaṭṭa give equal shares to the brother's daughters. *See* Stokes, H. L. B. 445. See *infra,* Bk. I. Chap. II. Sec. 15, B. II. (2).

(*a*) *See* Introduction, p. 116, 117; below Sec. 14 I. B. 1 *a*, Q 1, and Nirṇayasindhu III. p. 95, l. 17, quoted in Bk. I. Chap. 14 I. B. *b*. 1, Q. 1. Brothers' sons exclude a son's widow, 2 Macn. 75. They are amongst the heirs specially enumerated. The Smṛiti Chandrikâ, Chap. XI. Sec. 4, para. 26, places the son of a half-brother next after a son of a full brother. Brother's sons exclude the widows of the deceased in a united family, *Totava et al* v. *Irapa,* R. A. No 26 of 1869, decided 4th July 1871. (Bom. H. C. P. J. F. for 1871.)

(*b*) *Brojo Kishoree Dossee* v. *Shreenath Bose,* 9 C. W. R. 463. *See* Q. 6.

(*c*) *Brojo Mohun Thakoor* v. *Gouree Pershad et al,* 15 C. W. R. 70.

Q. 4.—A man died, leaving neither wife nor children. He has left two relatives, namely, a sister-in-law and a nephew. Which of these is the heir of the deceased? The sister-in-law has sold a house of the deceased without the consent of her son. Is this a legal sale?

A.—When a man dies without male issue, his widow becomes his heir. When there is no widow, his daughter, and in her absence, her son is the rightful heir. In the absence of a daughter's son, the parents, and in their absence, the uterine brothers, and in their absence, the nephews are the heirs. This is the rule of succession laid down in the Śâstra. According to it a sister-in-law cannot be the heir while there is a nephew alive. The sale effected by the widow without her son's consent cannot be considered legal.—*Ahmedabad, January* 31*st*, 1852.

AUTHORITIES.—(1) Vyav. May. p. 134, l 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p 2, l. 1 (*see* Chap I Sec. 2, Q 4)

Q. 5.—A man died. His surviving relatives are a nephew and a son of another nephew. Which of these is his heir?

A.—The nephew is the heir. The son of a nephew cannot be considered the heir while a nephew is alive.

Ahmednuggur, July 8th, 1856.

AUTHORITIES.—(1) Vyav May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4).

Q. 6.—If a deceased person has left a sister and some nephews, which of them will be his heir?

A.—If the deceased and his nephews were undivided in interest, the nephews will be his heirs; but if they were separated, the sister will be his heir.

Ahmednuggur, December 31*st*, 1846.

AUTHORITY.—*Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS —The nephews (brother's sons) are the heirs in every case. They take *per stirpes* according to the Subodhini, but this is met by Bâlambhaṭṭa with the argument that, as a brother has not a vested interest like a son, he cannot transmit it, and therefore the brothers'

sons take *per capita*. (*See* 1 Macn. 27.) The discussion brings out the difference between the successive possibilities of ownership, each excluded by the preceding one, in "obstructed" as compared with the successive outgrowths of actual co-ownership in unobstructed "dáya," (= participation) commonly rendered "inheritance." *See* above, Introd. pp. 60, 63, 67.

2. Where there is no reunion, all co-sharers participate according to their relationship in the lapsed share of a deceased co-sharer in each of the several parts of the original estate in which his share was settled by agreement so as to constitute a partition. (*a*)

Q. 7.—A man separated from the rest of the members of his family. Afterwards he died. His sisters claim the right of inheritance. The grandmother and the nephew of the deceased have objected to their claim. The question is, which of these three relatives is the heir of the deceased?

A.—If the deceased was a separated member of his family, and if he had no son, his nephew is his heir. When there is no nephew, the mother of the deceased's father, and in her absence, his sisters are his heirs.

Surat, October 11th, 1845.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) Manu IX. 217:—

"The mother also being dead, the paternal grandfather and grandmother take the heritage on failure of brothers and nephews."

Q. 8.—Who will be the heir of a deceased person, his kept woman or his brother's son?

A.—The nephew is the heir, but the kept woman will be entitled to a maintenance.—*Dharwar,* 1846.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 57, p. 1, l 5 (*see* Chap II. Sec. 3, Q. 3).

REMARK.—See *Vrindavandas* v. *Yemunabai.* (*b*)

Q. 9.—There were two brothers, Uderâm and Hûma. The latter had kept a woman, by whom he had a son. After his

(*a*) *Amrit Rav Vinayak* v. *Abaji Haibat,* Bom. H. C. P. J. F. for 1878, p. 293.

(*b*) 12 Bom. H. C. R. 229.

death Uderâm protected the son and got him married. The woman and Uderâm died. Can the illegitimate son of Hûma be the heir of the deceased Uderâm ?

A.—He may be considered the heir, if, according to the custom of the Mârwâḍîs, there is no objection to his succession; but if it is contrary to the custom, he will be entitled to whatever he may have received from his uncle as a mark of his affection, and if the son is a minor, the Sirkâr should make a provision for his protection till he attains to the proper age, and the rest of the property may be taken by Government.—*Ahmednuggur, March 8th,* 1847.

AUTHORITY.—Vyav. May. p 7, l. 1:—

"Thus Bṛihaspati says:—'Let all rules of each country, caste and family, that have been divided and preserved from ancient times, be still observed in the same way, otherwise the subjects will rise in rebellion.'" (Borradaile, p. 7; Stokes, H. L. B. 15. *Compare* also Manu VIII. 41.)

Q. 10.—A village was granted on hereditary Inâm tenure to a younger brother. The grantee subsequently died without issue, but there are sons of his brother. Can the Sanad, declaring the grant to be "Vaṁśaparamparâ," be construed to extend the benefit of the grant to the nephews of the grantee ?

A.—The grantee was a Brâhman. By reason of the grant he became proprietor of the village. After his death, the surviving members of his family have a right to his property. A king is prohibited from taking any property of a Brâhman, even though he may have at his death left it without an heir. If the deceased has left no other heir than his nephews, they will be his heirs entitled to the village.

Sadr Adálat, September 8th, 1837.

AUTHORITIES.—(1*) Amarakośa, Bk. II. Chap. 7, 1:—Amarasiṁha here enumerates *vaṁśa* amongst the words for lineage. *See* also Wilson's Sanskrit Dictionary.

(2*) Vîramitrodaya, f. 204, p. 1, l. 1:—"A son and a daughter both continue the race of the father."

REMARKS.—1. By the term "Vaṁśa-paramparâ" are understood "male" and "female" descendants in the direct line, but never brothers or brothers' sons. Consequently the nephews, in the case stated, have no title to the property.

See above, Section 6A, Q. 8, for the case of a widow succeeding to separate property, such as an inâm would generally be. See also Bk. II. Introd.

2. A grant to a man and his heirs does not constitute an estate inalienable. (a)

*SECTION 14.—I. GOTRAJA SAPINḌAS.

A.—HEIRS MENTIONED IN THE MITÂKSHARÂ AND VYAVAHÂRA MAYÛKHA.

1. *A.*—FULL SISTER. (b)

Q. 1.—A man died. He possessed certain property acquired by himself and his ancestors. The question is, whether the sister or the sister-in-law of the deceased is the heir?

A.—The sister, and not the sister-in-law, is the heir.

Surat, August 15th, 1858.

AUTHORITIES.—(1) Vyav. May. p. 140, l. 1:—

"In default of her (the grandmother) comes the sister; under this text of Manu: To the nearest Sapiṇḍa (male or female) after him in

(a) *Krishna Ráo Ganesh* v. *Rang Ráo et al*, 4 Bom. H. C. R. 1 A. C. J.; *Bahirji Tannaji* v. *Oodatsing et al*, R. A. No. 47 of 1871 (Bom. H. C. P. J. F. 1872, No. 33). As to grants, see Bk. II. Introd. 5 A 2.

(b) The Smṛiti Chandrikâ, Chap. XII. para. 35, admits the sister as successor to a reunited parcener on failure of children, wife, and father, though it excludes her as heir to a divided brother. Chap. XI. Sec. 5. See *Icharam* v. *Purmanund*, 2 Borr. R. 515. A sister succeeds to a brother, after the latter's widow has entered into a Natra marriage with another, under Act XV. of 1856, in the absence of custom excluding her from succeeding to Bhâgadâri Vatan, *Bhaiji Girdhur et al* v. *Bai Khusal*, S. A. No. 334 of 1872, Bom. H. C. P. J. F. for 1873, No. 63. See the next Section. *Biru valad Sadu* v. *Khandu valad Mari*, I. L. R. 4 Bom. 214.

Under the earlier Roman law a whole group of agnates standing equally near to the deceased succeeded together without distinction

* For references to the Introductory Remarks to this Section in the earlier editions, see now Introd. to Bk. I. p. 114 ss.

the third degree, the inheritance belongs." (*a*) (Borradaile, p. 106; Stokes, H. L. B. 89.)

(2) Mit. Vyav. f. 69, p. 1, l. 16; (3) f. 45, p. 1, l. 5; (4) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. Hindû sisters inherit equally from their deceased brother; the unendowed has not a preference over the one provided for, as in the case of daughters inheriting from a mother. (*b*)

2. The sister (by adoption) of an adopted son succeeds before other kinsmen (deceased's uncle's widow). (*c*) A sister succeeds before remote kinsmen (males). (*d*)

A full sister is preferred to a paternal first cousin. (*e*)

In the case of *Sakharam* v. *Sitabai*, (*f*) one of two separated half-brothers having died was succeeded by his mother. On her death a contest as to the inheritance arose between her daughter and her step-son, which was disposed of in favour of the former. The judgment places her precedence (*g*) on the succession to reunited brethren which is referred to in Vyav. May. Chap. IV. Sec. IX. p 25, and *Vinayak Anandrav* v. *Lakshmibai* is relied on as having not only on the authority of the Mayûkha but also on Nanda Paṇḍita's and Nilakaṇ-

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of sex. The females being always dependent, no inconvenience arose from their joint ownership. When the Lex Voconia afterwards prohibited legacies to females they began to be thought unfit members of the heritable group of agnates, but an exception was maintained in favour of full sisters. It would seem that an analogous exception in favour of full sisters, in virtue of their consanguinity, may, at one stage of progress and in some provinces, have prevailed under the Hindu law. Str H. L.; *see* Q. 4, Rem.

(*a*) *See* page 130 for Bâlambhaṭṭa's doctrine The poverty qualification does not give a preferential claim amongst sisters as it does amongst daughters. See *Bhagathibai* v. *Baya*, I. L R. 5 Bom. at p. 268.

(*b*) *Bhagirthibai* v. *Baya*, I. L. R. 5 Bom. 264.

(*c*) *Mahantapa* v. *Nilgangowa*, B. H. C. P. J. F. for 1870, p. 390.

(*d*) *Dhondu* v. *Ganga*, I. L. R. 3 Bom. 369.

(*e*) *Lakshmibai* v. *Dada Nanaji*, I. L. R. 4 Bom. 210.

(*f*) S. A. 34 of 1875, in which judgment was delivered on 3rd March 1879 (P. J. 335 of 1879; S. C. I. L. R. 3 Bom. 353.

(*g*) Vyav. May. Chap. IV. Sec. 8, p. 16, 20, (supported by a passage of Bṛihaspati, cited Col. Dig. Bk. 5, T. 407).

tha's interpretations of the Mitâksharâ (making brethren include sisters) settled the law for the Bombay Presidency generally. Any divergence from the rule must, it is said, be supported by "an ancient and invariable usage to the contrary........ alleged and proved by him who uses it." The case was dealt with entirely on a consideration of who was heir to the pre-deceased son, not of who was heir to his mother. The mother, Mathurabai, it is laid down, "on succeeding on the death of her son Nana to his moiety of the immoveable property, took only such a limited estate in it as a Hindû widow takes in the immoveable property of her husband dying without leaving male issue."

There can be no doubt as to the sister's succession before the half-brother according to the Mayûkha and to Nanda Paṇḍita's and Bâlambhatta's construction of the Mitâksharâ But the same authorities give the deceased son's estate to his mother, so that for the further succession we should, according to them, seek her heirs. not the son's heirs. (a) The sister of the deceased Nana was entitled to the property, according to the native authorities, in succession to her mother, not to her brother. With the cases relied on of *Narsappa* v. *Sakharam* and *Bachiraja* v. *Venkatapadda* should be compared those cited in *Vijiyarangam's* case.

3. The property inherited by a sister from her brother is Strîdhana, passing on her death, in the first place, to her daughters. (b)

Q. 2.—A man died. He had no wife or children, and

(a) See above, p. 328. The same view is taken by the Vivâda Chint., by Jagannâtha, the author of Coleb. Dig., and in fact by all the authorities except the Dâya Bhâga and the works which have since adopted its forced construction of a single text applicable only to a widow succeeding to her husband's property. According to both the Mit. and the Mayûkha, property which a woman acquires by inheritance is strîdhana (*supra*, pp. 149, 270, 272, 298, 327), heritable by her heirs. The 'limited estate' which a widow takes from her deceased husband may be identical in kind with that which a mother inherits from her son, but the character of the estate must in each case now be determined by the decisions rather than by the doctrines of the principal native authorities recognized in Bombay. See above, pp. 150, 334.

(b) *Bhâskar Trimbak* v *Mahadeo*, 6 Bom. H. C. R. 1 O. C. J; *Vinâyak Anandrâo et al* v. *Lakshmibai et al*, 1 Bom. H. C. R. 117, and 9 M. I. A. 516.

there is no member of his family except a sister. She has two daughters; one of them is a widow, and the other is a married woman and has a male child. The question is, whether the son should be considered the heir of his mother's maternal uncle, in preference to the claims of his mother and grandmother?

A.—In the absence of a near relation, a distant relation becomes heir of a deceased person. The sister is a gotraja relation and must be preferred to all others mentioned in the question.—*Ahmedabad, May 28th,* 1847.

AUTHORITIES.—(1) Vyav. May p. 140, l. 1 (*see* Chap II. Sec 14 I. A. 1, Q. 1); (2) p. 134, l. 4 (*see* Auth. 3); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

Q. 3.—A man had two wives. The elder of them had a daughter. The daughter has three sons. The second, or the younger wife, had a son and two daughters. One of the last mentioned daughters died when her mother was alive. She has left a son. The second, or the younger wife, and her son died. Her surviving daughter has applied for a certificate of heirship of the deceased mother and brother. The deceased daughter's son, and the sons of the daughter of the elder wife, have brought forward objections to their claim. It must be observed that the uterine brother and sister of the applicant died when their mother was alive, and that the elder wife and her daughter died when the younger wife was alive. The question is, which of the survivors is the heir of the deceased younger wife?

A.—When a man dies, his widow, daughter, and other near relations become his heirs; and in the absence of these, the uterine sister; and failing her and her son, the daughter is the heir of the deceased younger wife. In the absence of the daughter, the daughter's son will inherit the

property of his maternal grandmother. The applicant (a) is therefore the heir of the two deceased persons.

Surat, September 28th, 1857.

AUTHORITIES.—(1) Vyav. May. p 140, l. 1 (*see* Chap. II. Sec. 14 I. A 1, Q. 1); (2) p. 138, l. 4; (3) p. 137, l. 5; (4) p 137, l. 8; (5) Mit. Vyav f. 48, p. 1, l 14:—

"The daughters share the residue of their mother's property after payment of her debts." (Colebrooke, Mit. p. 266; Stokes, H.L.B. 383.)

Q. 4.—A man died. He has left neither a wife nor children. His sister and her son claim to be his heirs. The question is which of them should be considered the heir?

A.—If there are none of the man's following relations, viz:—

A son,	A daughter's son,	A uterine brother,
A wife,	The mother,	A half-brother, and
A daughter,	The father,	A brother's son,

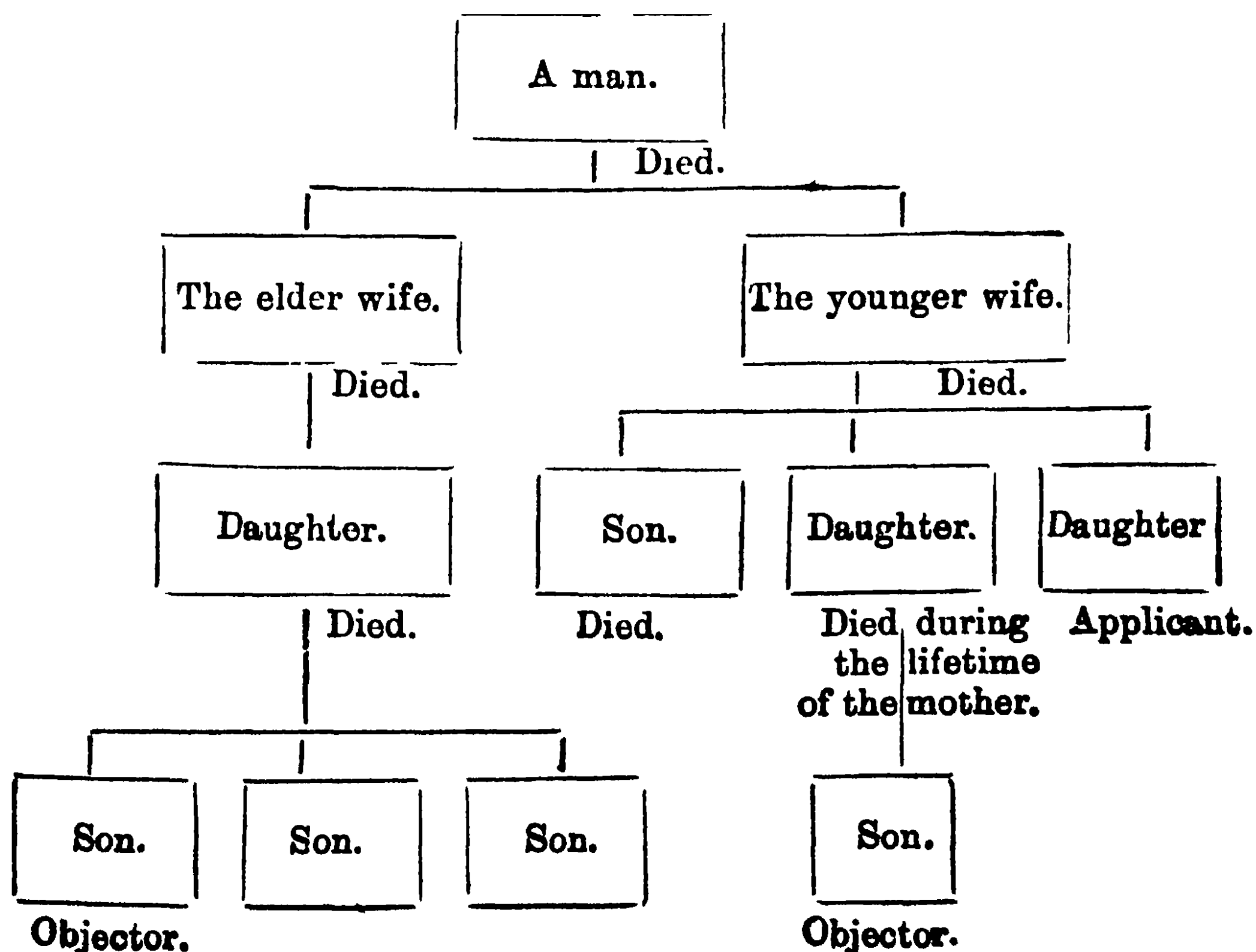
a gotraja relation becomes heir; and among the gotraja

(a) The following genealogical table will illustrate the answer:—

A man.
Died.

The elder wife. Died.
The younger wife. Died.

Daughter. Died. (of the elder wife)
Son. Son. Son. — Objector.

Son. Died. (of the younger wife)
Daughter. Died during the lifetime of the mother.
Son. — Objector.
Daughter — Applicant.

relations, the father's mother is to be preferred to all others. The next gotraja and heir is the sister, and then the sister's son.—*Ahmedabad, April 20th,* 1847.

AUTHORITIES.—(1) Vyav. May p. 134, l. 4 (*see* Auth 3); (2) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A 1, Q. 1); (3*) Mit. Vyav. f. 55, p. 2, l 1 (*see* Chap I. Sec. 2, Q. 4).

REMARKS.—In the case of *Sakharam* v. *Sitaram,* (*a*) it was held that a full-sister succeeds before a half-brother, both according to the Vyav. Mayûkha (Chap. IV. Sec. VIII paras. 16—20) and according to the Mitâksharâ (Chap. II. Sec. IV. paras 1, 6, and notes) construed according to Nanda Paṇḍita and Bâlambhaṭṭa so as to make "brothers" include sisters. (*b*) It is strange that the Mitâksharâ, if it intended "brothers" to include "sisters," did not say so; but amongst reunited brethren at any rate it is clear from Mit Chap. II. Sec. IX. paras. 12, 13, that Vijñâneśvara recognized full sisters as having a right with full brothers preferable to that of half-brothers as heirs to a deceased member.

Regarding the sister's son, *see* Introductory Note to Chap. II. Sec 15, Cl. 4.

Q. 5.—Who is entitled to inherit from a deceased person, his sister or the sister's son ?

A.—If there is a sister, she succeeds first; a sister's son does so after her.—*Ahmednuggur, November 1st,* 1847.

AUTHORITIES —(1) Vyav. May. p 140, l. 1 (*see* Chap. II. Sec. 14 I A. 1, Q 1); (2) p. 134, l. 4 (*see* Auth. 6); (3) p. 141, l. 7; (4) p. 181, l. 5; (5) p. 142, l. 8; (6*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q 4).

REMARK —*See* Introduction, pp 115, 134.

Q. 6.—A deceased man has a sister, who has two sons. Who will be the heir ?

A.—If a nearer relation cannot be found, a sister will be the heir, and in the absence of a sister her sons will be the heirs.—*Ahmednuggur, January 6th,* 1846.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

(*a*) I. L. R. 3 Bom. 353.

(*b*) See *Thakoorain Sahiba* v. *Mohun Lall,* 11 M. I. A. at p. 402.

Q. 7.—A woman's husband died, and she married another man. On his death, she lived with her son by her first husband, and they both acquired property. The son afterwards died without issue. His sister lives with her husband in his house. Is the sister or the mother the heir of the deceased?

A.—The mother does not belong to the family of her first husband. The sister alone is the heir of the deceased.

Sholapoor, August 27th, 1846.

AUTHORITY.—*Mit Vyav. f. 55, p. 2, l 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—The mother would lose her right to inherit from her first husband but not, according to the cases, from the son (*a*) under Act XV. 1856, Sec. 2. (*See* Sec 9, Q. 9).

I. *A.* 2.—HALF-SISTER.

Q. 1.—Is a step-mother or a half-sister the heir of a deceased man?

A.—The right of a full mother is recognized by the Śâstra, but that of a step-mother is nowhere defined. The right of a brother is likewise recognized by the Śâstra, and it is stated that on failure of a brother, a half-brother has the right of inheritance. The right of a sister is also admitted by the Śâstra; and by inference, a half-sister may be considered an heir. A half-sister is born in the gotra, and she will therefore have a better right than the step-mother to inherit the deceased's property.

Sadr Adálat, June 10th, 1844.

AUTHORITIES.—(1) Vyav. May p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (2) p 142, l. 6; (3) Nirṇayasindhu III. f. 98, l. 26.

REMARKS.—1. The Śâstri appears to have followed the Mayûkha, which places the sister immediately after the paternal grandmother; at the same time he must have understood the term 'bhaginî,' 'sister,' to include the sister both of the full and of the half-blood. This interpretation is from a philological point of view admissible.

(*a*) See *Okhorah Soot* v. *Bheden Barianee,* 10 C. W. R. 35 C. R.; 11 C. W. R. 82 C. R.

According to the Mayûkha's interpretation of the term Gotraja as *born in the same family as the deceased,* (a) the step-mother could not inherit before the half-sister; she being necessarily descended from a different stock, but that Nîlakaṇṭha does not confine Gotraja to this sense is plain from his calling the grandmother the first of the gotrajas in the order of succession. Custom, however, seems to have given to natural birth in the family of the propositus precedence over the second birth by marriage into the same family, though the latter also is a source of heritable right. *See* below, I. A, 4, Q. 9. In *Kesserbai* v. *Valab Ravji,* (b) even a half-sister is preferred to a step-mother and a paternal uncle's widow.

The marginal note in *Sreenarain Rai* v. *Bhya Jha,* (c) to the effect that in Mithila a half-sister ranks as a sister, goes much beyond the Vyavasthâ in the text. All that the Śâstri says is that if custom assigns the half-sister this rank it will not be inadmissible according to the method of interpretation adopted by the Mithila law writers. In this he refers *inter alia* to Vâchaspati in the Vivâda Chintâmani (Translation, p. 240), who construes the text of Bṛihaspati (Coleb. Dig Bk. V. T 85) so as to make mâtarah include step-mothers. *See* below, Rem. 2. As between step-mother and half-sister this mode of interpretation would give precedence to the former. The Vyav. Mayûkha, Ch IV Sec. VIII. p. 16, 20, refuses recognition to half-blood except in virtue of descent from a common ancestor; and except in the case of a sister makes no provision for representation of a collateral line by a daughter. See *supra,* p. 130,131. The passages cited below, Sec. 15 B. II. (2), Q 1, are those at Stokes, H. L. B. 86, pl. 10, and p. 89, pl. 19, which relate only to the succession of a daughter to her father and of a sister to her brother. Nîlakaṇṭha assigns no place to the brother's daughter or to the grandfather's daughter (paternal aunt). Her son is a Bandhu, *infra,* Sec. 15 B. I. (1). The Śâstri at Sec. 14 I. B. *b* 2, Q. 3 *infra,* refers to the passages, Stokes, H. L. B. p 85, pl. 7, to Bṛihaspati, quoted *ibid,* p. 89 pl. 19, and *ibid,* p. 93 pl. 5. See *supra,* p 342, Q. 4. Those passages do not support a doctrine of female representation. If half-sisters are brought in by analogy that can only be by a mode of interpretation which concurrently makes step-mothers, mothers, as in Vyav. Mayûkha Chap. IV. Sec. 4, pl. 19. Still however the half-sister is a gotraja-sapiṇḍa according to Vyav. May. 1, Ch. IV. Sec. VIII. p. 19, as said by the Śâstri.

(a) *See* Introduction, p. 131 *supra.*

(b) I. L. R. 4 Bom. 188. Herein may be found a support for the doctrine propounded by Sir M. Westropp, C. J., in *Tuljaram's* case, *supra,* p. 336.

(c) 2 Calc. S. D. A. R. 28.

2. Regarding the right of the step-mother to inherit (*a*) as recognized in the case just discussed, Sir T. Strange, H. L. 144, states that "step-mothers, where they exist, are excluded;" against this opinion it may be remarked that Bâlambhaṭṭa asserts that they inherit immediately after mothers, as in his opinion the term mâtâ stands for jananî, "*genitrix*," and sâpatnamâtâ "*noverca*." Most likely his opinion is based on a verse attributed to Manu, (*b*) which declares that all the father's wives are mothers, as well as on Manu IX. 183:—"If among all the wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue;" but it is inadmissible, as the arguments brought forward by Vijñâneśvara in the discussion on the claims of the mother do not apply to the step-mother, and this author consequently cannot have included step-mother by the term '*mother*.' (*c*) Nevertheless it is not probable that either Vijñâneśvara or Nîlakaṇṭha intended to exclude step-mothers entirely from inheriting. The high reverence which, according to Manu, is to be paid to step-mothers, as well as the fact that step-sons inherit from their step-mothers, may furnish an *à priori* argument, that Hindû lawyers who admit women, though not authorised by special texts, to inherit, would not object to the step-mother's claims, and in fact if the interpretations of the terms "Sapiṇḍa" and "Gotraja" given above in the Introduction to Bk. I. pp. 128, 131, hold good, then, according to the doctrines of both the Mitâksharâ and the Mayûkha, step-mothers must be allowed to inherit. The Mayûkha adopts the Mitâksharâ doctrine of Sapiṇḍa relationship. *See* p. 120 above.

(*a*) The grandmother takes before the step-mother, Macn. Cons. H. L. 64. In Bengal the latter seems excluded. *See* 1 Calc. S. D. A. R 37, (*Bishenpirea Munee* v. *Ranee Soogunda*); 2 Macn. Prin. and Prec. 62; *Lala Joti Lall* v. *Musst. Durani Kower*, Beng. L. R. 67, F. B. R, rules similarly under the Mitâksharâ. In Madras a male gotraja sapiṇḍa, grandson of the great-grandfather of the propositus, inherits before either his half-sister or his step-mother, *Kumaravêlu* v. *Virana Goundan*, I. L. R. 5 Mad. 29. Reference is made to *Kutti Ammal* v. *Rada Kristna Ayyana*, 8 M. H. C. R. 88, to show that even a full-sister is postponed to a gotraja sapiṇḍa, which rank she has not, according to the Smṛiti Chandrikâ, Chap. XI. Sec. 5. *See* above, p. 129 note (*a*), p. 130 note (*c*). In Madras, as in Bengal, a step-mother is postponed to a paternal grandmother, *Muttamál* v. *Vengalakshmi Ammál*, I. L. R. 5 Mad. 32. *See* above, p. 113.

(*b*) Nirṇayasindhu, III. Pûrvârdha, f. 6, p. 1, l. 12.

(*c*) *See* Mit. Chap. II. Secs. 3, 32, 51; and Colebrooke's note to 1 Calc. S. D. A. R. 37 (*Bishenpirea Munee* v. *Ranee Soogunda*).

According to the Mitâksharâ a step-mother would be by her marriage a "Gotraja" relation of her step-son, and for the same reason also a "Sapiṇḍa" relation. Consequently she would take inheritance amongst the Gotraja-Sapiṇḍa relations. According to the opinion of the learned Śâstri who assisted in the original compilation of this Digest, she ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts.

According to the Mayûkha the step-mother would not be Gotraja, in the sense of *born* in the same family as the step-son, but certainly a Sapiṇḍa relation. The Vyavahâra Mayûkha, Chap. IV. Sec. 4, p. 19, assigns to step-mothers and step-grandmothers an equal share with mothers and grandmothers on partition amongst their husbands' descendants. The passage of Vyâsa, on which this rests, and a corresponding text of Bṛihaspati, are discussed in Colebrooke's Digest, Bk. V. T 84, 85, Comm. The limitations proposed by Jîmûtavâhana and Raghunandana are there rejected, and the declaration of Bṛihaspati that *janani* and *mâtaraḥ* are entitled to equal shares is taken as showing that *mâtaraḥ* means step-mothers. The Dâya Krama Saugraha also (Chap VII pl. 7, 8) refers the rights of the step-mother, admitted by the Mithila School, to a similar interpretation. If Nîlakaṇṭha can be supposed, in accepting its consequence, to have adopted this construction of the texts, his doctrine would not differ materially from that of the Mitâksharâ, as above stated. (*a*) The alternative seems to be that in omitting step-mothers from the Gotrajas, whose claims he discusses he intends to exclude them. According to this view, they would rank only as Sapiṇḍas, and consequently inherit like other Sapiṇḍas, sprung from a different family after the Bandhûs (*see* Section 15). The step-mother's right of maintenance, it was said, is not that of a parent such as can be dealt with by an order under Section 10 of Act XX of 1864 (*b*)

(*a*) In answer to Q. No. 1832 MSS, the Śâstri at Ahmedabad said that step-sons were bound to support their step-mother in virtue of Manu's text, commanding children to maintain aged parents. *See* also next section, Q. 2. A step-son succeeds to the Strîdhana of his stepmother, *Teencowree Chatterjee* v. *Dinanath Banerjee et al*, 3 Calc. W. R. 49. A step-mother's heritable right is recognized in the answer to Q. 3 in Chap. IV. B, Sec. 6 II. B. The first and last of these cases being from Ahmedabad seem to show how the law is understood in Gujarâth.

(*b*) *Lakshmibai* v. *Vishvanath Narayan*, S. A. No. 352 of 1875 (Bom. H. C. P. J. F. for 1876, p. 23).

In the Vyav. May. Chap. IV. Sec. 4, p. 19, it is said that the step-mother is entitled to a share on partition. This is the rule of the Benares School, though the Vîramitrodaya contends (Transl. p. 79) that mother, being used as strictly correlative to "sons," the sons dividing, the step-mother cannot, under the text of Yâjnavalkya, take a 'like' share, but is entitled only to a maintenance, and the Śâstris, at 2 Macn. 63, say that 'mâtâ' (=mother) in the Mitâksharâ &c. includes step-mother, whose right to a share the Vîramitrodaya (Tr. p. 79) admits to be recognized though erroneously by the Mit Chap. I. Sec. 7, para 1, on a partition by sons after their father's death. But the position and the right of step-mothers to inherit at all are questioned by Macn. 2 H L. 64, note.

I. *A*. 3.—THE PATERNAL UNCLE.

Q. 1.—A man died. His uncle is absent in a distant Native State. The aunt has applied for a certificate of heirship. Should it be granted to her?

A.—The aunt has no right to be the heir of the deceased, because her husband is alive.—*Poona, June 30th*, 1855.

AUTHORITIES —(1) Vyav. May. f. 134, l. 4 (*see* Authority 3); (2) p. 140, l. 1 (*see* Chap II. Sec. 14 I A. 1, Q. 1); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap I. Sec. 2, Q. 4); (4*) f. 58, p. 2, l. 13:—

"On failure of the paternal grandmother, the (Gotraja) kinsmen sprung from the same family with the deceased, and (Sapiṇḍa) connected by funeral oblations, namely, the paternal grandfather and the rest, inherit the estate For kinsmen sprung from a different family, but connected by funeral oblations, are indicated by the term cognate (Bandhû). Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons. On failure of the paternal grandfather's line, the paternal great-grandmother, the paternal great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations." (*a*) (Colebrooke, Mit. p. 350; Stokes, H. L. B. 446-7).

Q. 2.—The paternal uncle of a deceased person claims his

(*a*) According to the Sanscrit text, the words "to the seventh degree" ought to be added. As to the translation, see *Lulloobhoy* v *Cassibai*, L. R. 7 I. A. at p. 235; above, p. 2 (*g*).

property. The deceased's wife wishes to marry another husband, and has consequently no objection to the uncle's application. The deceased's father has left a "Pâṭ" wife who stands in the relation of a step-mother to the deceased. Who will be the heir?

A.—So much of the property of the deceased as will suffice for the maintenance of the mother should be given to her, and the rest to the applicant.

Dharwar, August 30th, 1846.

AUTHORITY.—*Mit. Vyav. f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 2, Q 1).

REMARKS.—1. Regarding the legalization of Pâṭ marriages, *see* Chap. II. Sec. 6 B.

2. Regarding the right of step-mothers to inherit, *see* Chap. II. Sec. 14 I. A. 2, Q. 1; above, p. 471.

I. *A.* 4.—FATHER'S BROTHER'S SON.

Q. 1.—Will a Brâhman's illegitimate son, or his cousin who has declared himself separate, be his heir?

A.—The cousin is the legal heir. The illegitimate son will be entitled to whatever he may have received from his father, as a mark of his affection, or as a reward for service.

Ahmednuggur, February 27th, 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap I. Sec. 2, Q. 4); (2) f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q 1); (3*) f. 58, p. 2, l. 13 (*see* Chap. II Sec. 14 I. A. 3, Q. 1); (4) Vyav. May. p. 98, l. 6; (5) p. 236, l. 6; (6) Manu IX. 155. (*a*)

Q. 2.—Who will be the heir of a deceased Śûdra? his father's brother's son or his sister's son?

A.—The right of the sister's son will be superior to that of the cousin.—*Tanna, April 27th,* 1850.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 4); (2) p. 140, l. 1; (3*) Mit. Vyav. f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1); (4*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

(*a*) As to the grant to the illegitimate son, *see* above, Introd. p. 263.

REMARK.—The father's brother's son inherits, since he is a Gotraja Sapiṇḍa, whilst the sister's son is only a Sapiṇḍa. The Śâstri has taken "brothers and their sons," in Vyav. May. Chap. IV. Sec. 8, pl. 1, as including "sisters and their sons." *See* Bâlambhaṭṭa cited in Introduction, p. 130.

Q. 3.—There were four cousins who lived separate from each other. One of them died, leaving a widow, and another without issue or widow. The question is, who will be the heir of the latter? whether the two cousins, or they and the widow? If the widow is not to be counted an heir, give reasons for her exclusion.

A.—The two cousins must be considered the heirs of the deceased. The widow must be excluded, because she has no son. Had her husband been alive at the time of the death of the cousin, he would have been counted an heir, and he having become an heir, in this way would have been able to transmit his right to his widow.

Dharwar, April 10*th*, 1856.

AUTHORITIES.—(1) Vyav. May p 134, l. 4 (*see* Auth. 4); (2) p. 130, l. 5; (3*) Mit. Vyav. f. 58, p 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1); (4*) f. 55, p 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—Regarding the reason of the widow's exclusion, *see* Introduction, p. 132.

Q. 4.—A man died. There are sons of his maternal and paternal uncles. Which of these is the heir of the deceased?

A.—So long as there is a son of the paternal uncle, the son of the maternal uncle cannot be his heir. The son of his paternal uncle is his heir.—*Broach, August* 21*st*, 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. 1. Sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1).

Q. 5.—A deceased person has left a cousin, some daughters, their sons, and a son of a cousin twice removed. The

daughters and their sons state that they have no objection to the cousin realizing the debt due to the deceased. Which of these relations will be the legal heir of the deceased?

A.—If the daughters and their sons resign their claims to the property, the cousin and the son of another cousin twice removed will be the heirs.—*Sholapoor, January 25th,* 1856.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 4); (2) p. 138, l. 4; (3*) Mit. Vyav f. 58, p. 2, l 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1); (4*) f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—According to Authority 3, the cousin alone will be the heir, in case the daughter and her sons refuse the inheritance

Q 6.—A man, who had already separated from his kinsman, died. There are two cousins who have separated from the deceased, the son of a separated cousin and the daughter of a sister. The question is, which of these is the heir?

A.—The order of heirs laid down in the Śâstra does not mention the daughter of a sister. The nearest kinsmen therefore are the two cousins, and they are the heirs of the deceased.—*Surat, November 24th,* 1855.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec 2, Q. 4); (2*) f 58, p. 2, l. 13 (*see* Chap II Sec. 14 I. A. 3, Q. 1); (3) Manu IX. 187 (*see* Auth. 4); (4*) Vyav. May. p. 110, l. 1 (*see* Chap. II. Sec. 14 I. A 1, Q. 1)

Q. 7.—A Gujar died. There are his cousins and cousin's sons. Which of these are his heirs?

A.—The rule for finding the proper heir is to take the one that is the nearest among the Gotraja and Sapiṇḍa relatives. According to this rule, the cousins appear to be the nearest in degree (and heirs).

Khandesh, October 18th, 1855.

AUTHORITY.—* Mit. Vyav. f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1).

Q. 8.—A man of the Brâhman caste died. The surviving relatives are, a daughter of a daughter, a cousin who has separated, and some second cousins. They have all applied for certificates of heirship, to enable them to succeed to the Inâm property of the deceased. The question is, which of them should be recognized as heir?

A.—If the deceased has left no wife or son, the cousin who separated will become his heir. The second cousins and the grand-daughter are not the heirs.

Tanna, December 18th, 1851.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I A. 3, Q. 1).

REMARK.—A second cousin excludes a third. (*a*)

Q. 9.—A Desâi died. The right of inheritance is claimed by the following persons:—

(1) A sister's son whom the deceased has by his will constituted his sole heir.

(2) Two widowed sisters-in-law of the deceased. They have applied to have their right to heirship recognized, on the ground that the deceased was the uterine brother of their husbands, and that the deceased was not married.

(3) Four cousins and three of his father's cousins. They apply for a certificate of heirship in regard to the Desâi Watan, &c.

The question is, which of these is the heir of the deceased?

A. 1.—A man may give away his moveable and immoveable property when it was acquired by his own industry, and when he is not married. When a man possesses immoveable property acquired by his ancestors, he cannot make a gift of it. The son of the deceased Desâi's sister cannot therefore be heir to the whole of his property under the will made in his favour.

(*a*) *Mahabeer Persad et al* v *Ramsurun,* 3 Agra S. D. A. R. 6 A. C.

2. Regarding the Śâstri's decision, that the sister-in-law is not "Sapiṇḍa in the fullest sense of the word," see Introduction, p. 130.

Q. 10.—There were two brothers who had no male issue. The elder of them adopted a son. The younger died, and his widow, having permission from her husband, adopted a son. She gave one-half of the property of her husband to her adopted son, and left the other half for charitable purposes. As her adopted son was young, she appointed an Agent to take care of the property. Subsequently she and her adopted son died. The adopted son of the elder brother has filed a suit for the recovery of the whole property. The Agent who represents the family from which the adopted son was selected, has raised objections. The question is, who should be considered entitled to the property?

A.—The portion set aside by the woman for charitable purposes could not have been claimed even by the deceased adopted son. It should therefore be applied to the intended purposes by the Agent, under the superintendence of the adopted son of the elder brother. The portion allotted to the deceased adopted son of the widow should be given to the adopted son of the elder brother.

Poona, January 23rd, 1857.

AUTHORITIES.—(1*) Mit Vyav f. 58, p. 2, l 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1); (2) Vyav. May. p. 127, l. 6; (3) p. 198, l. 2:—

Kâtyâyana:—"What a man has promised in health or sickness for a religious purpose, must be given, and if he die without giving it, his son shall doubtless be compelled to deliver it." (Borradaile, p. 169; Stokes, H. L. B. 136)

REMARK.—*See* above, Sec. 2, Q. 3 and 4; Coleb Dig. Bk. II. Chap. IV. Sec. 2, T. 45, 46; Bk. V. T. 111; above, pp. 206, 300.

I. *A.* 5.—PATERNAL GRANDFATHER'S BROTHER'S SON.

Q. 1.—A man died. There are a daughter of his uterine sister and a grand-uncle's son. Which of these is the heir of the deceased?

A.—The grand-uncle's son being a "Sagotra" (Gotraja) relation, the daughter of the sister cannot be his heir.

Surat, April 3rd, 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1); (3) Vyav. May. p. 140, l. 1 (*see* Auth. 4); (4*) Manu IX. 187 (*see* Chap. II. Sec. 14 I. B. *b*. 1, Q, 1).

Q. 2.—Two men died. There is a grand-uncle's son and a son of their father's sister. Which of these is the heir?

A.—The grand-uncle's son is the heir. The son of their father's sister cannot be the heir.—*Broach, July 23rd,* 1849.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (*see* Chap. II. Sec. 14 I. A. 3, Q. 1).

I. *B.*—HEIRS NOT MENTIONED IN THE LAW BOOKS.

a.—MALES.

1.—BROTHER'S GRANDSON.

Q. 1.—A deceased man has left three sons of his first cousin. Which of these is the heir?

A.—If any one of these cousin's sons was united in interests with the deceased, he will be the heir; but if all are separate, all are equal heirs.—*Dharwar, May 17th,* 1853.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Introd. p. 118.

Q. 2.—Who will be the heir to a deceased man when there are his brother's grandson and daughter's grandson?

A.—The brother's grandson is the heir.

Ahmednuggur, December 13th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Introd. p. 133, 137, and Introductory Remarks to Sec. 15, Clause 4; *Brojo Kishore Mitter* v. *Radha Govind Dutt et al.*(a)

I. *B. a.* 2.—PATERNAL UNCLE'S GRANDSON.

Q. 1.—Can a man's paternal uncle's grandson be his heir after his death?

A.—The deceased has left a sister, and a son of a first cousin. Of these the latter is his heir.—*Dharwar*, 1845.

AUTHORITY.—*Mit. Vyav f. 55, p. 2, l 1 (see Chap. I Sec. 2, Q. 4).

REMARKS.—1. *See* Introd. p. 128; and Introductory Remarks to Sec. 15, Clause 4.

2. Great-grandsons, through different sons of the same man, are Gotraja Sapindas.(b)

I. *B. b.*—FEMALES.

1.—DAUGHTER-IN-LAW.

Q. 1.—The father of a widow's deceased husband died. He had certain rights in land and other property. There is no male member of the family who has any claim to the property. Can the widowed daughter-in-law of the deceased claim the property?

A.—There being no better heir than the daughter-in-law, and she being the nearest relation of the deceased, she is the legal heir.—*Surat, December* 15*th*, 1853.

AUTHORITIES.—(1) Manu IX. 187:—

" To the nearest Sapinda, *male or female*, after him in the third degree, the inheritance next belongs; then, on failure of Sapiṇḍas and of their issue, the Samânodaka or distant kinsman, shall be the heir; or the spiritual preceptor, or the pupil or the fellow-student of the deceased."

(a) 3 B. L R. 435 A. C., 12 C. W. R. 339.

(b) *Brojo Kishore Mitter* v. *Radha Gobind Dutt et al, supra.*

(2) Nirṇayasindhu III. p. 95, l. 17:—

It is stated in the Smṛiti Sangraha:—"The son, the son's son, the son's son's son, and the daughter's son, the wife (*patnî*), the brother, the brother's son, the father, the mother, and the daughter-in-law,(*a*) the sister, the sister's son, the Sapiṇḍas and Sodakas; in default of the first-mentioned, the latter-mentioned persons are said to present the funeral oblation."

REMARK.—1. *See* Introd. p 132, and above, Bk. I. Ch. II. Sec. 8, Q. 2.

2. The second passage seems to be intended as an explanation of the term "Sapiṇḍa," which the Śâstri understood to mean "connected by giving funeral oblations."

3. A daughter precedes a daughter-in-law.(*b*) So does a separated brother, being one of the enumerated heirs.(*c*) So does a brother's son, (*d*) but the widow and daughter-in-law were preferred in a claim advanced by divided distant cousins. (*e*) *See* Chap. II. Sec. 7, Q 10; Chap. IV. B. Sec 6 II. f. A daughter-in-law was preferred in succession to a widow as heir to a first cousin (paternal uncle's son) of the deceased husband. The Court said "the question is which of these two is to be preferred as heir to Sarasvati's (deceased widow's) husband."(*f*)

I. *B*. *b*. 2.—BROTHER'S WIFE.

Q. 1.—In the case of a Brâhman's death, will his sister-in-law or sister's son be his heir?

A.—The sister-in-law is the heir (*g*).

Tanna, February 28th, 1852.

(*a*) This is cited in the Śrâddha Mayûkha, referred to in Mayûkha, Chap. IV. Sec. 8, p. 29.

(*b*) *Musst. Murachee Koour* v. *Musst. Ootma Koour*, Agra S. R. for 1864, p. 171; 2 Macn. H L 43.

(*c*) *Venkuppa* v. *Holyawa*, S. A. No. 60 of 1873, Bom. H. C. P. J. F. for 1873, No. 101.

(*d*) *Wittul Rughoonath* v *Huribayee*, S. A. No. 41 of 1871, decided 12th June 1871, *ibid.* 1871.

(*e*) *Baee Jetha* v. *Huribhai*, S. A. No. 304 of 1871, Bom. H. C. P. J. F. for 1872, No. 38.

(*f*) *Vithaldás Mánickdás*, v. *Jeshubái*, I. L. R. 4 Bom. 219.

(*g*) *See* Bk. I. Chap. II. Sec. 14 I. A. 1, Q. 4 to 6.

AUTHORITIES.—(1) Vyav. May. p. 140, l 1 (see Auth. 2); (2*) Manu IX. 187 (see Chap. II. Sec. 14 I. B. b. 1, Q. 1)

REMARK.—See Introd. p. 130, 132, and Chap. II. Sec. 11, Q. 6.

Q. 2.—A man died. There are his sister-in-law and a male cousin, who have separated from the deceased. Which of these is the heir?

A.—The sister-in-law, though separate, is nearer, and the preferable heir.—*Khandesh, September 5th*, 1847.

AUTHORITIES.—(1) Vyav May p. 134, l 4 (see Auth 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I. Sec 2, Q 4).

REMARKS —1. See Introd p. 125 ss

2 If the male "cousin" is a brother's son, he inherits, according to Authority 2 (comp Sec. 12), before the sister-in-law.

3. The Śâstri puts the widow next to her husband erroneously in this particular case, on account of the express specification of brother's sons after brothers See Introd. pp. 128, 132.

Q. 3.—Three brothers lived as an undivided family. The eldest of them died leaving a widow, afterwards the second and the youngest died successively. The widow of the eldest has applied for a certificate of heirship. A distant member of the family, four or five times removed from the deceased, has objected to the application. The question is, which of these relations is the heir?

A.—All the brothers died as members of an undivided family. Each surviving brother therefore became heir of the predeceased. The last surviving brother therefore was the heir of the two who died before him. The widow of the eldest brother, being the nearest heir to the deceased, is entitled to inherit the property.

Surat, August 10th, 1853.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p 2, l 1 (see Chap. I. Sec. 2, Q. 4); (2) Manu IX. 187 (see Chap. II. Sec. 14 I. B. b. 1, Q. 1).

REMARK.—See Introd. p 125 ss.

I. *B*. *b*. 3.—PATERNAL UNCLE'S WIDOW.

Q. 1.—A dumb son of a deceased man lived, with his property, under the protection of his sister. He afterwards died, leaving his sister and a paternal uncle's widow. Which of these is his heir?

A.—The aunt, though she may have separated herself from the deceased, is his heir. If the aunt had no existence, the sister, according to the rule laid down in the Mayûkha, would have been the heir, and in her absence other relatives would have succeeded to the property.

Rutnagherry, February 4th, 1852.

AUTHORITIES.—(1) Vyav. May p 134, l. 4 (*see* Auth. 3); (2) Vyav. May p. 140, l. 1 (*see* Chap. II. Sec. 14 I A 1, Q. 1); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I Sec. 2, Q 4)

REMARKS.—1. *See* Introd. pp. 117, 125, and Sec 14 I. A. 1.

2. In the case of *Upendra Mohan Tagore et al* v. *Thanda Dasi et al*,(*a*) it is said that the uncle's widow does not succeed, but this is not the law in Bombay. *See* below, *b* 4.

Q. 2.—If there are a paternal uncle's wife and a maternal uncle of a deceased person, which of them will be his heir?

A.—If the deceased has left no male issue, his heir will be the paternal uncle's wife, and not the maternal uncle.

Ahmednuggur, October 16th, 1846.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I Sec. 2, Q. 4).

REMARK.—*See* Introd. p. 125, and Introductory Remarks to next Section.

Q. 3.—A man died, and there are his father's second cousin and paternal aunt. Which of these will be his heir?

A.—If the father's second cousin had not separated from the deceased, he will be the heir; but if he had, the aunt will be the heir.—*Tanna, June 25th*, 1852.

(*a*) 3 B. L. R. 349 A. C. J.

AUTHORITIES.—(1) Vyav. May. p. 136, l. 4; (2) p. 144, l. 8; (3) p 140, l. 1 (*see* Auth. 5); (4*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (5*) Manu IX. 187 (*see* Chap. II. Sec. 14 I. B. *b*. 1, Q. 1).

REMARK.—*See* Introd. p. 125.

I. *B*. *b*. 4.—PATERNAL UNCLE'S SON'S WIFE.

Q. 1.—A man died. Is his cousin's wife or her daughter-in-law his heir?

A.—The cousin's wife, and not the daughter-in-law, is the heir.—*Ahmednuggur, May 4th*, 1854.

AUTHORITIES.—(1) Vyav. May p. 134, l. 4 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. *See* Introd. p 125

2. The widow of a first cousin of the deceased on the father's side was held to have become by her marriage a Gotraja Sapiṇḍa of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral Gotraja Sapiṇḍas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor,(*a*)

At Allahabad, on the other hand it was held that according to the Mitâksharâ none but females expressly named can inherit, and that the widow of the paternal uncle of a deceased Hindu, not being so named, is not entitled to succeed to his estate in preference to the deceased's father's sister's two sons (*b*) These, however, being but Bandhus, could not come in until the Gotrajas were exhausted. (*c*)

I. *B*. *b*. 5. —THE WIDOW OF A GENTILE WITHIN THE FOURTH DEGREE.

Q. 1.—A man died. A widow of his distant male cousin, four times removed from the deceased, is alive, and the question is, whether she is his heir?

(*a*) *Lallubhai* v. *Cassibai*, I. L. R. 5 Bom. 110, S. C. L. R. 7 I. A. 212.

(*b*) *Gauri Sahai* v. *Rukko*, I. L. R. 3 All. 45.

(*c*) *See* Mit. Chap. II. Sec. 1, para. 2, and *Lallubhai's* case, *supra*.

A.—If there is no nearer relation of the deceased, the widow of a cousin four times removed from the deceased may inherit from him.—*Surat, September 17th*, 1845.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. *See* Introd. p. 125.

2. The widow of a joint cousin succeeds in preference to descendants of a long severed branch. (*a*) The Śâstri said the widow's right was equally good to joint and to separately acquired property of her husband's cousin, but he seems to have grounded his opinion partly, if not wholly, on the widow's having lived in community with the cousin.

3. The widow of a collateral does not, it has been ruled, take an estate in the property of her husband's Gotraja Sapiṇḍa which she can dispose of by will after her death. (*b*)

II. SAMÂNODAKAS.

(GENTILES WITHIN THE THIRTEENTH DEGREE.)

Q. 1.—Should a deceased person have no near relation, can a distant relative inherit his property? and what may be the degree of distance?

A.—In the absence of a near relation, if it can be shown that the party claiming to be the heir and the deceased are descendants of the same ancestor, he will be the heir.

Ahmednuggur, December 24th, 1851.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Chap. I. Sec. 2, Q. 4); (2) p. 140, l. 1 and 6; (3*) Mit. Vyav. f. 58, p 2, l. 15:—

"If there be none such (Sapiṇḍas) the succession devolves on kindred connected by libations of water, and they must be understood

(*a*) *Musst. Bhuganee Daiee et al* v. *Gopaljee*, Agra S. R. for 1862, Part I. p. 306.

(*b*) *Bharmangavda* v. *Rudrapgavda*, I. L R. 4 Bom. 181. *See* Introd. p. 335 ss. *See* Tupper's Panj. Cust. Law, vol. II. p. 148, where a widow of a collateral ending the line, or one of a group of brothers ending it, takes the share that would have fallen to her husband had he been alive.

to reach seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend." (Colebrooke, Mit. p. 351; Stokes, H. L. B. 448.)

REMARK.—*See* Introd. p. 132.

Q. 2.—A Brâhmaṇ, who held the Joshi and the Kulakaraṇi Watans, died. His surviving relations are distant eight or nine removes. Can they inherit the Inam?

A.—Yes, they can.—*Poona, August 29th,* 1851.

AUTHORITY.—Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4.)

REMARKS.—1. *See* the preceding case, and *Nursing Narain et al* v. *Bhuttun Lall et al* (*a*); *Musst. Dig. Daye et al* v. *Bhuttun Lall et al.* (*b*)

2. A great-grandson of the 5th in ascent from propositus succeeds before his father's sister's son. (*c*)

3. In *Thokoorain* v. *Mohanlál* (*d*) it was held that a sister's son does not inherit according to the Mitâksharâ. His position as a Bandhu had been abandoned, and the decision only excluded him from the nearer Sapiṇḍas.

4. A male descendant in 5th degree from great-grandfather of propositus succeeds before sister's son. (*e*) The possibility of the latter's succession only is questioned.

SECTION 15.—BANDHUS. *i.e.* COGNATES. (*f*)

INTRODUCTORY REMARKS.

1. Under the heading Bandhu, "cognate kindred," the Mi-

(*a*) C. W. R for 1864, p. 194.

(*b*) 11 C. W. R. 500.

(*c*) *Thakoor Jeebnath Singh* v. *The Court of Wards*, L. R. 2 I. A. 163.

(*d*) 11 M. I. A. 386.

(*e*) *Kooer Goolabsingh et al* v. *Rao Kurum Sing*, 10 Beng. L. R. 1 P. C. S. C., 14 M. I. A. 176.

(*f*) In Bengal, the Bandhus come next after the nearer Sapiṇḍas, *i.e.* before descendants from ascendants beyond the great-grandfather,

Chap. II. Sec. 6, clause 1, and the Mayûkha, Chap. IV. Sec. 8, p. 22, enumerate nine persons only, namely:—

<table>
<tr><td rowspan="3">The man's own cognates.</td><td>1. The father's sister's sons.</td><td rowspan="9">Or, in other words, sons of the paternal aunt and of the maternal aunt and uncle (1,2,3), and the same relatives of father (4,5,6), and of mother (7, 8, 9).</td></tr>
<tr><td>2. The mother's sister's sons.</td></tr>
<tr><td>3. The maternal uncle's sons.</td></tr>
<tr><td rowspan="3">His father's cognates.</td><td>4. The father's paternal aunt's sons.</td></tr>
<tr><td>5. The father's maternal aunt's sons.</td></tr>
<tr><td>6. The father's maternal uncle's sons.</td></tr>
<tr><td rowspan="3">His mother's cognates.</td><td>7. The mother's paternal aunt's sons.</td></tr>
<tr><td>8. The mother's maternal aunt's sons.</td></tr>
<tr><td>9. The mother's maternal uncle's sons</td></tr>
</table>

The enumeration may perhaps be intended to mark merely the extreme terms of the Sapiṇḍa-relationship, the connection on one side or both being established through a mother, and extending only to four steps between the persons regarded as Bandhus. It seems very likely that an extension was given to the terms seven and five as marking the gradation of Gotraja Sapiṇḍaship and Bandhuship corresponding to that devised by the Canon lawyers on the basis of the Roman law. By this the degrees were counted only upwards from the more remote of two collateral descendants to the common stock which had previously been counted both up and down to determine the nearness of relationship. It would seem appropriate that when definite connexion with names for each grade must be traced on the father's side from the same great-grandfather, it should on the mother's side be traced from one point lower or from the same grandfather. This is confirmed by the early laws of the other Aryan nations. But in the modern law there is no doubt but that the four steps may be counted upwards on either side to coincidence of origin. *See* above, Introd. p. 242.

2. From this enumeration, and the fact that the word Bandhu is frequently used to designate these nine relations exclusively, it might be inferred that the list was intended to be exhaustive, and to preclude the wider interpretation of Bandhu in the sense of "relation," or "distant relation" in general Consequently the other relations, as the maternal uncle, maternal grand-uncle, &c, would be excluded from inheriting.

Roopchurn Mohapater v. *Anundlal Khan*, 2 C S. D A. R. 35; *Deyanath Roy et al* v. *Muthoor Nath Ghose*, 6 C. S. D. A. R. 27. But according to *Inderjeet Singh et al* v. *Musst. Her Koonwar et al*, Calc. S. D. A. R. for 1857, p. 637, Gotraja Sapiṇḍas and Samânodakas are preferred to Bandhus.

3. This inference, however, becomes very improbable if another passage of the Mitâksharâ is taken into account, where Vijñâneśvara apparently gives a different interpretation of the word Bandhu. (*a*) He says that the term "gentiles," Gotrajas, includes "the paternal grandmother, Sapiṇḍas (relations within the sixth degree), and Śamânodakas (relations within the thirteenth degree)." Pursuing the same subject he adds (*ibid.* in cl. 3), "on failure of the paternal grandmother, the kinsmen sprung from the same family as the deceased, and Sapiṇḍas (within the sixth degree)..................inherit the estate. For kinsmen within the sixth degree (Sapiṇḍas), and sprung from a different family, are indicated by the term Bandhu." So also the Vyavasthâ referred to, though doubted by, the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall.* (*b*) Hence it would seem that Vijñâneśvara interpreted Yâjñavalkya's term "Bandhu" as meaning "relations within the sixth degree, who belong to a different family," or at least that all such persons who come under the term "Sapiṇḍa," according to the definition given in the Achârakâṇḍa (*see* Introd. p. 118), are included by the term Bandhu: consequently the maternal uncle, the paternal aunt, &c., would also be entitled to inherit as Bandhus. In the passage translated, Mit. Chap. II. Sec. 12, p. 2, the word "Mâtṛibandhu" is explained as including the maternal uncles, and Goldstücker (On the Deficiencies, &c,) refers to Vijñâneśvara's Commentary on Yâjñ. III. p. 24, for the same sense.

4. For the correctness of this wider interpretation, a passage of the Vîramitrodaya may be adduced, where Mitramisra likewise contends that other relations, "the maternal uncle and the rest," are comprised by the term Bandhu. (*c*) For, says he, if maternal uncle's sons were allowed to inherit and their fathers not, this would be very improper, as nearer relations would be excluded to the advantage of more distant kindred. (*d*) A similar opinion was given by the Śâstris also in *Musst. Umroot et al* v. *Kulyandass et al.* (*e*) They state that the Bhinnagotra Sapiṇḍas, or blood relations within seven degrees, not belonging to the deceased's family, inherit. But this assertion is too wide and vague to be of use, because Yâjñavalkya

(*a*) Coleb. Mit. Inh. Chap. II. Sec. 5, Cl. 1; Stokes, H. L. B. 446.

(*b*) 11 M. I. A. 386.

(*c*) The father's maternal uncle inherits, *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448.

(*d*) Vîramitrodaya, f. 209, p. 21, l. 6, Tr. p. 200. *See* also Macnaghten's Principles and Precedents, Ed. H. H. Wilson, p. 37, note.

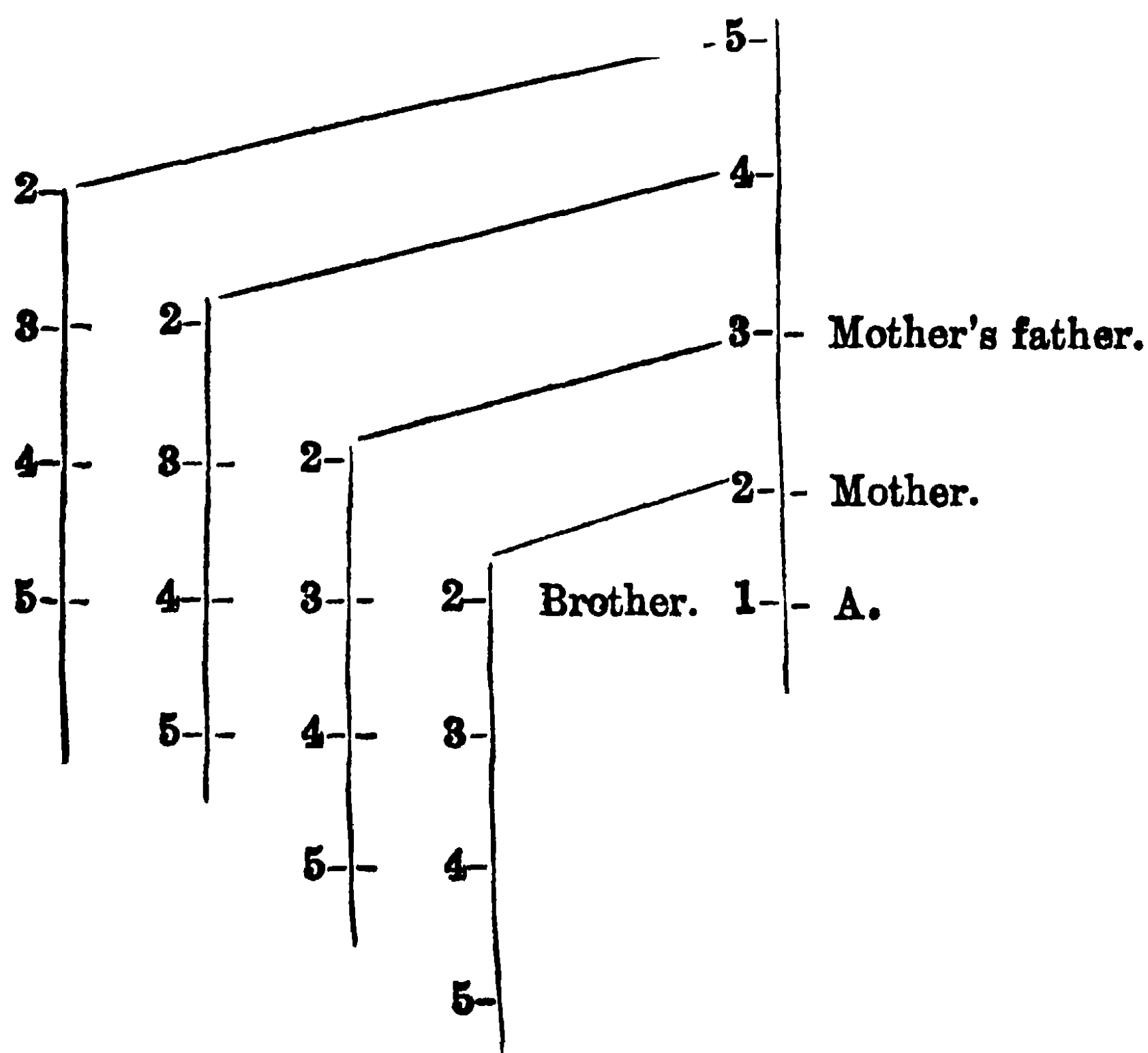
(*e*) 1 Borr. R. 323.

I. 53 (*a*) says that, in the mother's line, the Sapiṇḍa relationship ceases with the fifth person. (*b*) Consequently a man's Sapiṇḍas in his mother's family cease with her great-grandfather in the direct ascending line, and with her grandfather's fifth descendant in the collateral line. (*c*) This principle must also be borne in mind in the case of descendants from daughters of gotraja relations. Thus the deceased's great-great-granddaughter's son would be no longer a Sapiṇḍa. The view here taken has been adopted by the Privy Council in *Gridhari Lall* v. *The Government of Bengal*. (*d*) In the answers to the questions of the following section, the Śâstris allow, besides the so-called nine Bandhus, the following Bhinnagotra Sapiṇḍas to inherit—1, sister's son; 2, maternal uncle; 3, brother's daughters; 4, sister's daughters. They quote as authorities partly the passage of Yâjñavalkya authorising the Bandhus to inherit, partly the verse of Manu, which prescribes "that the nearest Sapiṇḍa inherits," and for the maternal uncle, the passage of the Vîramitrodaya above cited.

(*a*) *See* Introduction, p. 137.

(*b*) It is for this reason that the prohibition to marry a person of the same kindred extending on the father's side to the 7th, extends, on the mother's side, only to the 5th degree, Nârada Pt. II. Chap XII. para. 7. So Vyav. May. (as to an adopted son) Chap. IV. Sec. 5, pl. 32.

(*c*) Table of a man's (A) Sapiṇḍas in his mother's family:—

					5	
2					4	
3	2				3	Mother's father.
4	3	2				
					2	Mother.
5	4	3	2	Brother.	1	A.
	5	4	3			
		5	4			
			5			

(*d*) 1 B. L. R. 44, P. C. S. C.; 12 M. I. A. 448.

· The passage, cited in the Vyav. May. Chap. IV. Sec. 10, p. 30 (Stokes, H. L. B. 106), is quoted in the Dâya Bhâga, Chap. IV. Sec. 3, p. 31 (Stokes, H. L. B. 257), and in Coleb. Dig. Bk. V. T. 513, to show the order of succession to woman's property. The nearness of the relationship is by Jîmûta Vâhana made a ground of succession through the benefits conferred by the oblations offered by a sister's son, &c., and a passage of Vṛiddha Śâtâtapa is quoted to prove the obligation to present these oblations. In translating this, Colebrooke has confined its import to offerings for the wives of the maternal uncle, sister's son, &c., but Goldstücker, "On the Deficiences, &c." p. 11, says that the duty is, according to the comment of the Dâyanirṇaya, reciprocal between the maternal uncle and his nephew, and that it is due by a son-in-law, a pupil, a friend, and a daughter's son to their several correlatives. As the maternal uncle thus performs a Śrâddha for his nephew, he is on this theory entitled to succeed to his property, and before the cousin, more remotely beneficial to the manes of the ancestors of the propositus.

5 Regarding the order in which the Bhinnagotra Sapiṇḍas succeed to each other, it is difficult to speak with certainty. It would seem however that the "nine Bandhus" mentioned in the law books ought to be placed first, if effect is to be given to the principle of the Mayûkha, that "incidental persons are placed last." (a) Amongst the other Sapiṇḍas, 'nearness to the deceased' ought, as the Śâstris also seem to indicate, to be the principle regulating the succession. (b)

(a) *See* Mayûka, p. 106, Borradaile; Stokes, H. L. B. 88. So also the Śâstris in *Musst. Umroot et al* v. *Kulyandass et al*, 1 Borr. Rep. p. 323.

(b) A sister's son was preferred to a maternal aunt's son, *Gunesh Chunder Roy* v. *Nilkomul Roy et al*, 22 C. W. R. 264 C. R. The great-grandson, through his mother, of an ancestor, common to a great-grandson by purely male descent, is not in Madras heir to the latter, *K. Kissen Lala* v. *Javallah Prasad Lala*, 3 M. H. C. R. 346. (See *supra*, page 481) A paternal uncle's daughter's son is an heir according to Bengal law, *Guru Gobind Shaha Mandal et al* v. *Anand Lal Ghose et al*, 5 Beng. L. R. 15 F. B. S. C., 13 C. W. R. 49 F. B., which apparently supersedes *Raj Gobind Dey* v. *Rajessurce Dossee*, 4 C. W. R. 10 C. R. The Śâstris at 1 Borr. 323 (*Musst. Umroot et al* v. *Kulyandass et al*) say that descendants through the daughter of propositus, to the 7th degree, are his asagotra sapiṇḍas. The grandson of a maternal grandfather's brother is an heir by Bengal law, *Brajakishor Mitter* v. *Radha Gobind Dutt*, 3 Beng. L. R. 435. A propositus being third in descent, a collateral, 5th in descent from the common

In the case of *Mohandas* v. *Krishnabai*, (*a*) it was held that this latter principle must prevail over the rule as to incidental persons even amongst the Bandhus, and that a mother's sister's son was excluded by maternal uncles of the propositus. Reference is made to *Amrit Kumari Debi* v. *Lakhinarayan*, (*b*) as well as to *Gridhari Lall Roy's* case, (*c*) and it may probably be considered as now finally settled that the mention of the Bandhus in the rule is not exhaustive, and does not give precedence to any one enumerated over others nearer to the propositus in the same line of connexion. The following cases have been arranged on the same principle as those regarding the Gotrajas.

SECTION 15.—BANDHUS OR COGNATES.

A.—Mentioned in the Law Books.

1.—FATHER'S SISTER'S SON.

Q. 1.—A man died, and none of his relatives are alive except his father's sister's son, who performed his funeral rites and receives emoluments as priest from his clients. Is he the heir of the deceased, and is he responsible for his debts?

A.—If the deceased has no wife, his father's sister's son will be his heir, and he, having received the emoluments belonging to the deceased, is responsible for his debts.

Surat, January 31*st*, 1846.

Authority.—*Mit. Vyav. f. 59, p. 1, l. 2:—

"On failure of gentiles, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text:—

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ancestor, inherits to him in preference to his paternal aunt's son, *T. Jibnath Sing* v. *The Court of Wards*, 5 Beng. L R. 443.

Two female links in the same line of descent are not recognized in any of these cases. It is doubtful whether the right transmitted through a female passes without being realized by actual succession more than one step further. *See* below, B. II. (3).

(*a*) I. L. R. 5 Bom. 597.

(*b*) 2 Beng. L. R. 28.

(*c*) 12 M. I. A. 448.

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred." (Colebrooke, Mit. p. 352; Stokes, H. L. B. 448.)

REMARK.—The Dâyabhâga, Chap. XI. S. 6, p. 9, says that the grandsons through daughters of ascendants inherit through a connexion with their mothers' gotra of birth by the oblations that they must offer to her father in each instance. They thus stand in a manner on a par with grandsons through sons. (*See* Smṛiti Chandrikâ, Chap. XI. S. 5, para. 15)

A. 2.—MATERNAL UNCLE'S SON.

Q. 1.—Can a deceased male's mother's brother's son be his heir ?

A.—Yes.—*Nuggur and Khandesh,* 1845.

Authority not quoted. *See* the preceding case.

Q. 2.—A man died. There is a son of his maternal uncle. He claims to be the heir of the deceased, and he is not opposed by the near relations. Can he, under these circumstances, be recognized as heir ?

A.—If the maternal uncle's son is not opposed by any near relation of the deceased, there is no objection to his claim on the ground of the Hindû law.

Surat, January 25th, 1855.

AUTHORITY.—Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

B.—NOT EXPRESSLY MENTIONED IN THE LAW BOOKS.

I.—MALES.

(1)—SISTER'S SON.

Q. 1.—Can a man's sister's son be his heir ?

A.—Yes.—*Tanna, October 5th,* 1855.

AUTHORITY.—Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

REMARKS.—1. See Introductory Remark to Section 15, Clause 4.

2. According to the Mithila law and to that of Madras, a sister's son, it was once held, does not inherit as a Bandhu. (*a*) But a sister's son is a Bandhu (*b*) and inherits in this character though not as a gotraja-sapiṇḍa.(*c*) The Nirṇaya Sindhu, quoted above (Sec. 14 I. B. *b*. 1, Q. 1), expressly names a sister's son as heir, (*d*) and gives to the sister's son a place amongst those who may present funeral oblations, and this is adopted in the Śrâddha Mayûkha referred to in the Vyavahâra Mayûkha, Chap. IV. Sec. 8, pl. 29.

3. Sister's sons have no right so long as a sister survives, but take before sister's daughters (*e*)

(*a*) *Thakoorain Sahiba* v. *Mohun Lall*, 11 M. I. A. 386; *Doe Dem. Kullammal* v. *Kuppu Pillai*, 1 M. H. C. R. 85.

(*b*) *See* Prof. H. H. Wilson's works, vol. V. p. 14; Introductory Remarks to this Section; 2 Macn Prin. and Prec. 84; *Omrit Koomari Dabee* v. *Luchee Narain Chuckerbutty*, 10 C. W. R 76 F. B.; *Amrita Kumari Debi* v. *Lakhinarayan Chuckurbutty*, 2 B. L. R. 29; *Srinivas Ayangár* v. *Rengasami Ayyangar*, I. L R. 2 Mad. 304, followed in *Sadashiv* v. *Dinkar*, Bom. H. C. P. J. F. 1882, p 17.

(*c*) *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 28 F. B.; *Chelikani Tirupati* v. *R. S. Venkata Gopala Narasimha*, 6 M. H. C. R. 278; *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448.

(*d*) *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 28 F. B.

(*e*) *Icharam* v. *Purmanand*, 2 Borr. 515. In Madras it has been ruled that a sister is indeed in the line of heirs as being a bandhu, but that she is to be postponed to a sister's son (*f*) The doctrine of sapiṇḍa relationship explained above, Introd. p 120 ss., and adopted in Bengal as that of the Mitâksharâ, (*g*) is fully accepted by the learned judges; but combined with that of a woman's losing her sagotraship by passing into another family. Nilakanṭha, as we have seen, says this is not decisive, as the right of a sister depends on an original consanguinity which cannot be lost. In Bombay, as the Śâstri's reference shows (though it is not pointed), the Mitâksharâ is not thought to be opposed to the precedence of a sister over a sister's son, and the preference which in a collateral line of gotraja sapiṇḍas may be claimed by a son over his own mother or grandmother rests on his connexion with the main stem through his father, whose place he may be supposed to take in preference to the

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(*f*) *Lakshman Ammal* v. *Tiruvengada*, I. L. R. 5 Mad. 241; *Kutti Ammal* v. *Radakristna Aiyan*, 8 M. H. C. R. 88.

(*g*) *Umard Bahadur* v. *Udvi Chand*, I. L. R. 6 Calc. 119.

4. In a Vyavasthâ of the Śâstris of the Sadar Court, N. W. P., dated 28th December 1860, the sister's son, it is said, inherits before the paternal aunt's son, (a) and a sister's son was preferred to a maternal aunt's son. These cases are opposed to the general principle that the persons actually specified take before those only implied, unless the specification in this case be meant merely to indicate the extreme points of heritable connexion. *See* above, pp.—134, 492.

5. In *Laroo* v. *Sheo* (b) the property came to a deceased intestate, apparently from his maternal uncle, and the Sadr Adálat decided that property inherited through the female (maternal) heir, must continue to descend in that line.

6. A fifth descendant from the grandfather takes precedence of the sister's son. (c)

Q. 2.—A man died. His property is in the possession of his sister's son. There is, however, a half-sister's son besides the sister's son. The question is, which of these is the heir?

A.—The sister's son is the heir. The half-sister's son is not the heir.—*Surat, August 5th,* 1845.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap I. Sec. 2, Q. 4); (2*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

REMARK.—*See* Sec. 14 I. A. 2, Q. 1.

B. I. (2)—MATERNAL UNCLE.

Q. 1.—Can a maternal uncle be the heir of his nephew?

A.—Yes.—*Tanna, February* 12*th,* 1859.

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widow. In the case of a male deriving his right only through his mother, this reason for preferring him to her or to one standing on an equality with her in relation to the propositus does not exist, the mother or her sister stands one degree nearer to the propositus in the same line as the son. See *Mohandas* v. *Krishnabai,* I. L. R. 5 Bom. 597.

(a) *Gunesh Chunder Roy* v. *Nil Komul Roy et al,* 22 C. W. R. 264.

(b) 1 Borr. 80.

(c) *Kooer Goolab Sing et al* v. *Rao Kurun Sing,* 10 Ben. L. R. 1.

AUTHORITY.—Vîramitrodaya, f. 209, p. 2, l. 6, Transl. p. 200:—

"In the law-book of Manu the word Sakulya (which is used in verse IX. 187): On the failure of them (Sapiṇḍas) the Sakulyas are (heirs of a separated male), or the teacher, or also a pupil: includes Sagotras (gentiles within the sixth degree), Samânodakas (gentiles within the thirteenth degree), the maternal uncles, and the other (Sapiṇḍas belonging to a different family), and the three (classes of relations called) Bandhu. In the passage of Yogîśvara (Yâjñavalkya, *see* Chap. II. Sec. 2, Q. 2) also the word Bandhu indicates the maternal uncle. Otherwise, if the maternal uncles were not included (by the word Bandhu), a great impropriety would take place, since their sons would be entitled to inherit, and they who are more nearly related (to the deceased) than the former, would not have the same right."

Q. 2.—If a man applies for a certificate of heirship on the ground that the deceased was his foster-son, should this application be granted?

A.—In the case to which this question refers, it appears that the deceased was applicant's sister's son. He should therefore call the deceased not his foster-son but his nephew, and as the maternal uncle of the deceased, he should be granted a certificate.—*Dharwar, November* 16*th*, 1846.

AUTHORITY.—*Vîramitrodaya, f. 209, p. 2, l. 6. *See* the preceding case.

B. II.—FEMALES.

(1)—GRAND-DAUGHTER.

Q. 1.—Has a grand-daughter the same right to the property of her grandfather as a grandson?

A.—No.—*Tanna, September* 15*th*, 1851.

AUTHORITY.—Mit. Vyav. f. 50, p. 1, l. 7.

REMARKS.—1. In an undivided family the grand-daughter cannot inherit.

2. In a divided family she might inherit on failure of nearer heirs as a "Sapiṇḍa relation belonging to a different family." *See* Introductory Remark to Section 15, Clause 5.

3. It has been ruled at Madras that a grand-daughter's son is not entitled to inherit to a second cousin, great-grandson in a male line of the same ancestor, (*a*) but this is not so in Bombay. *See* the Introductory Remarks to this Section.

B. II. (2)—BROTHER'S DAUGHTER.

Q. 1.—A man, who was not married, died. There are two daughters of his brother. One of these daughters has a son. The son's father is his guardian. He claims the possession of the deceased's property. The daughters have no objection to the claim of the son's father. The question is, whether the son of a daughter can be recognized as heir, while there are two daughters of the deceased ? and whether the father of the son has right to be his guardian ?

A.—The brother's two daughters are the nearest relations of the deceased. They are therefore legal heirs, and while they are alive, the son of one of them cannot be considered an heir. It is therefore unnecessary to discuss the question of the right of the father to be the guardian of his son.

Ahmedabad, March 25th, 1855.

AUTHORITIES.—(1) Vyav. May. p. 140, l 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (2) p. 137, l. 4.

REMARKS—1. *See* Introductory Note to Section 15, Clause 4.

2. In the case of *Choorah Monee Bose et al* v *Prosonno Coomar Mitter*, (*b*) it was held that a brother's daughter's son is not an heir, and so in *Govindo Hureehar* v. *Woomesh Chunder Roy*. (*c*) But the Śâstris in *Umroot* v. *Kulyandas* (*d*) pronounce in favor of the niece's sons and even grandsons. And a brother's daughter's son was recognized as an heir in *Musst Doorga Bibee et al* v. *Janaki Pershad*. (*e*) The brother's daughters were postponed to a first cousin once removed (first cousin's son) in the male line, in *Gangaram* v. *Ballia et al*. (*f*) Comp. Q. 2, p. 498.

(*a*) *K. Kissen Lala* v. *Javallah Prasad Lala*, 3 M. H. C. R. 346.
(*b*) 1 C. W. R. 43.
(*c*) C. W. R. F. B. R. 176.
(*d*) 1 Borr. R. 314.
(*e*) 10 Beng. L. R. 341.
(*f*) S. A. No. 519 of 1873 (Bom. H. C. P. J. F. for 1876, p. 31).

B. II. (3)—SISTER'S DAUGHTER.

Q. 1.—A man died. There were three daughters of his sister. Two are alive, and one died before the man's death, leaving a son. The question is, which of these is the heir?

A.—The two surviving daughters of the sister are the heirs. The son of the third daughter, who died before the man's death, has no right to inherit from the deceased.

Ahmedabad, June 26th, 1855.

AUTHORITIES.—(1) Vyav. May p. 134, l. 4 (*see* Auth. 3) ; (2) p. 140, l. 1 (*see* Chap II. Sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARK.—*See* Introductory Note to Section 15, Clause 4.

Q. 2.—Can a "Bhâchî," or a daughter of a sister, of a man of the goldsmith caste, be his heir?

A.—Yes.—*Ahmednuggur, December 28th,* 1853.

AUTHORITIES.—(1*) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec 14 I. A. 1, Q. 1).

REMARKS.—1. Grand-nephews through the mother of a deceased succeed to him, *Musst. Umroot et al* v. *Kulyandas et al* (*a*) A sister's daughter's son is, it is said, an heir according to the Mitâksharâ; and as such can question a gift by the deceased's widow as invalid in law, *Unaid Bahadur* v. *Udoichand.* (*b*) This, however, seems questionable. "It is clear that a son of a daughter of a father's brother is much further removed in the order of succession than the son of a father's brother or a son of such a son." (*c*) Thus the intervention of even one female link is a cause of postponement. Much more where the heritable right is traced through a daughter and then again through her daughter to a grandson or granddaughter. The sacrificial connexion which at least indicates heritable relation is lost in the case of a maternal grandmother's family: only one female link is properly admitted between the claimant and the stem, but it is not certain, as the case cited shows, that the principle will be rigorously followed by the Courts.

(*a*) 1 Borr. 314.

(*b*) I. L. R. 6 Calc. 119.

(*c*) Pr. Co. in *Rani Anand Kunwar* v. *The Court of Wards,* I. L. R. 6 Calc. at p. 772.

2. A maternal grand-niece inheriting property takes it with the same power of alienation as a daughter or sister. (*a*)

3. The grandson of the maternal uncle of the mother of propositus is in the line of heirs. (*b*)

4. A sister's grandson succeeds to property inherited from her father by a woman in preference to her own daughter under the Bengal Law. (*c*) The Pandit relied on Vishṇu's Dharmaśâstra, (Transl p. 68.) A nephew's daughter is not an heir according to Bengal Law. (*d*)

CHAPTER III.

HEIRS TO MALES WHO HAVE ENTERED A RELIGIOUS ORDER.

SECTION 1.—HEIRS TO A YATI.

Q. 1.—Can the relatives of a "Sannyâsî" claim his property?

A.—No relative can claim any property acquired by a man during the time he was "Sannyâsî."—*Dharwar*, 1846.

AUTHORITY —* Mit. Vyav. f. 59, p 1, l. 15:—

"A virtuous pupil takes the property of a yati or ascetic The virtuous pupil, again, is one assiduous in the study of theology, in retaining the holy science, and in practising its ordinances." (Colebrooke, Mit p. 355; Stokes, H. L. B. 451.)

Q. 2.—How should property be divided among three disciples of a deceased Guru? and if some of them are absent should their shares be held in deposit, or made over to those that are present?

A.—The Śâstras do not provide for division of a Guru's property among his disciples. One of them should there-

(*a*) *Tuljaram Morarji* v. *Mathuradas Dayaram*, I. L. R. 5 Bom. 662.

(*b*) *Ratnasubbu Chetti* v. *Ponappa Chetti*, I. L. R. 5 Mad. 69.

(*c*) *Sheo Sehai Singh et al* v. *Musst. Omed Konwur*, 6 Calc. S. D. A. R. 301.

(*d*) *Radha Pearee Dossee et al* v. *Doorga Monee Dossia et al*, 5 Calc. W. R. 131 C. R. See *Lallubhai* v. *Mankiwarbai*, I. L. R. 2 Bom. 485, and above, p. 487 (*f*).

fore take it and perform the funeral rites of the deceased, according to custom.—*Ahmednuggur, September 26th,* 1845.

Authorities not quoted. *See* the preceding question.

SECTION 2.—HEIRS TO A NAISHṬHIKA BRAHMACHÂRÎ.

Q. 1.—Is an Âchârya or Guru the heir of his disciple?

A.—Yes.—*Sholapoor, October 27th,* 1846.

AUTHORITY.—* Mit. Vyav. f. 59, p. 1, l. 14:—

"It has been declared that sons, grandsons (or great-grandsons) take the heritage, or, on failure of them, the widow or other successors. The author (Yâjñavalkya) now propounds an exception to both those laws. The heirs of a hermit, of an ascetic, and of a professed student, are, in their order, the preceptor, the virtuous pupil, and the spiritual brother and associate in holiness.

"The heirs to the property of a hermit, of an ascetic, and of a student in theology, are in order, that is in the inverse, the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage.

"The student (Brahmachârin) must be a professed or perpetual one (Naishṭhika), (*a*) for the mother and the rest of the natural heirs take the property of a temporary student (Upakurvâṇa); (*b*) and the preceptor is declared to be heir to a professed student as an exception [to the claim of the mother and the rest]." (Coleb. Mit. 354; Stokes, H. L. B 450-1.)

REMARK.—Only if the deceased was a Naishṭhika Brahmachârî, *i. e.* a student, who had renounced the world and professed his intention to live all his life with his preceptor.

Q. 2.—Can a preceptor (Guru) be the heir of his disciple (Śishya)?

(*a*) *See* Smṛiti Chandrikâ, Chap. XI. S. 7. Naishṭhika is derived from *nishṭhâ,* "fixed resolve," and means literally a person who has taken the fixed resolution (to stay with his preceptor until death).

(*b*) Upakurvâṇa means literally a person who pays or gives a present (to the preceptor at the end of his studentship).

A.—As the parents of the disciple had devoted him to the service of the Guru, and as he was not married, the Guru is his heir.—*Sholapoor, July 15th,* 1846.

Authority not quoted. *See* the preceding Question.

CHAPTER IV.

HEIRS TO A FEMALE.

A.—HEIRS TO AN UNMARRIED FEMALE. (*a*)

SECTION 1.—BROTHER.

Q. 1.—Can a brother inherit his sister's property?

A.—Yes.—*Dharwar,* 1846.

AUTHORITY.—*Mit. Vyav. f 62, p. 1, l. 7 :—

"But her uterine brothers shall have the ornaments for the head and other gifts, which may have been presented to the maiden by the maternal grandfather (or the paternal uncle) or other relations, as well as property which may have been regularly inherited by her For Baudhâyana says :—'The wealth of a deceased damsel let uterine brothers themselves take On failure of them it shall belong to the mother; or if she be dead, to the father.'" (Coleb. Mit. 373; Stokes, H L. B. 465)

REMARKS —1. The text of Vijñânesvara quoted refers in the first instance to a maiden who died after her betrothal, but before her marriage. As Baudhâyana's passage contains no such restriction, its rules seem to apply also to a girl who died before her betrothal. So Nârada quoted in the Dâya Krama Sangraha, Chap. II. Sec. 1. (Stokes, H. L. B 487.)

2. Regarding the case of a married sister, *see* Chap IV B. Sec. 7, II. *b*

A.—SECTION 2.—THE FATHER.

Q. 1.—If a daughter has no relative except her father, will he be her heir?

(*a*) The uncles and cousins of an unmarried damsel, daughter of their deceased coparcener, exclude her from inheritance, but are bound to defray her marriage expenses out of the joint estate, 2 Macn. H. L. 47.

A.—Yes.—*Ahmednuggur, January 10th,* 1846.

Authority not quoted.

REMARKS.—1. *See* the preceding case.

2. Regarding the father's succession to the estate of a married daughter, *see* Chap. IV. B. Sec. 7.

A.—SECTION 3.—THE SISTER.

Q. 1.—Can a sister of a deceased Muralî be her heir ?

A.—Yes.—*Poona, September 23rd,* 1852.

AUTHORITIES.—(1) Vyav May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1; (2*) Manu IX. 187 (*see* Chap. II. Sec. 14 I. B. *b.* 1, Q. 1).

REMARK.—The above text of Manu, declaring the "nearest Sapiṇḍa entitled to inherit," applies in the first instance to the succession to a male's estate. In the Mayûkha, p. 159, l. 5 (Stokes, H. L. B. 105), Nîlakhaṇṭha uses it in regard to a female's estate also.

B.—MARRIED.

SECTION 1.—DAUGHTER.

Q. 1.—A woman of the Kuṇabî caste died. Her daughter, who was abandoned by her husband, lived with her mother for about six years. Can this daughter be the heir of the deceased mother ?

A.—As there are no other and better heirs, the daughter will be the heir of the deceased. If the daughter, however, is a notoriously bad character, the Sirkâr should pay the expenses of the funeral rites, assign a maintenance to the daughter, and hold the rest in deposit, pending a reform in her character.—*Ahmednuggur, January 14th,* 1847.

AUTHORITIES.—(1) Vyav. May. p. 142, l. 2; (2) p. 137, l. 5; (3, p. 156, l. 5; (4) p. 159, l. 5; (5) p 136, l. 8; (6) p. 162, l. 1; (7) Mit. Vyav. f. 45, p. 1, l. 5; (8) f. 58, p. 1, l. 7; (9) f. 58, p. 2, l. 16; (10) f. 57, p. 1, l. 5; (11*) f. 60, p. 1, l. 13; (12) f. 60, p. 2, l. 2; (13) f. 60, p. 2, l. 1; (14*) f. 48, p. 1, l. 13:—

"It has been declared, that sons may divide the effects after the death of their father and mother. The author states an exception in regard to the mother's separate property :—'The daughters share

the residue of their mother's property after payment of her debts.' Let the daughters take their mother's effects remaining over and above the debts; that is, the residue after the discharge of the debts contracted by the mother. Hence the purport of the preceding part of the text is, that sons may divide their mother's effects, which are equal to her debts or less than their amount. The meaning is this: a debt incurred by the mother must be discharged by her sons, not by her daughters; but her daughters shall take her property remaining above her debts." (Colebrooke, Mit. p. 266; Stokes, H. L. B. 383.)

(15) Mit. Vyav. f. 61, p. 1, l. 16 :—

"In all forms of marriage, if the woman 'leave progeny,' that is, if she have issue, her property devolves on her daughters." Colebrooke, Mit. p. 368; Stokes, H. L. B. 461.)

Q. 2.—Who will be the heir of a deceased widow? her daughter or her husband's illegitimate son?

A.—A daughter only is entitled to inherit her mother's Strîdhana; an illegitimate son of the deceased widow's husband has no right to it. If the parties concerned be of the Śûdra caste, a daughter and an illegitimate son will be entitled to equal shares of their father's property. If the property is Strîdhana, a daughter has a prior and superior right to it. The illegitimate son and the daughter should therefore take equal shares of the property of the deceased.

Ahmednuggur, January 31*st*, 1848.

Authorities.—(1) Vyav. May. p. 99, l. 1; (2) p. 151, l. 2; (3) p. 155, l. 7; (4) p 156, l. 5; (5) p. 157, l. 7; (6) p. 159, l. 5; (7*) Mit. Vyav. f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1); (8) f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1).

Remark.—The Śâstri in his last direction treats the property as that of the predeceased husband, and applies to it the construction of Yâjñavalkya's text supported by Devânda Bhaṭṭa in the Dattaka Chandrikâ, Sec. 5, pl. 31 (Stokes, H. L. B. 660).

Q. 3.—A woman died leaving a son by her first and a daughter by her second husband. She had taken no property belonging to her first husband. The deceased's property was left in possession of her daughter and son-in-law.

The question is, whether the daughter or the son should be considered the heir?

A.—If there is no proof that the property in question did not belong to her first husband, the daughter alone is the heir.—*Khandesh, March 4th,* 1851.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2*) Mit. Vyav. f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1).

REMARK.—The words "did not belong" are evidently a mistake for "belonged."

Q. 4.—A woman died leaving a daughter and a son of a predeceased daughter. Which of these will be heir of the deceased?

A.—The grandson is a distant relation. The daughter should be considered the heir of the deceased.

Khandesh, October 22nd, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2*) Mit. Vyav. f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1).

Q. 5.—A woman died. She possessed some waste land. She had had three daughters. The second is alive, the eldest died leaving a son. The youngest died without issue, but her husband is alive. The question is, how the land should be divided among the heirs?

A.—The land should be equally divided between the daughter's son and the surviving daughter. The husband of the deceased daughter has no right to any part of the property.—*Surat, October 12th,* 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2*) f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1); (3) Vîramitrodaya, f. 205, p. 2, l. 2.

REMARK.—The daughter's son will inherit only in case his mother died after his grandmother. In this case he inherits his mother's share of the grandmother's property. If his mother died before his grandmother, the surviving daughter of the latter takes the whole.

Q. 6.—A man had two sons. The younger of these died, leaving a widow. The elder subsequently died, leaving a son. The last mentioned died, leaving a widow and a daughter. The widow also died, and the question has arisen, whether the daughter of the deceased or the widow of the younger son who died first should be considered the eldest son's heir?

A.—The widow of the last deceased man is his heir, and on her death the right of inheritance devolves on her daughter. The widow of the younger son who died first cannot have any right to inherit the property of her husband's elder brother's son.—*Bombay, Sadr Adálat, July 30th,* 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2*) f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1).

Q. 7.—A deceased woman of the Sonâra caste has left a daughter and a grandson of her husband's cousin. The daughter incurred the expense of the funeral ceremonies of her mother. The grandson underwent the ceremony of shaving his head and actually performed the obsequies. He was separate, but used to keep up a friendly intercourse with the deceased as a relation. Which of the two will be her heir?

A.—The daughter must be recognized as the heir, her relationship being nearer than that of the grandson.

Khandesh, May 31st, 1848.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 ; (2*) Mit. Vyav. f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1).

Q. 8.—A woman died. Her surviving relatives are a daughter who has no issue, and a separated member of the family of her husband. The question is, which of these is the heir?

A.—The rule is, that when a separated member of a family dies, his wife becomes his heir. In the absence of a wife, his

daughter is the legal heir. If the daughter, however, is a widow, and without male issue, she cannot be the heir. The separated member of the family of her husband will be her heir.—*Surat, February* 10*th*, 1846.

AUTHORITY.—*Mit. Vyav. f. 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1. Q. 1).

REMARK.—The daughter alone is the heir. The Mitâksharâ and the Mayûkha do not mention barrenness as an impediment to a daughter's inheriting. The Surat Śâstri seems here, as in some other instances, to have given Bengal law. (*See* Dâyabhâga, Chap. XI. Sec. 2.)

Q. 9.—*A*, a man, and *B*, his son, lived separate. When *B* died, his son *C* inherited his property. When *C* died, *D*, the widow of *B*, inherited her son's property. *D* died leaving two married daughters. *A*, the father-in-law of *D*, is alive. The question is, who has the right of inheriting the property of *D*?

A.—As *A*, the father-in-law of *D*, was separate from *B*, the husband of *D*, the daughters are the legal heirs. (*a*)

Bombay, Sadr Adálat, August 6th, 1849.

AUTHORITIES.—(1) Mit. Vyav. f. 61, p. 1, l. 16 (*see* Chap. IV. B. Sec. 1, Q. 1); (2) f. 45, p 1, l. 5; (3) f. 55, p. 2, l. 1; (4*) f. 48, p. 1, l. 13 (*see* Chap. IV. B Sec. 1, Q. 1).

Q. 10.—It cannot be ascertained whether the husband and brother-in-law of a woman were separate or united in interests. It cannot also be ascertained whether, after the death of her husband, the woman was supported by her father-in-law or brother-in-law. Will the daughter or the brother-in-law of the woman, under these circumstances, inherit the property acquired by the woman?

A.—When two uterine brothers are separate, and one of them dies, his widow will become his heir, and after the widow's death her daughter. The daughter alone can inherit the property acquired by the woman alluded to in the

(*a*) This case illustrates pp. 328, 332, 336, 338.

question. The brother-in-law, whether separate or otherwise, can have no right to it.—*Surat, January 25th,* 1845.

AUTHORITIES.—(1) Vyav. May. p. 137, l. 5; (2) p. 157, l. 3 (*see* Auth. 3); (3*) Mit. Vyav. f. 61, p. 1, l. 16 (*see* Chap. IV. B. Sec. 1, Q. 1).

REMARK.—A sum of money, on the death of her husband, was given to a widow by his undivided brother in lieu of maintenance. With this she bought land. It was held that the property was her own absolutely, and being disposable *inter vivos* at her pleasure, could be equally disposed of by her will. (*a*) *See* above, pp. 181, 219, 315, and also Book II. Introduction, 'PARTITION BETWEEN BROTHERS.'

Q. 11.—Can a daughter inherit all her mother's property or only her Strîdhana?

A.—If the mother should have no son, the daughter will be her sole heir; but if the mother has a son, the daughter can inherit only her "Strîdhana." The rest will pass into the hands of her sons.—*Dharwar,* 1845.

AUTHORITY.—*Mit. Vyav. f 48, p. 1, l. 13 (*see* Chap. IV. B. Sec. 1, Q. 1).

REMARK.—The Śâstri seems to have intended to express the Mayûkha doctrine. (*See* Introduction to Book I. p. 146.)

Q. 12.—A woman died. Her husband had a Vatan. She has two daughters, one of whom has some children and the other has none. There are distant relations of the husband. The question is, whether the husband's relations or the daughter of the deceased woman has a right to inherit the Vatan?

Should a custom prevalent in a family or caste be respected, when it is inconsistent with the law of inheritance laid down in the Śâstra?

A.—In the above case it appears that the wife inherited her husband's property. On her death her daughter becomes the heir.

(*a*) *Nellaikumara Chetty* v. *Marakathammal,* I. L. R. 1 Mad. 166, referring to *Doorga Daye et al* v. *Poorun Daye et al,* 5 C. W. R. 141 C. R., and to *Rajah Chandranath Roy* v. *Ramjai Mazumdar,* 6 B. L. R. 303.

If a custom has uniformly and for a long time been respected by a family or caste, and if the observance of it is not prejudicial to the rights of any individual, or contrary to religion or morality, it may continue to be respected.

Bombay, Sadr Adálat, May 17th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 137, l. 4; (3) p. 7, l. 1 (*see* Chap. II. Sec. 13, Q. 9); (4) Mit. Âchâra, f. 52, l. 1, p. 13 (*see* Auth. 3); (5) Vîramitrodaya, f. 9, p. 2, l. 6 (*see* Auth. 3); (6*) Mit. Vyav. f. 48, p. 1, l. 13, and f. 62, p. 1, l. 16 (*see* Chap. IV. B Sec. 1, Q 1).

REMARK.—It is obvious that the rights of the individual must themselves depend on the custom in so far as the custom is binding. *See* above, p. 155, Sec. 6. As to the conditions of a good custom, *see* *Mathura Naikin* v. *Esu Naikin*. (*a*)

Q. 13.—A man of the Vâṇî caste died. His wife also died shortly after him, leaving a daughter-in-law who was a widow, and three daughters, two of whom were young and unmarried, and consequently under the protection of the daughter-in-law. The last mentioned has applied for a certificate of heirship to the deceased, and the question is, whether the two daughters have a right to any portion of the property of their mother, or whether the whole should be made over to the daughter-in-law alone?

A.—The daughter-in-law is the heir to all the property left by her mother-in-law. If the mother-in-law should have any property which can be called her "Strîdhana," the daughters would be entitled to it. Those daughters who are unmarried will have a superior claim to it. Out of this property these daughters must be maintained and married, and the remainder, if any, should be equally divided among the married and the unmarried.

Ahmednuggur, October 21st, 1851.

AUTHORITIES.—(1*) Mit. Vyay. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4); (2) Vyav. May. p. 134, l. 4 (*see* Auth. 1); (3) p. 137, l. 5; (4) p. 151, l. 1; (5) p. 159, l. 5; (6) p. 156, l. 5; (7) Vyav. May. p. 157, l. 3:—

(*a*) I. L. R. 4 Bom. 545, 571.

" These distinctions are declared by Gautama :—'A woman's property goes to her daughters, unmarried or unprovided.' " (Borradaile, p. 125 ; Stokes, H. L. B. 103).

REMARKS.—1. The Śâstri's answer is right only if the son died after his father, since in this case only his widow (the daughter-in-law of the question) would inherit his property.

2. If the son died before his father, his rights revert to the latter. (a) After the father's death, his widow inherits the property, and from her, her daughters. See above, pp. 146, 150, 324.

Q. 14.—A Lingâyat woman died. Her step-son has lived separate from her for the last 20 years, and her daughter is a married woman. Which of these will be her heir ?

A.—The daughter will inherit her mother's Strîdhana, and the son will inherit such property of his father as may have remained in the possession of the deceased.

Dharwar, August 6th, 1851.

AUTHORITIES.—(1) Vyav. May. p. 83, l. 7 ; (2) p. 158, l. 4 ; (3*) Mit. Vyav. f. 48, p. 1, l. 13 (see Chap. IV. B. Sec. 1, Q. 1).

REMARK.—The Śâstri, as in answer to Q. 11, intends to give the Mayûkha doctrine. (See Borradaile, 126 ; Stokes, H. L. B. 104.)

B.—SECTION 2.—GRAND-DAUGHTER.

Q. 1.—There are two relatives of a deceased woman. The one is her daughter's daughter, and the other her husband's brother's daughter. Which of these should succeed to the deceased's property ?

A.—The daughter's daughter is the heir to the property.

Dharwar, December 24th, 1847.

AUTHORITIES.—(1) Vîramitrodaya, f. 217, p. 1, l. 15 ; (2) Mit. Vyav. f. 61, p. 2, l. 5 :—

" On failure of daughters, her grand-daughters in the female line take the succession under this text ; 'if she leave progeny, it goes to her (daughter's) daughters.' " (Colebrooke, Mit. p. 369 ; Stokes, H. L. B. 462.)

(a) See *Udâram Sitârâm* v. *Rânu Pândujee et al*, 11 Bom. H. C. R. 76.

B.—SECTION 3.—DAUGHTER'S SON.

Q. 1.—A woman who held a Kulakaraṇi Vatan died. There are her relations of ten days, (*a*) and a son of her daughter. Which of these should succeed to the Vatan ?

A.—There is an order of heirs laid down in the Śâstras in the case of persons who, having separated themselves from, and not having reunited with, the other members of a family, have died without male issue. The order commences with wife, who is followed by other relatives having a right to succeed one after another. The Śâstra also declares that all the heirs of a man living and about to come into life expect to inherit his Vatan, and that no man should therefore alienate it to his family's prejudice. From these, it appears that the daughter's son should inherit all the property of the deceased, except the Vatan, which should be given to the (nearest) relations of the same Gotra as the deceased.—*Khandesh, October 5th,* 1853.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 3.); (2) p. 196, l. 3; (3) Mit. Vyav f. 55, p. 2, l. 1 (*see* Chap. 1, Sec. 2, Q. 4); (4*) Mit. Vyav. f. 61, p. 2, l. 7:—

"On failure of daughter's daughters, the daughter's sons are entitled to the succession. Thus Nârada says: 'Let daughters divide their mother's wealth; or on failure of daughters, their male issue.' For the pronoun refers to the contiguous term 'daughters.'" (Colebrooke, Mit. p. 370; Stokes, H. L. B. 462.)

REMARK.—The decision as to the Vatan is based on the supposition that the Vatan is not Strîdhana, or separate property subject to the ordinary rules of descent. But *see* Chap. I. Sec. 2, Q. 5, and Chap. II. Sec. 8, Q. 1.

(*a*) Ten days here show the duration of the mourning and the impurity supposed to result from the death of a relation. The more remote the relationship, the less is the duration. Hence relations are called in Maraṭhi according to their various degrees, as of ten days, three days, one day, or of ablution (Sapiṇḍas).

B.—SECTION 4.—SONS.

Q. 1.—A woman died. Her husband and son have survived her. Which of these is her heir? And who has a right to inherit her Palu?

Supposing the husband has a right to inherit her Palu, will his right be destroyed, because the Palu has been applied towards the purchase of some property, and because the deed of purchase sets forth that the property purchased was intended for the benefit of the woman's children?

A.—It is not mentioned in the question whether the woman had obtained her Palu from her husband or from her father, or whether it was earned by her by following any particular trade. It is not also stated whether the deceased woman has any daughter.

The son of a deceased woman has a right to inherit all the property of his mother. When a woman has children, her husband has no right to her property. In the absence of a daughter, a son has a right to inherit her Palu. Though the Palu has been applied towards purchasing some property, the husband can have no claim on it.

Surat, June 14th, 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 48, p. 1, l. 14 (*see* Chap. II. Sec. 14 I. A. 1, Q. 3); (2) Vyav. May. p. 156, l. 1; (3*) Mit. Vyav. f. 61, p 2, l. 9:—

"If there be no grandsons in the female line, sons take the property; for it has already been declared the (male) issue succeeds in their default." (Colebrooke, Mit. p. 370; Stokes, H. L. B. 462.)

Q. 2.—A woman received a house from her father. She had two sons. One of them died, leaving a widow. The mother died after the death of her son. The question is, whether the surviving son or the daughter-in-law should inherit the house given to the woman by her father?

A.—The son, and not the daughter-in-law, has the right to inherit the property of his maternal grandfather.

Surat Adálat, June 7th, 1827.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 61, p. 2, l. 9 (see Chap. IV. B. Sec. 4, Q. 1).

REMARK.—The son inherits the property as heir of his mother, not as heir of his maternal grandfather.

Q. 3.—A woman of the Śûdra caste died. One of her sons is in jail undergoing the sentence of imprisonment for life. The other died, leaving a son. The question is, whether the grandson or the son is the heir to the woman's property?

A.—The grandson, as well as the son, has a right to inherit the property.—*Poona, May 13th,* 1851.

AUTHORITIES.—(1) [Vyav. May. p. 90, l. 2]; (2*) Mit. Vyav. f. 61, p. 2, l. 9 (see Chap. IV. B. Sec. 4, Q 1).

REMARK —If the grandson's father died before his mother, the grandson cannot inherit, as grandsons inherit their mother's Strîdhana on failure of sons only.

Q. 4.—A man died, and his property was taken possession of by his mother. After the death of the mother, her daughter came into possession of the property. On the death of the daughter, her son assumed the possession. He is now sued by a separated cousin of the original proprietor for the recovery of the property, and the question is, whether it should be made over to him?

A.—The several successions described in the question appear to be legal, and the possession of the grandson cannot be disturbed.—*Rutnagherry, September 3rd,* 1855.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) [p. 151, l. 2]; (3) p. 157, l. 3; (4) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I. Sec. 2, Q. 4); (5) f. 61, p. 1, l. 16 (see Chap. IV. B. Sec. 1, Q. 1); (6*) f. 61, p. 2, l. 9 (see Chap. IV. B. Sec. 4, Q. 1).

Q. 5.—*A* married a woman, *B*, who had been previously married, and who brought to his house the son *C*, whom she had borne to her first husband. *A* died without having either a son or a daughter born of his marriage with *B*. On his death, his wife *B* inherited his property. After *B*'s death,

will the property of *A* pass to his blood relations, or to *C*, the son of *B* by her first husband?

A.—If *A* died without issue, his widow *B* was his heir, and any property, which she inherited from *A*, became her Strîdhana. As she had neither a son nor a daughter by *A*, and had a son by her former husband, this son will be her heir, and on her death will succeed to the property of which she may die possessed, in preference to any relatives of her husband *A*.—*Broach, September* 11*th*, 1851.

AUTHORITIES.—(1) [Mit. Vyav. f. 60, p. 2, l. 16]; (2*) f. 61, p. 2, l. 9 (*see* Chap. IV. B Sec. 4, Q. 1).

REMARK.—*See* above pp 149, 324, 331; but also pp 334, ss A step-son has, as such, no right of succession to his step-father's property (*a*) He can claim only maintenance.

Q. 6.—A woman of the Marâthâ caste adopted a son. The witnesses have proved the fact. Can the adopted son be legal heir to the property of the deceased?

A.—It having been proved that the adoption was solemnized with due ceremonies, the adopted son is the proper heir.—*Rutnagherry, September* 26*th*, 1845.

Authority not quoted.

REMARK.—There is no special authority to show that the adopted son inherits his adoptive mother's Strîdhana. It follows from his occupying in all respects the position of a son where there is not one by birth.

B.—SECTION 5.—HUSBAND.

Q. 1.—A woman died. Her husband lived with his father as a member of an undivided family. His age was about 19 years. Is he or his father entitled to receive the "Palu" of the deceased woman?

A.—If the deceased has left no children, her husband has the right to receive her "Palu."—*Surat, March* 28*th*, 1848.

(*a*) Comp. Tupper, Panj. Cust. L. Vol. II. p. 150. It is as heir to his mother's estate that he is entitled. As to the *quantum* of this estate *see Brij Indar's* case, L. R. 5 I. A at p. 14.

AUTHORITY.—(1) Mit. Vyav. f. 61, p. 1, l. 12 :—

"The property of a childless woman married in the form denominated Brâhma, or in any of the four (unblamed modes of marriage), goes to her husband; but if she leave progeny, it will go to her (daughter's) daughters; and in other forms of marriage (as the Âsura, &c.) it goes to her father (and mother on failure of her own issue)."

"Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brâhma, Daiva, Ârsha, Prâjâpatya, the (whole) property, as before described, belongs in the first place to her husband." (Colebrooke, Mit. p. 368; Stokes, H. L. B. 460.)

REMARK.—According to Manu, whose view is adopted in the Vyav. May., the property of a woman married according to the Gândharva form of marriage, goes likewise to the husband. The reason is that Manu and others consider the Gândharva rite as lawful for the Kshatriya. (a) As to the Bengal law of inheritance to Strîdhana, see *Judoonath Sircar* v. *Bussunt Coomar Roy* (b).

Q. 2.—A woman received certain property from her father at or after the time of her marriage. She is now dead. Who is entitled to this property, her husband or her relations on the side of her father?

A.—The property which may have been granted to the woman by her father on the occasion of her marriage or afterwards, must be considered her Strîdhana. After her death, her children are entitled to inherit it. If she has no children, her husband will be her heir. Her father has no right whatever to such property.

Broach, February 12*th*, 1852.

AUTHORITY.—Mit. Vyav. f. 61, p. 1, l. 12 (*see* Chap. IV. B. Sec. 5, Q. 1).

REMARK.—Similarly ruled in *Judoonath Sircar* v. *Bussunt Coomar Roy*, (c) and *Bistoo Pershad* v. *Radha Soondernath*. (d)

(a) *See* May. Borr. p. 178; Stokes, H. L. B. 106.

(b) 11 B. L. R. 286, 295, S. C. 19 C. W. R. 264, which over-rules the decision at 16 C. W. R. 105.

(c) *Supra.*

(d) 16 C. W. R. 115.

Q. 3.—A woman received some property, consisting of a house and other things, from her father. She has neither a son nor a daughter. In case of her death, can her "Pâṭ" husband inherit her property?

A.—By the custom of the caste, the "Pâṭ" husband is the heir.—*Sadr Adálat, April 2nd,* 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 61, p. 1, l. 12 (*see* Chap. IV. B. Sec. 5, Q. 1); (2) f. 61, p. 1, l. 10; (3) Mit. Âchâra, f. 8, p. 1, l. 8; (4) Vyav. May. p. 160, l. 2; (5) Nirṇayasindhu, p. 203, l. 26.

REMARK.—As re-marriages of widows have been legalized by Act XV. 1856, the decision seems in accordance with the present law.

Q. 4.—A woman, leaving her husband, lived with a man, from whom she obtained some ornaments. On her death the authorities seized her property, and treated it as heirless. A creditor, who holds a decree against her husband, attached the ornaments. The question has therefore arisen, whether the ornaments should be held liable for her husband's debts, or restored to the man who originally presented them to her, or considered as heirless property?

A.—As the ornaments are not the property of the woman's husband, his creditor cannot attach them. If the woman lived and died as a faithful concubine of the man who presented her with the ornaments, he will inherit her property. If the woman died as a public prostitute, the Sirkar may spend a suitable sum for her funeral rites, and take the rest as heirless property.—*Ahmednuggur, November 1st,* 1848.

AUTHORITIES.—(1) Vyav. May. p. 236, l. 4; (2) p. 199, l. 4; (3) p. 200, l. 3 and 7; (4) p. 202, l. 17; (5) p. 24, l. 1; (6) Mit. Âchâra, f. 16, p. 1, l. 13; (7) Mit. Vyav. f. 68, p. 2, l. 16; (8) f. 60, p. 2, l. 12; (9) f. 57, p. 1, l. 5; (10) f 61, p. 1, l. 12 (*see* Chap. IV. B. Sec. 5, Q. 1).

REMARK.—If the ornaments were the property of the deceased, and her husband had not been divorced from her, he will be her heir, and consequently his creditors may attach them.

Q. 5.—A Kuṇabî kept a woman in his house. Her husband was then alive. The Kuṇabî gave her some ornaments,

a nose ring, &c. She died, and the question is, who is the heir to her ornaments ?

A.—The Kuṇabî is the heir to the woman's ornaments, even though they may have been given to her as a present or as a token of his affection ; for the heir of a slave is her master. If they were granted merely for her use, his right to them cannot be considered to have ceased.

Ahmednuggur, February 17th, 1847.

AUTHORITIES—(1) Vyav. May p. 152, l. 8; (2) p. 153, l. 8; (3) p. 202, l. 7.

REMARKS—1. According to the Hindû Law, the woman, who commits herself into the keeping of a man, becomes his slave (*see* Vyav May. p. 171, Borradaile; Stokes, H. L. B 137, and above Chap II Sec. 3, Q 12), and gifts made to her revert at her death to her master. But as any title to property based on slavery is abolished by Act V of 1843, the property of the woman will, if she was not divorced from her husband, fall to the latter.

2. The acceptance of property earned by a wife by prostitution would be sinful on the part of the husband But the sin may be expiated by penance, and cases, where this actually has been done, are said to have occurred only recently

Q. 6.—A woman of the Śimpî (Tailor) caste, having lived the life of a prostitute, died during the absence of her husband. Her husband's brother has applied for the property of the deceased. Can he get it ?

A.—If the deceased woman had acquired her property by prostitution, and if she was out of the caste, her husband's brother can have no right to it. If the property in her possession belongs to her absent husband, his brother cannot claim it while he is alive. After his death, his brother can inherit it.—*Poona, December 17th*, 1859.

AUTHORITY.—Mit. Vyav. f. 61, p. 1, l. 12 (*see* Chap. IV. B. Sec 5, Q. 1).

REMARK.—The property acquired by the woman belongs to her husband. *See* preceding cases.

B.—SECTION 6.—THE HUSBAND'S SAPIṆḌAS.

INTRODUCTORY REMARKS.

1. The same discrepancy which prevails between the Mitâksharâ and the Mayûkha in regard to the definition of Strîdhana, or 'woman's property,' shows itself again in the rules on the succession to this kind of property, and the difficulties arising herefrom are considerably increased by the circumstance that the Vîramitrodaya also departs from the line laid down by the Mitâksharâ.

2. Vijñâneśvara, who declares every kind of property acquired by a woman by any of the recognised modes of acquisition to be Strîdhana, (*a*) gives the simple rule (*b*) that the property of a childless wife goes, if she was married according to the Brâhma, Daiva, Ârsha, or Prâjâpatya rites, to her husband, and on failure of him, 'to his nearest Sapindas.' If she was married according to the Âsura, Gândharva, Râkshasa, or Paiśâcha rites, it goes to her mother, her father, and their nearest Sapindas successively. The latter part of this rule has no immediate interest, as no case, in which the inheritance to a woman married according to the last four rites, was disputed, occurs amongst the Questions which follow. (*c*)

It will therefore only be necessary to consider the first part of the rule. According to the passage from the Âchârakâṇḍa of the Mitâksharâ, quoted in the Introduction pp. 120, 121, *supra*, it appears that the term 'Sapiṇḍa' includes, on the father's side, all blood relations within six degrees, together with the wives of the males, and on the mother's side, those within four degrees. As regards the expression *tat pratyâsannânâm*, 'to his nearest,' Mitramiśra in the Vîramitrodaya, (*d*) and Kamalâkara in the Vivâdatâṇḍava both explain it to mean, "the Sapiṇḍas of the husband succeed according to the degree of their nearness to him."

(*a*) Colebrooke, Mit. Chap II Sec. 11, cl. 2 ff. (*See* above, Introd. Sec. 11, pp. 265 ss.)

(*b*) *Ibid*, cl. 11 and 25.

(*c*) *See* the case of *Vijiarangam* v. *Lakshaman*, 8 Bom. H. C. R. 244 O. C. J :—"The husband's nearest kinsman is heir to a woman's separate property" (Coleb in 2 Str H. L. 412.)

(*d*) Vîramitrodaya, f. 219, p. 1, l. 3 :—"On failure of him (the husband) the succession goes to the husband's nearest (Sapiṇḍas). For, as it is by the husband that the nearness to the possessor is barred, the nearness to the husband must be made the principal consideration." *See* Transl. p. 240.

Moreover, Kamalâkara is of the opinion that the 'nearness' is to be determined by the rule given in the Mitâksharâ (a) in regard to the succession to the property of a male who died without male descendants, and that, consequently, first, the wife, *i.e.* the rival wife of the deceased, succeeds; next, the daughter, *i.e.* the deceased's step-daughter; thirdly, the deceased's step-daughter's son; fourthly, the husband's mother, and so on.

This opinion seems to be based on the consideration that, as the Sapiṇḍas inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate. Against this it may indeed be urged, that the word 'pratyâsanna,' 'nearest,' if employed in regard to persons generally, has the sense of 'nearest by relationship,' and that the list of heirs to a man without male descendants is not made solely with regard to nearness by relationship, since, for instance, it places the daughter's son before the parents and brothers, though he is further removed than the former, and not nearer related than the latter. If the objection be admitted, we should take the word 'pratyâsanna' in its first sense, and assume that Vijñâneśvara really intends 'nearness by relationship' to be the principle regulating the succession of the Sapiṇḍas.

On this interpretation the heirs of childless widows in the first instance would be those kinsmen related to the husband in the first degree, *i.e.* rival wives of deceased, their offspring, and the husband's parents, all inheriting together; next the kinsmen related to the husband in the second degree, as the husband's brothers, deceased's step-children's children, &c., and so on to the sixth degree inclusive. (*See* Bk. I. Chap. IV. B. Sec. 6 II. *c*, Q 2) But the identity of the wife with her husband being accepted as a leading principle of the Mitâksharâ, the rule seems on the whole most consonant to it, whereby precedence, in heritable relation to him, gives a like precedence, and order of succession in relation to his widow. Such appears to be the rule too which custom has preferred in this part of India.

3. In opposition to these doctrines, Nîlakaṇṭha in the Mayûkha makes a two-fold division of the Strîdhana of a childless woman (b) —I, into *páribháshika* 'Strîdhana proper' as defined by the texts of Manu, Kâtyâyana, and others, *i.e.* property presented at the time of marriage (*yautaka*), and subsequent presents of the relations

(a) Colebrooke, Mit. Chap. II. Sec. 1, cl. 2; Stokes, H. L. B. 427.

(b) *See* Borradaile, May. Chap. IV. Sec. 10, cl. 26 and 27; Stokes, H. L. B. 105.

(*anvâdheya*), and of the husband (*prîtidatta*); and II, into *pâribhâshikâtiriktavibhâgakartanâdilabdha*, Strîdhana other than Strîdhana proper, acquired by division and the like, *i.e.* property acquired by division, inheritance, or any of the other recognised modes of acquisition. For each kind he gives a different order of heirs; I, 'Strîdhana proper' goes (a) if the woman was married according to the Brâhma, Ârsha, Prâjâpatya, Daiva, or Gândharva rites, to the husband, and (b) if she was married according to the Âsura, Râkshasa, or Paiśâcha rites, to her parents. (*a*) The next heirs after the husband and the parents are in either case (*b*) 1, the widow's sister's son; 2, the husband's sister's son; 3, the husband's brother's son; 4, the widow's brother's son; 5, the son-in-law; 6, and the husband's younger brother. After these 'the woman's Sapiṇḍas in the husband's family according to the degree of their nearness to her through him,' (*c*) inherit if she was married according to one of the five first mentioned rites. If she was married according to one of the last mentioned three rites, her father's Sapiṇḍas succeed. (*d*) II, 'Property other than Strîdhana proper,' devolves, according to the rules which are given for the descent of a separated male's property, on the sons, son's sons, &c. (*e*) *See* Stokes, H. L. B. 105.

4. As the Mitâksharâ is the highest authority in this Presidency, the subjoined questions have been mainly arranged according to the principle laid down in that work. There occurs, however, one deviation from it. The Sapiṇḍas have been divided into Sagotra or Go-

(*a*) *See* Borradaile, May. Chap. IV. Sec. 10, cl. 28,29; Stokes, H. L. B. 105-6.

(*b*) Borradaile, *ibid.* cl. 30; Stokes, H. L. B. 106. *See* also Stokes, H. L. B. 499. The Smṛiti Chandrikâ, distinguishing between the constituents of Class I. and those of Class II. assigns the *yautaka* to the unmarried daughters alone in equal shares. The *anvâdheya* and the *prîtidatta* it assigns in equal shares to sons and daughters. The second class it assigns in equal shares to the unmarried daughters and the married ones, who are indigent. (*See* Smṛiti Chandrikâ, Chap. IX. S. 3.)

(*c*) Borradaile, *ibid.* cl. 28; Stokes, H. L. B. 105.

(*d*) The Smṛiti Chandrikâ, l. c. para. 30, quotes Kâtyâyana, to the effect that gifts from kinsmen go only on failure of kinsmen to the husband. In case of an *Âsura* marriage, the kinsmen who actually gave, Devânda Bhaṭṭa says, take back their property. The Śulka goes in every case to the uterine brothers, Mit. Chap. II. Sec. 11, p. 14; Stokes, H. L. B. 461.

(*e*) Borradaile, May. *ibid.* cl. 26; Stokes, H. L. B. 105. *See* above, Introd. p. 150.

trajas, *i.e.* those belonging to the same family as the husband, bearing the same name; and Bhinnagotras, *i.e.* those belonging to a different family, and the former, as a body, have been placed before the latter. The opinion that the Sagotras inherit before the Bhinnagotras, seems to have been held by most of the Śâstris also, who wrote the following Vyavasthâs, and was shared by the Law Officer who assisted in the compilation of the Digest. It is based on the principle which prevails in the case of a male's property, namely, that no property should be allowed to pass out of the family through inheritance, as long as a single member of the family survives. Though the Mitâksharâ does not expressly state that this principle holds good in the case of Strîdhana also, this may be inferred, not only from the general consideration that Hindû lawyers regard the family connected by name as a closely united whole, but especially also from the circumstance, that according to the Mitâksharâ the sonless husband's property merges on his death in the Strîdhana. In accordance with these principles, the questions referring to the rights of Sapinḍas in general have been placed first (Sec 6, I); next come those referring to the rights of Gotraja-Sapinḍas (Sec. 6, II); and lastly those referring to the Bhinnagotra-Sapinḍas (Sec. 6, III.). Both the Gotrajas and Bhinnagotras have been arranged according to the degree of the nearness of their relationships.

B.—SECTION 6.—THE HUSBAND'S SAPIṆḌAS.

I.—Sapiṇḍas in General.

Q. 1.—A widow died. A relation claims to be her heir. He is the sixth descendant, while the widow's husband was the fifth descendant from one and the same ancestor. Should he be declared her heir?

A.—Yes.—*Tanna, February 16th,* 1847.

Authorities.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 58, p. 2, l. 16; (3) f. 61, p. 1, l. 14:—

"On failure of him (the husband) it (the woman's property) goes to his nearest kinsmen (Sapiṇḍas) allied by funeral oblations." (Colebrook, Mit. p. 368; Stokes, H. L. B. 461.)

Q. 2.—A man claims to be the heir of a deceased woman. He appears to be her husband's relation by consanguinity. Can he be her heir?

A.—As the man belongs to the same family he will be the heir of the deceased.—*Ahmednuggur, November 27th,* 1848.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3 (*see* Auth. 5); (2) p. 151, l. 7; (3) p. 142, l. 8; (4) p. 181, l. 5; (5*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

REMARK —Provided that the claimant, if a Gotraja, is related to the deceased's husband within the sixth degree; or if a Bhinnagotra-Sapiṇḍa, within the fourth degree.

Q. 3.—A widow of the Prabhu caste lived with her brother, who not only afforded her maintenance but defrayed the expenses of her pilgrimages. She inherited no property from her husband. So situated the woman died, and the question is, whether her brother or the relatives of her husband are entitled to her property?

A.—As the woman did not inherit any property from her husband, and as she lived under the protection of her brother, the latter is the heir.

Ahmednuggur, February 14th, 1850.

AUTHORITY.—Vyav. May. p. 159, l. 2.

REMARKS —1. According to the Mitâksharâ Vyav. f. 61, p. 1, l. 14, the husband's Sapiṇḍa relations are the heirs. (*See* Chap. IV. B. Section 6 I. Q. 1.)

2. According to the Mayûkha, the property would fall to her brother only if she was married by one of the three blameable rites. (*See* Introductory Remarks, cl. 3.) (*a*)

II. HUSBAND'S SAGOTRA SAPIṆḌAS.

a.—STEP-SON.

Q. 1.—Will a man inherit the property of his step-mother?

A.—If the step-mother has neither a daughter nor a son, her step-son will be her heir.

Ahmednuggur, July 30th, 1846.

AUTHORITY.—*Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

(*a*) This would not generally occur or be presumed except in a caste in which the purchase of wives is recognized. See *Vijiarangam* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J.

REMARK.—The step-son cannot take before the husband. "He takes the property on failure of offspring, husband, and the like." (Smṛiti Chandrikâ, Chap. IX. S. 3, p. 38.)

Q. 2.—A wife, having been abandoned by her husband, became a Muralî, (*a*) and adopted a son. Will this adopted son or the son of the second wife of her husband be her heir?

A.—The son of her husband's second wife is her heir.

Poona, June 23rd, 1846.

Authority not quoted.

REMARKS.—1. The answer is correct For though abandoned by her husband the Muralî remains his wife. The second wife's son is therefore entitled to receive her property as Sapiṇḍa relation of her husband. The adoption made by her was null.

2. When a person has more than one wife, and when one of them has a son, the other cannot adopt. The object of the Śâstra is to create, by adoption, an heir to the husband, and not to the wife, except incidentally.

3. *See* the authorities of the preceding Question.

II. *b.*—THE HUSBAND'S MOTHER.

Q. 1.—Can a mother-in-law inherit her daughter-in-law's property?

A.—Yes.—*Poona, October 26th,* 1858.

AUTHORITIES.—(1) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (2) p. 160, l. 4; (3*) Mit. Vyav. f 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

Q. 2.—A man had two wives. Each of them had a son and a daughter-in-law. The elder wife and her son died first. The man also died afterwards. His death was followed by the death of his son born by the younger wife. His widow, under a decree of the Civil Court, obtained possession of the property of the family. When the daughter-in-law died, the property passed into the hands of the mother-in-law.

(*a*) A Muralî is a woman nominally devoted to the worship of Khandobâ, but really a beggar, singer, and prostitute.

The daughter-in-law of the elder wife has sued the step-mother-in-law for possession of the property. The question is, who is the nearer heir of the daughter-in-law of the man's younger wife ?

A.—The nearer heir is the younger wife of the man. The elder wife's daughter-in-law must be considered as a somewhat distant relation.—*Rutnagherry, June 25th,* 1852.

Authorities.—(1) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (2) p 83, l. 3; (3) p. 134, l. 4; (4) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec 6 I. Q 1).

Remarks —1. The authorities quoted by the Śâstri refer to the succession to the estate of a male.

2. The mother-in-law is related to the deceased daughter-in-law's husband *in the first degree, the elder wife's daughter-in-law in the third.*

Q. 3.—A woman of the Vâṇi caste died. She has two mothers-in-law, one direct, and the other a step-mother-in-law. Which of these is the heir of the deceased?

A.—As the direct mother-in-law of the deceased had brought up and protected her husband, she will be her heir. In the absence of the mother of the husband, the step-mother will have the right to inherit the property of the deceased.—*Ahmedabad, October 22nd,* 1859.

Authorities.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2*) f. 61, p. 1, l. 14 (*see* Chap IV. B. Sec. 6 I. Q. 1); (3*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

Remarks.—(1) The authorities quoted by the Śâstri refer to the succession to a male's estate.

2. The answer nevertheless seems correct, as the mother is more nearly related to her son than the step-mother.

II. *c.*—FELLOW-WIDOW.

Q. 1.—A property was equally divided between an aunt and her nephew. When the latter died his two widows divided his share between them. One of these widows is

dead, and the question is, who should take her share as heir, the other widow or the aunt?

A.—The other widow, and not the aunt.

Ahmednuggur, July 17th, 1846.

AUTHORITIES.—(1*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (2*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

Q. 2.—Government settled upon a widow an annual allowance of Rupees 300. At her death certain arrears were due to her by Government. The surviving members of the family are a fellow-widow and some others. The deceased widow, when she was alive, had authorized her brother to draw the arrears, and to spend the money in the performance of her funeral rites. The question is, whether the right of receiving the arrears should belong to her brother or her fellow-widow?

A.—The arrears are on account of an allowance for the maintenance of the widow; they must therefore be considered Strîdhana. The fellow-widow is entitled to them as her heir.—*Surat, August 29th,* 1846.

AUTHORITIES.—(1*) Vyav. May. p. 140, l. 1 (*see* Chap II. Sec. 14 I. A. 1, Q. 1); (2*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

REMARKS.—The assignment by the deceased to her brother is inoperative according to Hindû law, as the contemplated duty cannot be performed by him, but only by her husband's family, so long as any of the latter survive.

2. The son of a step-daughter of a widow deceased, by her co-wife who died before the husband, is heir to such widow.(a) As the widow inherited from her husband, the succession would, according to the Bengal theory, be to the same person as heir to the deceased widow's husband, his own maternal grandfather. *See* above, Introd. pp. 138, 332, 334.

(*a*) ***Motiram Sukram* v. *Mayaram Barkatram*, Bom. H. C. P. J. for 1880, p. 119.**

II. *d.*—THE HUSBAND'S BROTHER.

Q. 1.—A number of uterine and half-brothers divided their property, and entered into a mutual stipulation that when any one of them died his property should be divided among the survivors, who should support the deceased's widow. Subsequently one of them died. His widow lived separately from her brothers-in-law (but was supported by them). When she died the question arose whether her husband's uterine brothers, or his half-brothers, or both, should be considered her heirs?

A.—When a separated brother dies, his widow is his heir. When she dies her heir is her husband's uterine brother. If her husband had not separated from his brothers (and if she was supported by the uterine brothers as well as the step-brothers), they are all her heirs.

Ahmednuggur, October 21st, 1848.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4 (*see* Auth. 9); (2) p. 135, l 5; (3) p 140, l. 1; (4) p. 133, l. 2; (5) p. 159, l. 3 (*see* Auth 10); (6) p. 136, l. 2 (*see* Chap. I. Sec. 2, Q. 3); (7) p. 152, l. 4 and 5; (8) p. 108, l. 3; (9*) Mit. Vyav. f. 55, p 2, l 1 (*see* Chap I. Sec. 2, Q. 4); (10*) f. 61, p. 1, l. 14 (*see* Chap IV. B Sec. 6 I. Q. 1).

Q. 2.—A deceased woman has no sons or other near relations, but there are one brother-in-law and four sons of another brother-in-law, who are all united in interests. The question is, which of these will be her heir?

A.—The brother-in-law and the sons of brother-in-law will all be her heirs.(*a*)—*Ahmednuggur, November 24th,* 1859.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 2 and 5 (*see* Auth. 3); (2*) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

Q. 3.—Of four brothers, three died. Their widows, having received the shares due to their respective husbands, lived together. They did not divide their property. One of them afterwards died, and the question is, who is her heir? the surviving brother or the other two widows?

(*a*) The brother-in-law must have the preference as nearer by one degree.

A.—The surviving brother is the heir.

Ahmednuggur, May 26th, 1859.

AUTHORITIES.—(1) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. l, Q. 1); (2*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec 6 I. Q. 1).

Q. 4.—A woman of the Marâṭhâ caste died. She had neither a son nor any other near relation. There are, however, two brothers-in-law, and a separated second cousin's son. Which of these should be considered the heir of the deceased?

A.—The brothers-in-law must be considered nearer than the nephew, (*a*) and they should therefore take each a half of the deceased's property.—*Tanna, January 19th,* 1853.

AUTHORITIES.—(1) Vyav. May. p. 140, l. 1 (*see* Chap II. Sec. 14 I. A 1, Q. 1); (2) p. 159, l. 2; (3*) Mit Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B Sec. 6 I Q. 1.)

Q. 5.—A man of the Mâlî caste died. He left a widow and some property. The widow subsequently died. There are now two heirs, the widow's sister and a brother of her husband. The question is, which of these is the heir?

Suppose a woman of the Mâlî caste had certain property, and that she died during the lifetime of her husband; if the husband die afterwards, and there be a sister of the woman and son of a brother of her husband, which of them will be the heir?

A.—If a man and a woman of the Mâlî caste should die without issue, the property of the husband goes to his brother, and not to his wife's sister.

If a woman of the Mâlî caste has some property given to her by her father, and if her husband dies before her, her father—and, among his near relations, her sister—will have the right to take her property.—*Broach, June 29th,* 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q 1).

(*a*) *i. e. Even* than the nephew, much more than their competitor here.

REMARK.—The second part of the answer would only be right in the case of an Âsura or other disapproved marriage. In the case of the Brâhma, &c., approved rites, the husband inherits from his wife. *See* the following Question.

Q. 6.—Who will inherit a woman's property, her own brother or her husband's brother?

A.—The brother-in-law may inherit so much of the woman's property as belonged to her husband, and that which she may have acquired from her parents and others will pass to her brother.—*Dharwar*, 1845.

AUTHORITIES.—(1*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1); (2) Vîram. f. 219, p. 2, l. 6:—

"The property of a childless woman, which she received from her relations, goes on her death to them, and on failure of them to her husband. For Kâtyâyana says:—'(Strîdhana) which has been given by the (wife's) relations goes to them; on failure of them to the husband.'"

REMARK.—The Śâstri's answer agrees with the doctrine laid down in the passage quoted above. But the decision can hardly stand, for—

(1) The Mayûkha, p. 160, l. 7 (Borradaile, p. 129; Stokes, H. L. B. 106) refers the passage of Kâtyâyana to women only who were married according to one of the blamed rites (Âsura). Moreover, instead of "goes to her husband," the reading is there "goes to her son."

(2) According to the Mitâksharâ the whole property of the deceased goes to the husband's brother. (*a*)

Q. 7.—A widow of a "Śûdra" became a "Jogtin," (*b*) and remained in that order for about 12 years. About a fortnight before her death she came to the house of her brother, and there died. The question is, whether her brother or her husband's brother should inherit her property?

(*a*) Coleb. Mit. 368; Stokes, H. L. B. 461. See *Musst. Thakoor Deyhee* v. *Rai Baluk Ram*; 11 M. I. A. 169.

(*b*) A woman devoted to the worship of the goddess called Yellumma, near Dharwar. She is to Yellumma what a Muralî is to Khaṇḍoba in the Dekhan, what a Bhâvîn is to Râwalnâtha in the Konkan.

A.—If any money was received by the woman's father from her husband at the time of her marriage, her brother will be her heir. If her father received no money, or if it cannot be ascertained whether any money was received or not, her husband's brother will be her heir.

Dharwar, June 3rd, 1850.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3; (2*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q 1).

REMARK.—See the case of *Vijiarangam* v. *Lakshaman.* (*a*)

II. *e.*—THE HUSBAND'S HALF-BROTHER.

Q. 1.—When there are two relatives of a deceased woman, viz. her husband's half-brother and her husband's half-brother's son, which of these will be her heir?

A.—The husband's half-brother being the nearest will have the precedence.—*Dharwar,* 1845.

AUTHORITIES.—(1*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap IV. B. Sec. 6 I. Q. 1); (2*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

II. *f.*—THE DAUGHTER-IN-LAW.

Q. 1.—A widow died, leaving a widowed daughter-in-law, and also a widowed daughter-in-law's daughter, who has a son. Who succeeds to the inheritance?

A.—The daughter-in-law, being the nearest, and "Sapiṇḍa" relation of the deceased widow, will inherit the property.—*Surat, July 25th,* 1859.

AUTHORITIES.—(1) Manu IX. 187 (*see* Bk. I. Chap. II. Sec. 14 I. B. *b.* 1, Q. 1; (2) Nirṇayasindhu, Chapter on Śrâddha (*ibid.*); (3) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

REMARKS.—1. The contrary case, *Bandam Settah et al* v. *Bandam Mahalakshimi,* (*b*) is not supported by any reasons. In *Baee Jetta* v. *Huribhai,* (*c*) the daughter-in-law was preferred to a distant cousin

(*a*) 8 Bom. H. C. R. 244, O. C. J.
(*b*) 4 M. H. C. R. 180.
(*c*) S. A. No. 304 of 1871, Bom. H. C. P. J. F. for 1872, No. 38.

of the husband as the person who would be his nearest heir. Reference is made to *Bhugwandeen Doobey* v. *Myna Baee,* (*a*) *Musst. Thakoor Daybee* v. *Rai Balack Ram et al,* (*b*) and *Lakshmibai* v. *Jayram et al.* (*c*) In the Vîramitrodaya, Transl. p. 244, the daughter-in-law's right is denied. Bâlambhaṭṭa on the other hand, as we have seen, (*d*) places the daughter-in-law next to the paternal grandmother.

2. *See* Bk. I. Chap. II. Sec. 14 I. A. 2, Q 1, Remarks, p. 469 et seq.; and *Lulloobhoy* v. *Cassibai,* L. R 7 I. A. 212.

II. *g.*—THE HUSBAND'S BROTHER'S SON.

Q. 1.—There were two uterine brothers. The elder brother had a son, but he died while his father was alive. The younger brother had a son. The brothers died. The elder brother's widow also died. The widow of the elder brother's son, who died during the lifetime of his father, and the son of the younger brother, have applied to be recognized as heirs. The question is, which of them is the heir of the widow of the elder brother ?

A.—The widow of the elder brother became heir of her husband on his death. From this the brothers seem to have been separated. The right of inheritance would therefore devolve upon her daughter or other relation. She has, however, no daughter or other near relation, and as the son died during the lifetime of the father, the right of inheritance has not been through him transmitted to the daughter-in-law. It will therefore belong to the nephew.

Surat, October 27th, 1857.

The following is a genealogical table, illustrative of the question :—

(*a*) 9 Calc. W. R. 23 P. C. S. C.; 11 M. I. A. 487.

(*b*) 10 Calc. W. R. 3 P. C.

(*c*) 6 Bom. H. C. R. 152.

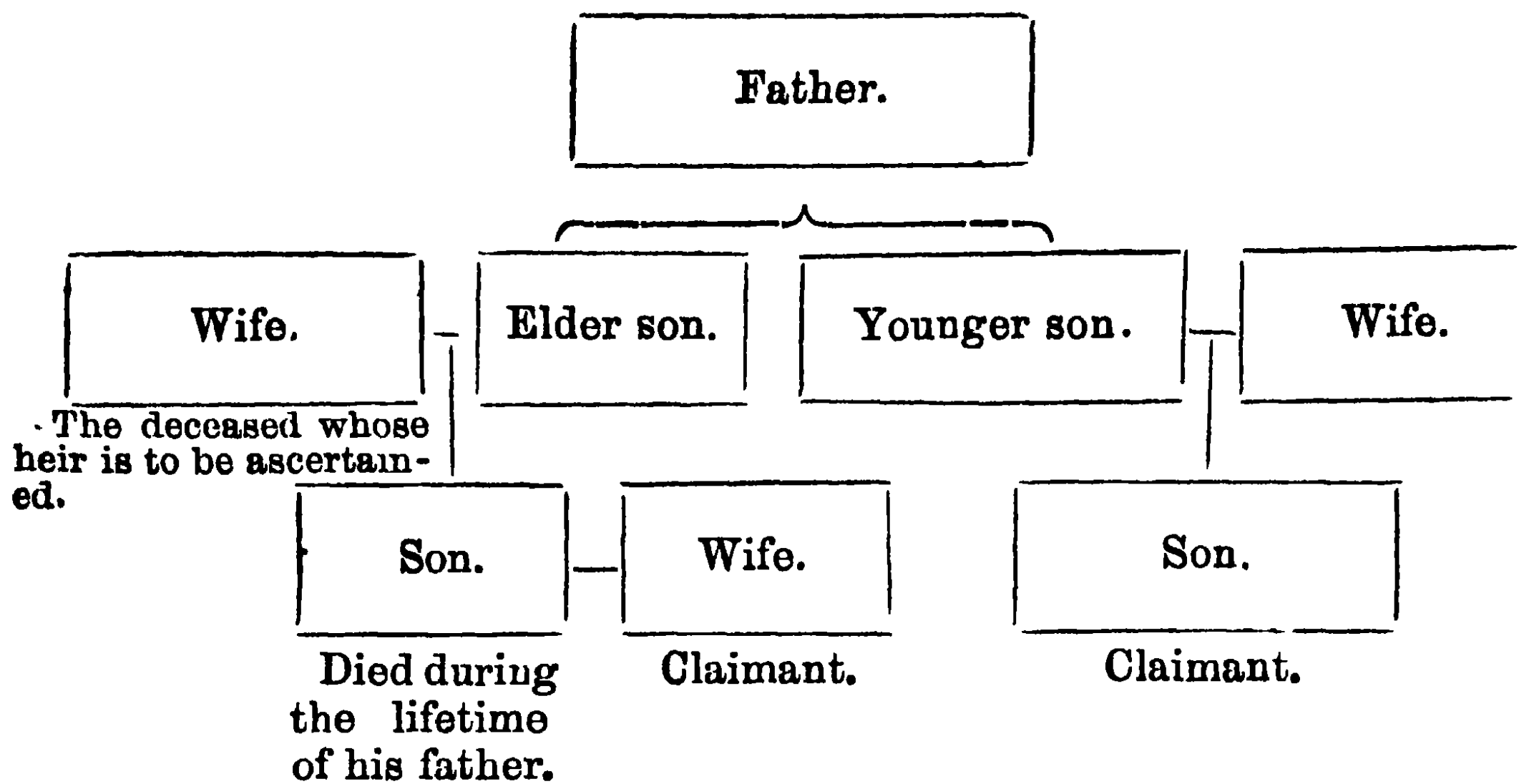
(*d*) *See* above, Introd. p. 128.

Father.

Wife. — Elder son. | Younger son. — Wife.

· The deceased whose heir is to be ascertained.

Son. — Wife. | Son.

Died during the lifetime of his father. | Claimant. | Claimant.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2*) f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6, I. Q. 1.)

REMARK.—This is *apáribhâshika* inherited from the husband. The answer would be correct according to the Mayûkha, according to which the property in question, having been acquired by inheritance from the husband, would descend in the first place to the widow's husband's heirs, as being for this purpose her own heirs. *See* above, Introd. to Bk. I. p. 146, 150, 272, 332; and the Introductory Remarks to this Section, p. 518, 519; Borr. 127; Stokes, H. L. B 105.

Q. 2.—A man, named Bhukhan, had two sons named Mâṇikchand and Mayârâma. They effected a partition of their father's property, and wrote a deed of separation. When Mayârâma died, his son Dâdâbhâi inherited his father's property. Afterwards Dâdâbhâi died, and was succeeded by his widow Jamnâ. She died without male issue. Dâdâbhâi's sister Gangâ, and her two sons, named Premânanda and Kâlidâsa, have applied for a certificate declaring them to be the heirs of Jamnâ. Jettâ, son of Mâṇik and cousin of Dâdâbhâi, has also applied for a similar certificate. The question therefore is, whether the former or the latter are the heirs?

A.—The two brothers mentioned in the question were separate. The Śâstra declares the following rule of succession in case of the death of a separated brother. Each of

the undermentioned relations succeeds in the absence of the next previously mentioned :—Widow, daughter, son of a daughter, parents, the uterine brothers, nephew, step-brother, son of a step-brother, and members of the same kin or Gotra, and among them the first is sister. Applying this rule to the case, it appears that Gangâ and her two sons are the heirs.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 140, l. 6; (3) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A 1, Q. 1, p. 463); (4*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

REMARK.—The kind of property in dispute not being stated, the Śâstri has treated the case as one of a succession to a male's property, and followed the Mayûkha. Her heir is, according to the Mitâksharâ, Jettâ, the son of Mâṇik, since he is the deceased's husband's uncle's child, *i. e.* a Gotraja-Sapiṇḍa. (*See* Introductory Remarks to this Section, para. 4.)

II. *h*.—HUSBAND'S BROTHER'S WIDOW.

Q. 1.—A widow died. The surviving relations are a widow of her brother in-law, and a son of a sister of her husband. Which of these is the heir of the widow ?

A.—The husband's sister's son is a "Sapiṇḍa," but not a "Gotraja" relation, and he is not, consequently, an heir. The widow of the brother-in-law is both the "Sapiṇḍa" and "Gotraja" relation, and she is therefore the heir.

Ahmedabad, December 30th, 1853.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 58, p. 2, l. 16; (3*) f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

II. *i*.—HUSBAND'S PATERNAL UNCLE'S SON.

Q. 1.—Can a cousin of a woman's husband be her heir ?

A.—Yes.—*Poona, September 10th,* 1852.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 2 (Stokes, H. L. B. 105); (2*) Mit. Vyav. f. 61, p. 1, l. 14 (Coleb. Mit. 368; Stokes, H. L. B. 461. *See* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

Q. 2.—A man received his share of the ancestral property and separated; afterwards he died. His widow inherited his property. She also subsequently died. There is a son of her husband's sister and a cousin of her husband. Which of these is the heir?

A.—The son of the sister of the woman's husband is the nearer relation of the two mentioned in the question, and in the order of heirs which is laid down in the Sâstra, a sister's son becomes heir in the absence of a sister. He should therefore be considered the heir entitled to all the moveable and immoveable property of the deceased, except the Vatan.—*Surat, September* 15*th,* 1849.

AUTHORITIES.—(1) Vyav. May. p. 138, l. 8; (2) Manu IX. 187 (*see* Auth. 5); (3) Dâya Krama Saṅgraha; (4) Nirṇayadîpikâ; (5*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1); (6*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6, I. Q. 1).

REMARKS.—1. *See* Bk. I. Chap. II Sec. 14 I. B *b* 2, Q. 1, p. 482; Sec. 15, B. I. (1), Q. 1, p. 495.

2. The Śâstri has taken this case for a question regarding the succession to a childless man's property, and decided it according to the Bengal law. *See* Coleb. Dâya Bhâga, 225 note. (Stokes, H. L B. 353). According to the Mitâksharâ and the Mayûkha the husband's cousin is the heir, *see* Introductory Remarks to this Section, and Chap. II. Sec. 15 B I. (1), Q. 1, p 493.

Q. 3.—Who is entitled to inherit from a deceased woman of Kuṇabî caste—her husband's sister, or a cousin who was separate from her husband, or the husband of her deceased daughter?

A.—The sister and the cousin of her husband are near relations of the deceased woman, and they both appear to have equal claims to the property of the deceased. The sister, though very near to the deceased, has gone into another family by her marriage. The cousin is a "Sapiṇḍa" relation of the deceased's family. The property should therefore

be equally divided between the two. There is nothing in the Śâstras which is favourable to the claim of the son-in-law.

Ahmednuggur, July 27th, 1847.

AUTHORITIES —(1) Vyav. May. p 134, l. 4 ; (2) p. 140, l. 1 (*see* Chap. II. Sec. 14 I A. 1, Q. 1) ; (3*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6, I Q. 1, p. 520).

REMARK.—The husband's cousin alone inherits according to the Mitâksharâ, as he is a Sagotra Sapiṇḍa The Śâstri regards the devolution of the property as governed by the rules applicable to the deceased husband's estate; but admitting the sister as a gotraja, he should have preferred her to the cousin. (Vyav. May. Chap. IV. Sec. 8, p. 19, Borr. 106; Stokes, H. L. B. 89.)

Q. 4.—A woman died. Her relations are, her husband's cousin, another cousin's five sons, and her husband's brother's widow. The last-mentioned died. One of the five sons died, leaving a son. How will the several heirs divide the property ?

A.—The property should be divided into seven equal shares, of which each of the heirs should take one, and the seventh share of the woman's husband's sister-in-law should be again equally divided among the six heirs.

Khandesh, March 22nd, 1848.

AUTHORITIES —(1) Vyav. May p. 134, l. 4; (2*) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A 1, Q. 1, p. 463; (3*) Mit. Vyav. f 61, p. 1, l. 14 (*see* Chap IV. B. Sec. 6, I. Q. 1. p 520.)

REMARK.—The husband's paternal uncle's son alone inherits as the nearest Sagotra Sapiṇḍa relation of the deceased's husband. He is related to him in the 5th, and the paternal uncle's grandson in the 6th degree, according to the inclusive mode of reckoning followed by the Hindûs. The succession to the second brother's widow, she having survived to inherit, would be the same.

II. *j.*—THE HUSBAND'S PATERNAL UNCLE'S GREAT-GRANDSON.

Q. 1.—The right of heirship to a deceased woman is claimed by her son-in-law and her husband's cousin's grandson. Which of these two is the legal heir ?

A.—The woman's husband's cousin's grandson.

Ahmednuggur, December 13*th*, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 151, l. 7; (3) p. 83, l. 3; (4) p. 142, l. 8; (5) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463); (6*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

II. *k.*—THE HUSBAND'S MORE DISTANT KINSMEN.

Q. 1.—A man named Śankarâjî had two sons. One of them was called Bhaisha and the other Dayâljî. Bhaisha's son was called Pîtâmbar, and Dayâljî's son Ratanjî. Pîtâmbar's son was called Trikam, and Ratanjî's son Purushottam. The wife of Purushottam, called Divâlî, died without issue. Pîtâmbar's son Trikam has applied for a certificate of heirship. One Narottam Rasikadâs objects to the claim of Trikam, on the ground that Shâmâ Bâi, the wife of Ratanjî, was the sister of Rasikadâs's grandfather, that Purushottam was her son, that Divâlî the wife of Purushottam made a will, which Rasikadâs has produced, that it authorizes him to take Divâlî's house and moveable property in consideration of his having given her maintenance, and promised to perform the funeral rites after her death, and that the sons of Śankarâjî had separated. The questions are, whether the said Trikam should be furnished with a certificate? and whether Divâlî had right to transfer her property as she had done?

A.—If there is no daughter or son of a daughter, or other near relation of Divâlî, the applicant Trikam must be considered a relation entitled to inherit the property of the deceased. The will does not appear to have been made under the pressure of any necessity. When Divâlî was possessed of the whole estate of her husband, she had no reason to receive maintenance from another man. The right of performing the funeral rites belongs to the relations of her husband. A will on her part was not therefore necessary, and she could not have made it conformably to the law.—*Surat, November* 12*th*, 1847.

The following genealogical table will illustrate the question :—

Śankarâjî.

Bhaisha. Dayâljî. Name not cited in the case.

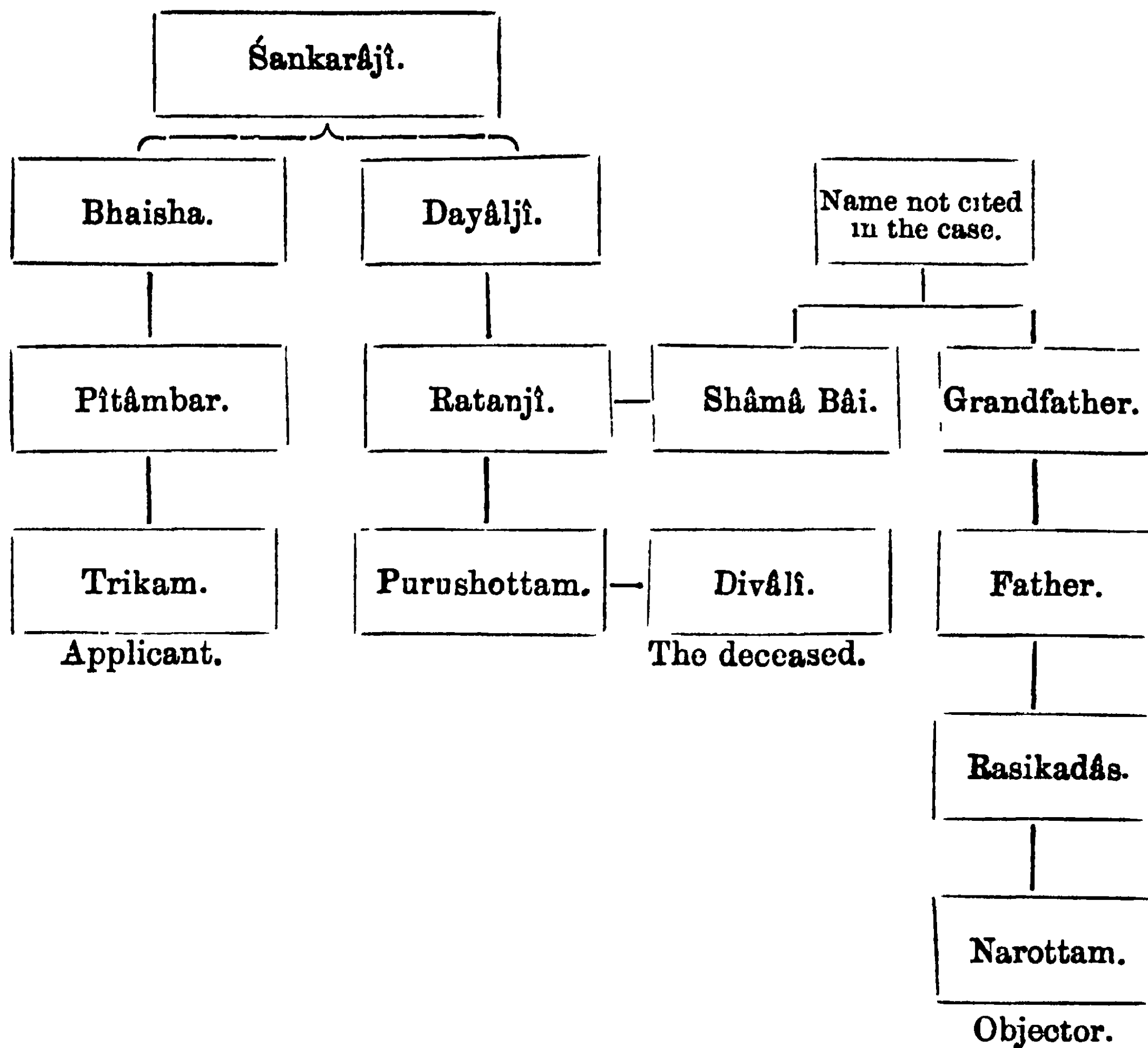
Pîtâmbar. Ratanjî. — Shâmâ Bâi. Grandfather.

Trikam. Purushottam. — Divâlî. Father.

Applicant. The deceased.

Rasikadâs.

Narottam.

Objector.

AUTHORITIES.—(1) Vîram. f. 194, p. 1, l. 2; (2) Vyav. May. p. 134, l. 4; (3) Jîmûtavâhana Dâyabh 49; (4*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B Sec. 6 I. Q. 1, p. 520).

REMARK.—*See* above, pp. 224, 294, 298, 309; Chap. II. Sec. 6 A. Q. 6, p. 394; and Bk. II. Chap. I. Sec. 2, Q. 8, Remarks.

Q. 2.—A woman, having first inherited the property of her husband, died. The heirship to her is disputed between her husband's sister's son and some cousins three or four times removed from her husband. The question is, which of these is the heir ?

A.—As the husband of the deceased woman had separated from the other members of his family, his sister's son is the heir. The cousins cannot be preferred as heirs to the son of the deceased's husband's sister.—*Surat, June 23rd,* 1845.

AUTHORITY.—*Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

REMARK.—The husband's cousins should be the heirs, as they are Sapiṇḍas of the deceased, and also Sagotras, while the sister's son is only a Sapiṇḍa. *See* Chap. II. Sec. 15 B. I. (1), Q. 1, p. 493, and Introductory Remarks to this Section.

Q. 3.—*A*, a man, had two daughters and a son. When *A* died, his property passed into the hands of his grandson by right of inheritance. The grandson afterwards died, and the property passed into the hands of his mother. The mother died; and the question is, whether the property should be considered the property of the mother, or of *A*?

Are the daughter and son of a daughter of *A*, or the cousin thrice removed from the husband of the woman who died last, the heirs?

A.—The property should be considered as the property of the last deceased person, and not of *A*. The cousin thrice removed of her husband is the nearer heir of the last deceased, and he should be considered the heir.

Broach, December 21st, 1860.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3; (2) p. 89, l. 2; (3) Mit. Vyav. f. 60, p. 2, l. 16; (4*) f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6, I. Q. 1).

REMARK.—The references are to the passages considered in the introductory remarks. The woman's heir would be her step-daughter or the step-daughter's son. The right of the latter as an heir is affirmed in *Motiram* v. *Mayaram*. (*a*)

Q. 4.—There are several heirs of a deceased woman, namely, her husband's cousins of 6 or 7 removes, and his sister. Which of these is the heir to the property of the deceased?

A.—In the absence of any nearer relations of the deceased, her (husband's) cousins of 6 or 7 removes are her "Sapiṇḍa" relations, and therefore heirs. Cousins as distant as 7 removes are called "Sapiṇḍa," and are heirs to each other. Cousins as distant as 14 removes are called "Gotraja,"

(*a*) Bom. H. C. P. J. 1880, p. 119.

and are also heirs. Cousins as distant as 21 removes are called "Samânodaka"; they are also heirs of each other. This is the rule laid down in the "Śâstra."

Ahmednuggur, June 9th, 1852.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3; (2) Chap. IV. Sec. 10, pl. 26, 28; (3) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

REMARKS.—1. The remarks on the Gotrajas and Samânodakas are incorrect. The Samânodakas cease with the fourteenth degree. Gotraja, "born in the same Gotra," is applied to all persons who descend from one common ancestor as far as such descent can be proved by a common name or otherwise. The Śâstri, relying on the Vyav. May., should have preferred the husband's sisters to the distant cousins. (*See* Introd. p. 117).

2. In the Mitâksharâ, Samânodakas are not named as heirs to a woman's property.

III.—THE HUSBAND'S SAPIṆḌAS BELONGING TO A DIFFERENT FAMILY (BHINNAGOTRA).

a.—DAUGHTER'S GRANDSON.

Q. 1.—A deceased woman has no relations except her daughter's grandson. Can he be her heir?

A.—It appears from the law books called Mayûkha and Mitâksharâ, that the daughter's grandson is the heir.

Poona, January 22nd, 1847.

AUTHORITY.—*Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1).

III. b.—THE HUSBAND'S SISTER.

Q. 1.—A woman died without issue. Her husband's sister and the daughter of the deceased's sister have applied for a certificate of heirship. The question is, which of these is the heir?

A.—If the property in the possession of the woman was acquired by her husband, his sister will be the heir. If the

property was obtained by the deceased from her parents, her sister's daughter will be her heir.

Ahmedabad, January 31st, 1857.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 160, l. 4:—

"On failure of the husband of a deceased woman, if married according to the Brâhma or other (four) forms, or of her parents if married according to the Âsura or other two forms, the heirs to the woman's property as expounded above, (*a*) are thus pointed out by Bṛihaspati:—'The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother, are pronounced similar to mothers If they leave no sons born in lawful wedlock, nor daughter's son, nor his son, then the sister's son and the rest shall take the property.'" (Borradaile, p. 129; Stokes, H. L. B. 106).

REMARK.—According to the Mitâksharâ the husband's sister inherits in every case, as his Sapiṇḍa relation.

III. *c*.—THE HUSBAND'S SISTER'S SON.

Q. 1.—A man died, and then his wife died. The man's "Bhâchâ," or sister's son, applied to be put in possession of his property as heir, but he subsequently died. His son has set up a claim to be his heir, and has produced a deed alleged to have been passed to his father by the first deceased, granting his land, &c. to him. There is a distant relation, seven degrees removed from the deceased. He claims to be the heir. There are also two daughters of the deceased, but they have relinquished their claim in favour of the distant relation.

A.—As it cannot be ascertained whether the distant kinsman is within 7 degrees or not, he cannot be recognized as heir. The deceased's sister's son applied for a certificate, but he died. His son has set up a claim, and if there is no other nearer, and Gotraja, relation, he may be considered the heir.—*Ahmedabad, January 10th*, 1851.

(*a*) *i. e.* the kindred provided for by special texts. *See* Vyav. May. Chap. IV. Sec. 10, p. 24 (Stokes, H. L. B. 104).

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II. Sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav. f. 61, p. 1, l. 14 (see Chap. IV. B. Sec. 6 I. Q. 1, p 520).

REMARK.—*See* Introductory Remarks to this Section, para. 4.

Q. 2.—A deceased woman has left her brother's son and her husband's sister's son. Which of these will be the heir?

A.—Her brother's son appears to be the nearest heir. This opinion is founded upon an inference drawn from the order of relatives who are authorized to perform the funeral ceremonies of a deceased woman. This order commences with son, and continues by mentioning grandson, husband, daughter, daughter's son, husband's brother, cousin's son, his daughter-in-law, father, brother, and brother's son.—*Dharwar, June 13th,* 1853.

AUTHORITIES —(1) Dharmasindhu III. f. 6, p. 1, l. 10 (*see* Sec. 7, Introductory Remark, Note); (2) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap IV. B. Sec. 6 I. Q. 1).

REMARK —According to the Mitâksharâ, the husband's sister's son would inherit as the deceased's husband's Sapiṇḍa, *see* Chap. II. Sec. 15 B. I. (1), Q. 1, p. 493 According to the Vyav. May. there would be a difference according to the source of the property. *See* above (*b*) Q. 1.

Q. 3.—A man died, and his wife also died after him. The man's sister's son, who lived with the wife, performed the funeral rites for her. Will he or her brother be the heir?

A.—The man's sister's son will succeed to the property, provided it has been bequeathed to him. If the deceased has left no will to that effect, her brother will be her heir by law. He should take the property and perform the funeral rites. In his absence the deceased's nephew will be the heir.—*Ahmednuggur, June 22nd,* 1848.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3 f.; (2*) Mit. Vyav. f. 61, p. 1, l. 14 (*see* Chap. IV. B. Sec. 6 I. Q. 1, p. 520).

REMARK.—See the preceding case. (*a*)

(*a*) The husband's family extends to the husband's paternal aunt's son, according to *Hurreemohun Shaba* v. *Sonatum Shaba,* I. L. R. 1 Cal. 275.

B. SECTION 7.—THE WIDOW'S SAPIṆḌAS.

INTRODUCTORY REMARKS.

1. The question, whether on failure of all relations on the husband's side, the widow's father's family is entitled to inherit her property, if she had been married according to one of the approved rites, is still more difficult to decide than those regarding the husband's Sapiṇḍas.

The Mitâksharâ is silent on this point; it mentions none of the widow's Sapiṇḍas as entitled to inherit. The Mayûkha names a few (six) among the heirs who succeed to Strîdhana proper on failure of the husband, *but before the husband's Sapiṇḍas.* (*a*)

2. Though the leading authorities thus seem to give no encouragement to the doctrine that the widow's Sapiṇḍas inherit after those of the husband, the Śâstris nevertheless declare unanimously that such is the case. They quote as authorities chiefly Mayûkha, p 140, l. 1 (*a*), and p. 159, l. 5 (*b*), where, in both passages, the verse, Manu IX. 187 (quoted in full in Chap II Sec. 14 I. B. *b.* 1, Q. 1, p. 481) :—"To the nearest Sapiṇḍa the inheritance next belongs," &c , is quoted. *See* Mit. Chap. II. Sec. 3, p. 5, note.

In the Mânava-dharmaśâstra this verse refers to the succession to a separate male's estate, and the Mayûkha quotes it, p. 140, l. 1, (*b*) in this sense, in order to prove the right of the sister to inherit her brother's property. But in the Mayûkha, p. 159, l. 5, (*c*) it is applied also to the succession to a woman's property, and Nîlakaṇṭha uses it in order to prove that the Strîdhana proper of a childless widow, who was married according to an approved rite, goes not to the husband's nearest kinsmen, as the Mitâksharâ states, but to *her own nearest Sapiṇḍas in the husband's family.* Hence it is evident that Nîlakaṇṭha took the above-mentioned verse of Manu to be a general maxim, applicable to all cases of inheritance—a proceeding perfectly in harmony with the principles of the Mimaṁsâ, which rules the interpretation of the Smṛitis. (*d*) The Śâstris, therefore, by applying

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(*a*) Vyav. May. Chap. IV. Sec. 10, cl. 30, Borradaile ; and Introductory Remarks to the preceding Section, cl. 3. *See* Bk. I. Chap. II. Sec. 15, Introductory Remarks.

(*b*) Chap. IV. Sec. 8, p. 19 (Borr. p. 106 ; Stokes, H. L. B. p. 89).

(*c*) Chap. IV. Sec. 10, p. 28 (Borr. p. 128 ; Stokes, H. L. B. p. 105).

(*d*) Compare the language of the Privy Council in *C. Chintamun Singh* v. *Musst. Nowlukho Konwari*, L. R. 2 In. A. at p. 272 ; Vyav. Mayûkha, Chap. IV. Sec. 8, pl. 11 ; and Mitâksharâ, Chap. I. Sec. 2, pl. 4.

it to the case of a widow whose husband's family is extinct, have only followed the example of Nîlakaṇṭha, and in no wise departed from the general rules of interpretation. The chief objection which could be raised against the correctness of their view, would be that the list of heirs given in the Mit. and May. must be considered exhaustive.

3. Before touching upon this latter point, it will be advisable to take into consideration some other circumstances which make it probable that the widow's own Sapiṇḍas inherit on failure of the husband's kinsmen.

For though a woman by marriage loses her place in her father's family, and many of the rights and duties which her parents and her kinsmen in her father's family possess over her, or have to fulfil towards her, are suspended, it appears that on extinction of the husband's family these same rights and duties revive. Thus the right or duty of guardianship over a female is vested after marriage in the husband, his sons, and his Sapiṇḍas successively.(a) But if the husband's family becomes extinct, it reverts to her parents and their kinsmen, not to the king, who takes the place of guardian only on failure of both families. (b)

In a similar manner the duty of performing the last rites and funeral oblations for a widow falls first on the husband's kinsmen, on failure of them on the widow's own relations, and lastly on the king.(c)

(a) *See* above, Introd. to Bk I Sec 10, ON MAINTENANCE, at pp. 231, 246 ss. Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX. of 1861 does not apply. The plaintiff must establish his right by a suit, *Balmukund* v. *Janki*, I. L. R. 3 All. 403, *see* Act. XX. of 1864, Sec. 31, and as to the representation of the minor in suits *Manokchand* v. *Nathu Purshotum*, Bom. H. C. P. J. F. for 1878, p. 204; *Jadow Mulji* v. *Chagun Raichund*, I. L. R 5 Bom. 306.

(e) *See* Vîramitrodaya, quoted in Chap. II. Sec. 6A, Q. 6, and Mit. Âchâra, f. 12, p. 1, l. 6:—For it is declared "On failure of relations on both sides (the husband's and the parents'), the king becomes the supporter and master of a female." So Nârada, Pt. II. Chap. XIII. 29.

In O. S. 894 of 1870 in the High Court, Bombay, on its original side, a widowed sister's maintenance was admitted by brothers as a charge on the ancestral estate.

(c) Dharmasindhu III. Uttarârdha, f. 6, p. 1, l. 10:—

"(The persons authorised to perform the funeral oblations) for a married female are, on failure of her son, the son of a rival wife; on

As then the widow's kinsmen would, but for her marriage, undoubtedly have the right to inherit her estate on account of their blood relationship, it seems not unreasonable to suppose that this right may revive on failure of the persons who barred it.

The objection which might be raised against this view, that the silence of the Mitâksharâ and of the Mayûkha regarding the rights of the widow's blood relations, is equivalent to a denial of these rights, cannot be sustained, since the lists of heirs given in the two law books are not exhaustive. For neither the persons connected by spiritual ties with the widow, *i.e.* the husband's Âchârya and pupil, nor the Brâhmanical community in the case of a Brâhman widow, nor the king in the case of other castes, are mentioned as heirs, though their eventual rights to the inheritance would not be disputed by any Hindû lawyer.

4. If therefore the right of the widow's own blood relations revives on failure of the husband's Sapiṇḍas, it seems natural to allow them to succeed in the same order as they would have done before her marriage, and to place the mother first, next the father, after him the brothers, and the rest of the Sapiṇḍas according to the nearness of their relationship. (*a*) (*See* Mitâksharâ, Chap. II. Sec. 3, p. 5, note; Stokes, H. L. B. 443).

In conformity with this principle, and according to the maxim that Sagotras inherit before the Bhinnagotra-Sapiṇḍas, (*b*) the Questions belonging to the following section have been arranged thus :—

I. Sapiṇḍas in general.
II. Sagotra-Sapiṇḍas, *a*, mother ; *b*, brother, &c.
III. Bhinnagotra-Sapiṇḍas.

B. SECTION. 7.—I. SAPIṆḌAS IN GENERAL.

Q. 1. A daughter of a Paradeśî Brâhman and her husband, lived with him. The husband subsequently ran

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failure of him, her grandsons and great-grandsons in the male line ; on failure of them, the husband; on failure of him, the daughter; on failure of her, the daughter's son; on failure of him, the husband's brother; on failure of him, the husband's brother's son ; on failure of him, the daughter-in-law; on failure of her, the father; on failure of the father, the brother; on failure of him, the brother's son, and the other (Sapiṇḍas) who have been mentioned before."

(*a*) *See* Chap. IV. A. pp. 501 ss.

(*b*) *See* Introductory Remarks, Chap. IV. B. Section 6, para. 4, p. 519.

away. The father had given some ornaments to his daughter. Afterwards both the father and his daughter died. There is neither the husband nor a son of the daughter, and the question is, whether the separated relativesof her father should be considered her heirs.

A.—The husband and his relatives are the heirs to the property of a woman who has neither a son nor a daughter. In the absence of the husband and his relatives, the woman's mother and father, or their relatives, are the heirs. The father's relatives mentioned in the question are therefore the heirs of the deceased woman.

Khandesh, September 9th, 1851.

AUTHORITIES —(1) Mit. Âchâra, f. 12, p. 1, l. 4; (2) Mit. Vyav. f. 60, p. 2, l. 16; (3) f. 61, p. 1, l. 12; (4) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec 14 I. A. 1, Q. 1, p. 464).

Q. 2.—When there are two "Sapiṇḍa" kinsmen(*a*) of a woman having equal relationship to her, how will they inherit the property ?

A.—Each of them should receive an equal share.

Dharwar, 1846.

AUTHORITIES.—*Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

II.—SAGOTRA SAPIṆḌAS.

a.—THE MOTHER.

Q. 1.—A woman died. Her parents applied for a certificate of heirship. Her four separated nephews, of whom the eldest is the guardian of the three under age, preferred a similar application. Subsequently the parents suborned the eldest nephew. He now states that he cannot prove his

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(*a*) This word means the relations of the same blood, and is, in the legal phraseology of the Hindûs, limited to those who can trace their descent to one common ancestor so far as the seventh degree, either through males or females. (Śâstri's Rem.)

relationship to the deceased, and that he is a distant relation. He further admits that the deceased's father is her heir. Can this admission affect the rights of the minors under his protection ?

A.—The nephews are not heirs of the deceased. Of the parents who have applied for recognition as the heirs of the deceased, the mother must be considered the first heir. The father will be the heir only in the absence of the mother. There can be no objection to the withdrawal of the claim advanced by the eldest nephew on behalf of himself and his younger brothers. He and the parents may have come to an understanding about the matter.

Ahmednuggur, April 11*th,* 1851.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 5 (*see* Auth. 3); (2*) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463); (3) Mit. Vyav. f. 47, p. 2, l. 15.

[NOTE.—The kind of property in dispute is not stated.]

II. *b.*—BROTHER.

Q. 1.—When there is no relation of a deceased woman on the side of her husband, who will be her heir—her two uterine brothers or her sister's son ?

A.—The uterine brothers.—*Poona, February 29th,* 1848.

AUTHORITIES.—(1) Vyav. May. p. 159, l, 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1).

REMARKS.—In *Hurrymohun Shaha* v. *Shonatun Shaha* (*a*) (Bengal law), there is a case in which a deceased woman's brother was declared heir in preference to her husband to property presented to her by the husband's paternal aunt's son. This would accord with Vyav. May. Chap. IV. Sec. 10, p. 13, 27, but not with the Mitâksharâ, Chap. II. Sec. 11, p. 2, 11.

II. *c.*—HALF-BROTHER.

Q. 1.—Can the step-brother of a deceased woman be her heir ?

(*a*) I. L. R. 1 Calc. 275.

A.—When there is no one of the family of the husband of the deceased woman, her parents will be her heirs. If the parents are dead, any one belonging to the family of the parents will be her heir. The half-brother, therefore, is her legal heir.—*Dharwar, September 23rd,* 1851.

AUTHORITIES.—(1) Vyav. May p. 159, l. 3; (2) p. 140, l. 7; (3*) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

Q. 2.—A woman died. Can a half-brother be her heir?

A.—According to the Mitâksharâ and Dharmâbdhi, when there are neither children nor husband of a woman, the Sapiṇḍa relations of her husband become her heirs. When there are no Sapiṇḍa relations, the woman's father and his relations become heirs. If there are no relations of her husband, her half-brother will be her heir.

Dharwar, September 23rd, 1851.

AUTHORITIES.—(1) Vyav. May p. 159, l. 3 (*see* Auth. 3); (2) p. 134, l. 4; (3*) Mit. Vyav. f. 61, p. 1, l. 12 (*see* Chap. IV. B. Sec. 6, I. Q. 1, p. 520).

II. *d.*—BROTHER'S SON.

Q. 1.—Can the sons of a full brother of a deceased woman be her heir?

A.—Yes.—*Ahmednuggur, June 7th,* 1853.

AUTHORITIES.—(1) Vyav. May. p. 159, l. 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

Q. 2.—A man granted a piece of land to his widowed daughter for her maintenance. The daughter afterwards died. There is none of her kin, but there is a son of her uterine brother. The question is, whether he is the heir?

A.—If there is none of the deceased woman's kin, her uterine brother's son is her heir.

Ahmedabad, February 15th, 1841.

AUTHORITIES.—(1) Vyav. May p. 134, l. 4; (2) p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

II. *e.*—HALF-BROTHER'S SON.

Q. 1.—A man died, and his moveable as well as immoveable property passed into the hand of his wife. She had no children. She had allowed her mother, half-brother, and elder sister to live with her. About four years afterwards, the widow died. There was no member of the family of her husband then living. Her property fell into the possession of her sister. Afterwards her mother, step-mother, and sister died. The sister's nephew and the son of the half-brother are now alive. Which of these is the heir of the deceased woman?

A.—The nephew of the woman's sister (*a*) cannot inherit the property. The son of the half-brother is entitled to it.

Ahmedabad, May 31st, 1845.

AUTHORITIES.—(1) Mit. Vyav f 58, p 2, l 16; (2) Vyav May. p. 140, l. 1 (*see* Chap. II. Sec 14 I A. 1, Q. 1, p. 463).

II. *f.*—PATERNAL UNCLE.

Q. 1.—A widow died, leaving two relatives, a Bhâchâ (a woman's brother's or sister's son, and a man's sister's son), and her father's brother. The question is, which of these is the heir?

A.—Her father's brother is the heir.

Ahmedabad, February 17th, 1858.

AUTHORITIES.—(1) Vyav. May p. 134, l. 4; (2) p. 140, l. 1 (*see* Chap. II. Sec 14 I. A. 1, Q 1, p. 463)

REMARK.—But only if the term Bhâchâ here means sister's son, as a brother's son is a nearer Sapiṇḍa than the father's brother.

II. *g.*—THE PATERNAL UNCLE'S SON.

Q. 1.—A woman of the Śûdra caste has no other heir than a cousin. Her husband is dead. Can the cousin be her

(*a*) This must apparently mean a son of another sister, nephew therefore of the deceased.

heir? If there are three cousins can one of them who has applied to be recognized as heir be considered her heir?

A.—**All the three cousins have equal right to be the heirs of the woman.—*Ahmednuggur, January* 31*st*, 1854.**

AUTHORITIES —(1) Vyav. May. p 159, l 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (*see* Chap II. Sec. 14 I. A. 1, Q. 1, p. 463).

III.—BHINNAGOTRA SAPINḌAS OF THE DECEASED'S FAMILY.

a.—THE SISTER'S SON.

Q. 1.—Can a man inherit the property from his mother's deceased sister?

A.—If there is no other heir, he can.

Dharwar, January 26th, 1850.

AUTHORITIES —(1) Vyav. May p 160, l. 4 (*see* Chap IV B Sec. 6, III *b*, Q. 1); (2*) p. 140, l 1 (*see* Chap. II. Sec 14 I A 1, Q. 1, p 463).

REMARK —A divided brother is preferred, notwithstanding the sister's son was acknowledged and recognized as the adopted son of the deceased brother, but without ceremonies of adoption (*a*).

Q. 2.—A Kuṇabî woman has died. Her sister's son survives. The deceased made no gift in his favour. Can he be her heir according to the Śâstra?

A.—It appears that the property left by the deceased is her Stridhana, and that her sister's son is entitled to it, even though there be no will left to that effect.

Ahmednuggur, February 22nd, 1847.

AUTHORITIES —(1) Vyav. May. p 160, l. 4 (*see* Chap. IV. B. Sec. 6, III. *b*. Q. 1); (2) p. 159, l. 5 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463); (3*) p. 159, l. 3.

III. *b*.—MATERNAL UNCLE'S SON.

Q. 1.—A widow died without issue. Her mother's brother's son has applied to be put in possession of her property,

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(*a*) *Bhagvan* v. *Kalá Shankar*, I. L. R. 1 Bom. 641.

consisting of some land, &c. The deceased widow had obtained the property from her mother's brother, and there are no nearer relations of the deceased. Should the applicant, under these circumstances, be put in possession of the property ?

A.—There is no nearer relation of the deceased; the applicant, though of a different Gotra, is a Sapiṇḍa relation. He is therefore the legal heir of the deceased.

Ahmedabad, June 30th, 1851.

AUTHORITIES.—(1) Vyav. May p. 140, l. 1 (see Chap II. Sec 14 I. A. 1, Q 1, p. 463) ;(2) p. 134, l 4; (3) p 140, l. 6.

III. *c.*—THE SISTER'S DAUGHTER.

Q 1.—Is a sister's daughter the heir to a deceased woman, there being no near relative ?

A.—Yes.—*Dharwar, June 11th*, 1853.

AUTHORITY —Vyav. May. p. 143, l. 1.

Q. 2.—A man died, leaving two daughters. One of them died, leaving a daughter. The other also died afterwards. The question is, whether the daughter of the first deceased daughter can inherit the immoveable property of the deceased ?

A.—The daughter who died last has left no children. Her sister's daughter cannot claim the right of inheritance. The order of heirs laid down in the Śâstra does not mention a daughter of a *sister*. That order states that, when there are no near relatives to be found, the Guru and others become heirs. A Brâhman's property is sacred, and the Râjâ or Government of any country is prohibited from taking it under any pretence whatever.—*Surat, March 23rd*, 1850.

AUTHORITIES.—(1) Mit. Vyav f 55, p. 2, l. 1 (Coleb, Mit. 324; Stokes, H. L B. 427); (2) f. 59, p. 1, l. 9 ; (3) f 45, p. 2, l 8

REMARKS.—1. The Śâstri mistakes the case for one regarding the succession to a man's property.

2. For the correct answer see the preceding case.

Q. 3.—Two brothers effected a partition of their landed property; afterwards one of them died. The son of the deceased held his father's share for some time, and died. His sister succeeded him, and after having remained for some time in the possession of the share, died. The question is, whether the daughter of the sister or the son of the sister-in-law of the father of the deceased is the heir?

A.—The uterine sister who inherited the property of the uterine brother died. The rights of inheritance will now descend to the daughter of the other sister.

Surat, December 7th, 1846.

AUTHORITY.—*Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463.

Q. 4.—Who will inherit from a deceased woman, her sister's daughter or her sister's son's widow?

A.—The sister's daughter is entitled to inherit. It is to be remarked that when there are two heirs, a daughter and a son, to Stridhana, the daughter has the priority of claim.

Ahmednuggur, August 13th, 1847.

AUTHORITY.—Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

REMARK.—The preference of daughters to sons only takes place in cases where they inherit from their mother. The right of the deceased's niece rests on her proximity.

CHAPTER V.

CASES OF INHERITANCE DECIDED BY THE CUSTOMS OF CASTES OR SECTS. (a)

SECTION 1.—HEIRS TO A GOSÂVÎ.

INTRODUCTORY REMARKS.

The Brâhmanical law, Mr. Ellis points out, (b) never obtained more than a qualified dominion in Southern India. In the Bombay Presidency the collections of Mr. Borradaile and Mr. Steele show that

(a) An instance of the flexibility of customary law, while yet unembodied in decisions formally recorded, is to be found in the case of the Mâlis (Moghreliya) at Surat. When questioned by the Judge they answered that a marriage might, amongst them, be dissolved at the desire of either husband or wife. Either some practical inconvenience arose or the moral perceptions of the caste became more refined; a meeting of the caste was held, and it was voted unanimously that divorce should not in future be allowed except for powerful reasons recognized by the caste panchayat This was communicated in answer to one of Mr Borradaile's inquiries, MSS Bk. G , sheets 29, 30. A recent change of custom was recognized, though it was not necessary to base the decision upon it, in *Musst. Radiyat* v *Madhowjee Panachund*, 2 Borr. 740 According to the notion generally entertained by the Śâstris that customs, where not plainly repugnant to the scriptures (Gaut. Chap. XI. para. 20; Apast. Transl. p. 15), may be regarded as resting on some lost Smṛiti (Ap. Tr. p. 47), the preference of conflicting Smṛitis may be determined by usage. *See* Vîram. Transl. p. 127 ; Coleb. Dig. quoted in the *Utpát* case, 11 Bom. H. C. R. at p. 267; M. Müller, H A. Sansk. L. p. 53. Macnaghten, H. L. p. 102, says the custom of Niyoga and consequent legitimacy of the Kshetraja son is still preserved in Orissa. But besides its conservative faculty custom has had to be recognized where it plainly abolished the ancient law, as in the very case of the Niyoga just mentioned (*see* Mit. Chap. I. Sec. 3, p. 4), and the unequal partition prescribed or allowed by the Smṛitis but condemned by usage (*see* Vîram. Tr. p. 61). Mitramiśra (Vîram. Tr p. 107) places the authority of custom so high that he declares what is illegal in one generation may by usage alone be made legal and even obligatory in another.

(b) 2 Str. H. L. 162.

many caste usages have been preserved contrary to the rules of the Smṛitis, designed generally or chiefly for the guidance and control of the Brâhmans. The tendency to adoption of the ceremonies and legal ideas of the higher castes by those of a lower order has already been noticed. (*a*) But many differences still subsist which make it hazardous to apply the rules of the Śâstras to the legal relations and transactions of any but the higher castes in the spheres of status and of family law, of adoption and of inheritance. But few cases of this kind appear as the subjects of questions to the Śástris, because being regarded as matters of special custom, such questions as arose were disposed of on the evidence given in each case. A collection of such cases might have been made from the records of the courts, but it would have been a work of considerable time; and meanwhile a process of gradual assimilation has been going on which is on the whole beneficial. The rules of the different religious orders based generally on a real or fancied analogy to those of Brâhman ascetics have frequently been submitted to the Śâstris, and a general idea of the law of inheritance prevailing amongst their members may be gathered from the cases here collected. But in litigation concerning any maṭha or community it must be borne in mind that it is the customary law of the particular class or institution that must govern the decision, rather than general rules deduced from

Nîlakaṇṭha, V. M. Chap I para. 13, points to many infringements of the scriptural law warranted by custom, and even goes so far as to maintain that its approval may exempt harlotry from penance. The necessities of social existence have thus forced the Commentators by degrees from the position of uninquiring submission to the letter of inspired precepts, and a sufficient authority can now be found within the Hindû law itself for a rational development of its principles in accordance with the improved moral consciousness of the castes (*see Mathura Naikin* v. *Esu Naikin*, I L. R. 4 Bom. at pp. 561, 567, 570). The sole choice is not between a retention of every rag of usage which the community has outgrown, and the adoption of a wholly foreign system : the course is open of a gradual amelioration of the indigenous law in harmony with its fundamental notions, and with the modified conception of these induced amongst the Hindûs themselves by the exigencies and the new standpoints of each stage of social progress. The customary and case law of England has been formed under influences substantially the same as those just indicated, and a remarkable analogy may be observed between the view of custom as derived from lost Smṛitis and custom in England as Statute law worn out.

(*a*) Above, pp. 9, 426.

the practice of other orders or societies. (a) This is the necessary qualification to the somewhat broad statement of Mr. Colebrooke at 2 Str. H L. 181. (b)

According to the statements made by the Gosâvîs to Mr. J. Warden (*see* Steele's Law of Caste, App. B. p. 64 ff.), the members of this order living in Western India consider themselves as Sannyâsîs, following the rules of Śankarâchârya, and pretend to obey the laws of Manu and other Dharmaśâstras. (c) Though it would therefore seem that cases of inheritance to their property should be decided according to the rules of the Dharmaśâstra on the succession to the property of a hermit, and though the answers to the following Questions show this to have been also the opinion of some of the Law Officers, (d) it nevertheless cannot be allowed that such a proceeding is in accordance with the general principles of the Hindû law. For, though on account of their retirement from the world, they are in a position analogous to that of the Sannyâsîs, the Gosâvîs cannot claim to be Sannyâsîs in the proper sense of the word. The order of the real Sannyâsîs is open, according to some authorities, to Brâhmans, Kshatriyas, and Vaiśyas, according to others to Brâhmans only. It may be entered at any time after the completion of the ceremony of investiture with the sacred girdle (e) The Sannyâsî is bound to

(a) *See* the cases cited above, Introd. p 201.

(b) *See* also the *Utpát* case, 11 Bom. H. C. R. 249, and the *Naikin* case, I L. R. 4 Bom. 545.

(c) Different statements are given by H. H. Wilson, Works, Ed. Rost, Vol. I. pp. 167—169, and *passim*.

(d) They are considered as real Sannyâsîs also, *Gungapooree* v. *Musst. Jennee et al*, 9 N. W. P. S. D. A. R 212; *Sungram Singh* v. *Debee Dutt et al*, 10 *ibid*. 477.

(e) Nirṇayasindhu, Par. III. Uttarârdha, f. 51, p. 2, l 9:—Angiras—"A person who knows (the Vedas) may enter the order of the Sannyâsîs, whether he be a Brahmachârî, a Gṛihastha or Vânaprastha, whether he be sick, or suffering........... Vijñâneśvara (Mit. Prây. f. 25, p. 1, l. 10) and the rest say that a Brâhman alone has a right to enter on this (order of the Sannyâsî), on account of this inspired text of Jâbâla:—'Brâhmans become Sannyâsîs,' and because Manu says:—'Having reposited the sacred fires in his mind, the Brâhman should leave his house and enter the order of the Sannyâsîs.' And there is another verse to the same effect:—'It is said that for Brâhmans four orders are ordained in the revealed texts, for Kshatriyas three, for Vaiśyas two, and for Śûdras one.' But the members of the three (twice-born) classes have also a right (to enter

keep the vow of chastity and to renounce all transaction of business. The Gosâvîs on the contrary receive among their number Śûdras (*a*) also and women, who have no right to become Sannyâsis. They neglect the performance of the Saṁskâras or initiatory rites. Concubinage is allowed by their custom, and some marry. (*b*) Lastly, many are engaged in trade and other worldly business. (*c*)

It thus appears that it is impossible to consider them Sannyâsîs in the sense of the Hindû law, and consequently to subject them to the laws of this order. It is equally impossible to place them under the laws of the Gṛihasthas or householders, as some Śâstrıs have done, since a very great number have no family ties and live in the Mathas as members of coenobitic fraternities; and others, though married, adopt pupils. Now, in all cases, where a section of the Hindû community places itself by its customs or opinions in opposition to orthodox Hindûism and its law, the Hindû legislators allow disputes between its members to be judged according to its law or custom. (*d*)

Thus the king is directed to uphold the customs of the castes, (*e*) of the Pâshandas, or heretical sects, and of the Naigama orthodox sects. (*f*) The custom to be followed in the case of particular institutions is in general that of such institutions as proved by testimony. The custom in order to be recognized must apparently be one not obviously bad or injurious to the institution to which it is attributed. *See* below, Sec. 1. On the same principle of guarding the interests of the foundation it has been held that in the case of a Trusteeship held in heritable shares by several families, though a father could relinquish his right of management to his son, the son could not join in an alteration in the constitution of the Trust. Nor could a majority of the trustees bind a minority by an agreement to increase the number of trustees. (*g*)

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the order of Sannyâsîs), since it is declared in the Kûrmapurâṇa:—
'A Brâhman, a Kshatriya, or a Vaiśya should leave his house and enter the order of the Sannyâsîs.' "

(*a*) Steele, Law of Caste, App. B, clause 24.

(*b*) Steele, Law of Caste, App. B, clauses 29 and 42.

(*c*) Steele, Law of Caste, App. B, clause 14.

(*d*) See *Bhâu Nândji* v *Sundrâbâi*, 11 Bom. H. C. R. 249.

(*e*) Vyav. May. p. 7, l. 1; Borradaile 7; Stokes, H. L. B. 15.

(*f*) Vyav. May. p. 206, l. 1; Borr. 176, 177; Stokes, H. L. B. 141; Mit. Vyav. f. 73, p. 1, l. 6.

(*g*) *Kiyipattu A. Narayan Nambudri* v. *Ayikotillatu S. Nambudri*, I. L. R. 5 Mad. 165.

Under these circumstances it would seem advisable to place the cases referring to the inheritance to Gosâvîs under the rules which, according to their statements to Mr. Warden, contain their law of custom. (a) Hence in some of the remarks on the following cases, instead of the authorities from the Law Books being quoted in full, references have been given to the paragraphs of Mr. J. Warden's Report, and to Steele's Law and Custom of the Hindoo Castes.

The following statement however may be quoted as describing a custom which with slight local variations governs the succession to Sannyâsîs throughout the greater part of India. "It has been laid down by the late Sudder Dewanny Adawlut that amongst the general tribe of fakirs called saniasis.........a right of inheritance strictly so speaking to the property of a deceased *guru* or spiritual preceptor does not exist; but the right of succession depends upon the nomination of one amongst his disciples by the deceased *guru* in his own lifetime, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made the succession is elective, the *mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, installing him then and there on the occasion of performing the funeral ceremonies of the late *guru*." (b)

In some instances the religious services performed by Gosâvîs or Vairâgîs in charge of temples are rendered on the voluntary principle. The temple is the property of a caste or section of a caste, whose representatives control the expenditure of the funds, pay the *guru*, and appropriate the surplus proceeds of the endowment and offerings for caste purposes. In such cases the *guru* holds his place for life and during good behaviour, but has not a property in his office or in the emoluments. His nomination of a chelâ as his successor has no special force, but is generally respected by the caste if he

(a) Compare also *Nirunjun Bharthee* v. *Padaruth Bharthee et al*, N. W. P. Repts. of Sel. Cas. 1864, Pt. I. p. 512.

(b) *Madho Das* v. *Kamta Das*, I. L. R. 1 All. at p. 541. *Sugan Chand* v. *Gopalgir*, 4 N. W. P. R. 101, excludes a *chelá* who deserts his *guru*. On the subject of sacerdotal privileges and superiority, see *Ramasawmy Aiyan et al* v. *Venkata Achari et al*, 9 M. I. A. 344; and *Kashi Bashi Ramlinga Swamee* v. *Chitumbernath Koomar Swamee*, 20 C. W. R. 217.

was himself held in esteem. (*a*) As to the formal expression of the will of the caste or its representatives in these and other cases reference may be made to Steele, L. C. 124 ss. The inhabitants of a village or of a quarter of a town sometimes erect a maṭha or temple —a practice often commemorated in inscriptions. (*b*) The position of the officiating worshipper or *guru* in such cases varies according to the terms of his institution; but he is generally removeable for misconduct. (*c*)

SECTION I.

I. To a Male Gosâvî.

a.—THE DISCIPLE.

Q. 1.—Can a disciple succeed to the property of a deceased Gosâvî?

A.—A disciple is the heir of a Gosâvî, and therefore can succeed as such.—*Ahmednuggur*, 1845.

Authority not quoted.

Remark.—*See* Steele, Law of Caste, App. B. para. 20. (*d*)

Q. 2.—A Gosâvî died. There is a disciple nominated by him as his successor. Can he succeed him?

A.—The Gosâvîs and Vairâgîs should be regarded as Sannyâsîs of the lower castes, such as Śûdras and others.

(*a*) His nomination is in other cases held binding. *See* Steele, L. C. 437.

(*b*) As for instance the one described in Ind. Antiq. vol. X. p. 185 ss.

(*c*) See *Acharji Lallu Ranchor* v. *Bhagat Jetha Lalji*, Bom. H. C. P. J. 1882, p. 374.

(*d*) Succession to ascetics is based wholly on personal association, *Khuggender N. Chowdhry* v. *Sharupgir Oghorenath*, I. L. R. 4 Calc. 543. An ascetic cannot alter the sucession to an endowment, *Mohunt Rumundas* v. *Mohunt Ashbul Dass*, 1. C. W. R. 160. He cannot impose restrictions on his successor contrary to the custom, such as disposing of the Mohantship by way of reversion, *Greedhari Doss* v. *Nund Kissore Doss*, 11 M. I. A. 405. The general rules of succession are given in the Smṛiti Chandrikâ, p. 122.

The trustee of a religious endowment may not alienate or encumber it except under special circumstances. *See* Q. 4. Rem. 2.

The person who claims to be the heir is a disciple nominated by the deceased. His claim therefore should be recognized.
Ahmedabad, September 15th, 1853.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 141, l. 7.

REMARKS—1. The Guru must nominate a chelâ as successor, and this must be confirmed by the mohants. (a) For the succession of a chelâ in the Śrâvak sect, see *Bhutaruk Rajendra* v *Sook Sagur et al.* (b) For a joint succession of two chelâs, *Gopaldas* v. *Damodhar* (c)

2. Śûdras cannot become Sannyâsîs in the sense in which the word is used in the Dharmaśâstras. *See* Introductory Remarks.

3. *See* also Steele, Law of Caste, App. B, para. 20.

Q. 3.—Is a disciple or a Gurubhâû of a Gosâvî his heir?

A.—If the Gurubhâû is separate the disciple will be the heir. If he is united in interests, he and the disciple will be the equal heirs.—*Khandesh, July 3rd*, 1854.

AUTHORITIES.—(1) Vyav May. p. 131, l. 8; (2) p. 134, l. 4

REMARK.—*See* Steele, Law of Caste, App. B, para. 20; *Mahdo Das* v. *Kamta Das* (d)

Q. 4.—A Maṭha of a Gosâvî had always been in charge of disciples succeeding one another. Should it remain with a disciple or a relation of the Gosâvî?

A.—The Śâstras contain no provision regarding the matter. The custom of the sect should therefore be inquired into.—*Poona, December 29th*, 1847.

AUTHORITY.—Vyav. May. p. 7, l. 2 (*see* Chap. II. Sec. 13, Q. 9, p. 462)

REMARKS.—The Maṭha should pass into the possession of the disciple if he was nominated by his Guru. If no nomination had taken place, and there are several disciples, they or the Dasnâmâh will elect a successor. *See* Steele, Law of Caste, App. B, paras. 18, 19, 20.

(a) *Atmanund* v. *Atmaram*, N. W. P. S. A. R. for 1852, p. 462.
(b) 1 Borr. R. 320.
(c) 1 Borr. R. 439.
(d) I. L. R. 1 All. 539.

2. In *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha,* (a) the Judicial Committee say :—" They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution." Reference is made to the case above, Q. 1, and approval given to Peacock C. J.'s dictum in that case, that "each case must be governed by the usage of the particular mohantee." The *Rameswara Pagoda* case (b) also is referred to. " The important principle.........is to ascertain .... the special laws and usages governing the particular community."

In *Sammantha Pandara* v. *Sellappa Chetti* (c) the origin of mathas is discussed, and the duties and powers of the superior described in a way assigning to him in Madras a somewhat larger discretion than is recognized elsewhere.

3 Religious endowments are generally inalienable, but they may be temporarily pledged for repairs and other necessary purposes. See *Prosunno Kumari Debya* v. *Golab Chand Babu* (d) ; *Narayan* v. *Chintaman* (e); *Khusálchand* v. *Mahadevgiri* (f); *Mohunt Burm Suroop Dass* v. *Khashee Jha* (g) ; *Malhár Sakharam* v. *Udegir Guru* (h) ; and the remarks in *Gundoji Bawa* v. *Waman Bawa.* (i)

Q. 5.—1. A Gosâvî, having nominated two disciples, died. Both those disciples lived in the Maṭha of their Guru. The senior disciple nominated a disciple to succeed him. The junior disciple was afterwards confined in prison on a charge of murder. While in prison he nominated a disciple, and passed to him a deed authorizing him to inherit his and his Guru's property. On the strength of this document, the disciple has filed a suit against the senior disciple, and the man nominated by him as his disciple, for the recovery of the property of his Guru. Is his claim admissible ?

(a) L. R. 4 I. A. at p. 83.
(b) L. R. 1 I. A. at p. 228.
(c) I. L. R. 2 Mad. 175.
(d) L. R. 2 I. A. 145, 151.
(e) I. L. R. 5 Bom. 393.
(f) 12 Bom. H. C. R. 214.
(g) 20 C. W. R. 471.
(h) Bom. H. C P. J. 1881, p. 108.
(i) *Ib.* p. 292.

2. What actions make a man Patita?

3. What ceremonies should be performed on the occasion of nominating a disciple?

A.—1. As the man was confined in prison for murder, he must be considered a Patita. He has forfeited his right of nominating a disciple, and a disciple nominated by such a person cannot claim any property.

2. A man becomes a Patita by the commission of the following crimes:— (1) Stealing gold; (2) Killing a Brâhman; (3) Drinking intoxicating liquors; (4) Having criminal intercourse with the wife of one's teacher, one's sister, &c.; (5) Burning a house; (6) Killing a man by administering poison to him. There are some others besides those above enumerated.

3. A person nominated a disciple must be one who is not married. The Guru gets him shaved and communicates to him certain sacred words. The followers of the sect to which the Guru belongs are informed of the intended nomination. The Śâstra is silent on this subject, but the custom requires these ceremonies, and a disciple, duly nominated with the customary ceremonies, becomes entitled to a share of his Guru's property.—*Ahmedabad, June 2nd,* 1845.

Authorities.—(1) Mit. Vyav. f. 60, p. 1, l. 13; (2) f. 60, p. 2, l. 1; (3) Vyav. May. p. 161, l. 7.

Remarks.—1. The acts for which a Gosâvî is outcasted are:— Killing a cow, a Brâhman, a woman, a Guru, or a child, and sexual intercourse with other than Hindû women. *See* Steele, Law of Caste, App. B, para. 30.

2. Regarding the ceremonies at the initiation of a Gosâvî, *see* also Steele, Law of Caste, para. 27.

3. Importance seems to be attached by some of the sects to a written nomination of a chelâ as successor to the guruship which, once delivered, they consider irrevocable except for conduct producing spiritual incapacity.

4. In *Greedharee Doss* v. *Nundkissore Doss Mohunt,* (*a*) the Judicial Committee say:—"This seems to be clear, from all the evidence

(*a*) 11 M. I. A. at p. 429.

in this case, as far as it has been brought under their Lordships' attention,—that there cannot be two existing *Mohants*; that the office cannot be held jointly; and that, therefore, if there was a double *Ticca* at all, it must have been a Ticca of the office in reversion after the existence of the incapacity of *Ladlee Doss* to perform the duties. But the evidence upon that point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these *Mohants*, or that any such *Mohantship* can be given in reversion."

Q. 6.—A Gosâvî had two disciples, one was born by a kept woman, and the other was presented to him by another Gosâvî. The Gosâvi, at his death, left no directions providing for his succession, and the question is who should succeed him?

A.—A virtuous disciple should succeed. The son of a kept woman cannot. A virtuous disciple means a disciple who is hospitable and civil to those who visit his dwelling.

Ahmednuggur, October 20th, 1859.

AUTHORITIES.—Vyav. May. p. 142, l. 4 and 8.

REMARK.—This answer would be right in the case of a real Sannyâsi. According to the custom of the Gosâvîs, however, to whose case also the authorities above quoted refer, natural sons may become disciples, and inherit as such from their fathers. *See* Steele, Law of Caste, Appx. B. paras. 29 and 20. *See* also *Nárâyanbhárti* v. *Lavingbhárti et al,* (*a*) which excludes the offspring of an adulterous connexion.

2. The purchase of a chelâ is in some cases recognized. *See* Coleb. Dig. Bk. V. Chap. IV. Sec. 10, note. This, Colebrooke says, is not to be regarded as adoption but as resting on the special custom of the caste. *See* 2 Str. H. L. 133.

Q. 7.—Two persons claim to be heirs of a Gosâvî of the Marâthâ caste. The one is a "Gurubhâû" or a disciple of the same preceptor. The other is a son of a kept woman of the deceased, but adopted by him as his disciple by the ceremony of tonsure (Muṇḍana). Which of these is the proper heir?

(*a*) I. L. R. 2 Bom. 140.

A.—Both appear to be the heirs, but the one adopted as disciple seems to be the nearer of the two.

Rutnagherry, November 8th, 1845.

Authority not quoted.

REMARKS.—*See* Steele, Law of Caste, Appx. B, para. 29.

2. The alleged disciple or shishya of a deceased Gosâvî who sued another alleged shishya in possession of the maṭha and estate for a declaration of his own superior title must, it was held, pay the fee proper for a suit for possession, the real purpose of the suit being to obtain the property. (*a*)

Q. 8.—A Maṭha of a Gosâvî was held from disciple to disciple. This being the case, a disciple married, and broke through the custom of the Maṭha. Can this breach of the custom be held a bar to his right of inheritance?

A.—A disciple, who conforms himself to the custom of the Maṭha, and no other, can succeed.

Ahmednuggur, August 14th, 1854.

AUTHORITY.—Vyav. May. p. 142, l. 2.

REMARKS.—The authority given by the Śâstrî refers only to a real Sannyâsî, though the answer itself appears to be correct.

2. Both in the Dekkan and elsewhere the Gosâvîs in some cases marry and still are eligible to mahantship in succession to deceased mahants. "The exception made (by Mr. Warden) must be extended to other places than the Dekhan also. It has been proved that the Bhârti sect of Gosâvîs in (Ahmedabad) the locality whence this appeal comes, very generally marry ...... and there is one if not two instances of a married member of the Bhârti sect being a mahant of a maṭh."

"The plaintiff having proved his succession as mahant .... we think that the burden of proving that the plaintiff's subsequent marriage worked a forfeiture of his office and its appendant property and rights lay upon the defendants."(*b*)

(*a*) *Ganpatgir* v. *Ganpatgir*, I. L. R. 3 Bom. 230.

(*b*) Sir M. Westropp. C. J., in *Gosain Surajbharti* (Plaintiff in both cases) versus *Gosain Rambharti* (Defendant in R. A. No. 11 of 1880), and *Gosain Ishvarbharti* (Defendant in R. A. No. 12 of 1880), I. L. R. 5 Bom. at p. 684.

Q. 9.—If a Gosâvî has got himself married, is he still to be considered a Gosâvî? Can he claim the right of inheriting from his Guru? A deceased Gosâvî had left two disciples;—one of them is suffering from a disease, and the other died leaving a disciple nominated by him. To whom will the right of inheritance belong? to the man afflicted with disease, or to the disciple of a disciple?

A.—The question of the legality or propriety of the marriage of a Gosâvî should be disposed of by the king in accordance with the usage of the sect. When a disciple is suffering from such diseases as black leprosy and others, and when he is in such a condition that he cannot be admitted into the sect, he cannot claim the right of inheritance. According to the custom of the sect, the disciple of a disciple will be the proper person to inherit the property of the deceased.—*Ahmednuggur, October 26th,* 1850.

AUTHORITY.—Vyav. May. p. 142, l. 2 and 8.

REMARKS.—1. Regarding the permissibility of the marriage, *see* the preceding case.

2. Regarding the right of the disciple's disciple to inherit from his Guru's Guru, *see* Steele, Law of Caste, App. B, para 20.

I. *b.*—FEMALE DISCIPLE.

Q. 1.—A Gosâvî who had no heir, nominated a woman as his disciple. Can she be the heir after his death?

A.—According to the Śâstras she cannot be the heir of the deceased.—*Dharwar, October 2nd,* 1848.

AUTHORITY.—Vyav. May. p. 142, l. 4.

REMARKS.—1. Female disciples are received by the Gosâvîs, and as it would seem, they also inherit their Guru's property. *See* Steele, Law of Caste, App. B, paras. 21 and 20.

2. In the Reports of Selected Cases, Sudder Dewani Adawlut, North-Western Provinces, Vol. II. p. 235, it is ruled, that a female disciple does not inherit, since, *according to the Hindû Law,* only males can take the property of their Guru.

I. c.—DISCIPLE'S DISCIPLE.

Q. 1.—A Gosâvî died. There is a disciple of his disciple, and some grand-disciples of the grand-disciple of his Guru. The question is which of these will be the heirs of the deceased?

A.—The grand-disciple is the heir. If, however, the deceased and the other disciples were united in interests, all would be entitled to an equal share of the inheritance.

Khandesh, January 26th, 1854.

AUTHORITY.—Vyav. May. p. 134, l. 4.

REMARK.—*See* Steele, Law of Caste, App. B. para. 20.

Q. 2.—Should a man apply for the property belonging to his Guru's Guru, can he have it?

A.—No.—*Dharwar*, 1846.

Authority not quoted.

REMARK.—*See* the answer and remark to the preceding case.

I. d.—THE FELLOW-DISCIPLE.

Q. 1.—A Gosâvî died. His Gurubhâû is alive. Should the property of the Gosâvî be considered heirless?

A.—The Gurubhâû is the heir of the Gosâvî.

Tanna, March 25th, 1850.

AUTHORITY.—Vyav. May. p. 142, l 4.

REMARK.—The authority refers to a real Sannyâsî.

Q. 2.—A Kânphâṭâ Gosâvî had two disciples. They both died, one after the other. A disciple of the first deceased has applied to be recognized as heir of the one who died afterwards. Is he the heir?

A.—When a man in the order of "Vânaprastha" dies, his Guru and others can inherit his property. When a man dies in the order of Sannyâsîs his disciples become his heirs. When a man dies in the order of Brahmachâri, his Dharma-Bhâûs or fellow-students can inherit his property.

From this, it appears that a disciple, nominated according to the custom of the caste by the one who died first, can inherit the property of his Guru's brother who died afterwards.—*Khandesh, August 23rd,* 1850.

AUTHORITY.—Vyav. May. p. 142, l. 4.

REMARK.—The authority and answer apply to the case of a real Sannyâsî.

Q. 3.—Can a Gurubhâû of a Guru of a deceased Gosâvî be his heir?

A.—No one can be the heir of a deceased Gosâvî except his Guru disciple or Gurubhâû.

Ahmednuggur, November 4th, 1846.

Authority not quoted.

Q. 4.—A Gosâvî had two disciples. One of them nominated a disciple, the other had none. The latter died. Can his property be claimed by the disciple of the former?

A.—The Śâstra does not recognize the heirship of a person situated as above mentioned. He cannot therefore be considered an heir of the deceased.

Poona, November 30th, 1853.

Authority not quoted.

I. *e.*—THE GURU'S FELLOW-DISCIPLE.

Q. 1.—A Gosâvî has died. Will the Gurubhâû of his Guru be his heir?

A.—The Śâstra allows a man to acquire knowledge from a person of a lower caste than himself. By the custom of the country, a Guru and a disciple stand in the same relation to each other as a father and a son, and they become heirs of each other. The Śâstra permits a disciple to inherit from his Guru, and a Guru can in like manner inherit from his disciple, who dies without issue. It is nowhere mentioned in the Śâstra that in the absence of a Guru his brother

may succeed, but as a Guru in the caste of Gosâvîs takes the place of a father in a family, a Gurubhâû may, in the absence of a disciple, brother, or brother's disciple, be considered an heir.—*Sadr Adâlat, March 5th,* 1853.

AUTHORITY.—Vîramit. f. 209, p. 2, l. 9.

REMARKS.—1. The answer would apply to a real Sannyâsî.

2. The decision of the question depends upon the custom of the caste and class.

II.—HEIRS TO A GHARBÂRI, OR MARRIED GOSÂVÎ.

Q. 1.—A Gosâvî kept a woman. She gave birth to a son. The Gosâvi then married another woman. He afterwards died. Which of these three survivors should be declared his heir? and how far would the fact of the deceased being originally a Brâhman, Kshatriya, or a Vaiśya before he entered the order of Gosâvî, affect the rights of heirs?

A.—A good disciple becomes the heir of a Gosâvî as a general rule. But if he were of the Sûdra caste and his wife childless, the son of his mistress would, according to the custom of the Sûdras, be his heir, the wife being entitled to a maintenance only. If the deceased originally belonged to either of the other three castes, viz. Brâhman, Kshatriya, or Vaiśya, his good disciple should be considered his heir.

Ahmednuggur, April 14th, 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 1, l. 11; (2) f. 59, p. 1, l. 13.

REMARKS.—1. The Śâstri's answer applies to a Gṛihastha or householder only.

2. If the customs of Gharbâri Gosâvîs are the same as those of Gosâvîs proper, as would seem to be the case according to Steele, Law of Caste, App. B. para. 42, the illegitimate son will be the heir. *See* Steele, *ibid.* para. 29. (*a*)

Q. 2.—A Maṭha of a Gosâvi was held from disciple to disciple. A Gosâvî who came into possession of it kept a woman, by whom he had a son. Afterwards he married and

(*a*) This case illustrates the remarks made above, Introd. p. 85, 86.

became a "Gharbâri." He subsequently acquired some property and died. The question is, whether the son of the kept woman or his widow is the heir?

A.—If the Gosâvî belongs to the Śûdra caste the son of his kept woman will be his heir. If the Gosâvî belongs to either of the three superior castes, namely, Brâhman, Kshatriya, and Vaiśya, his widow will be his heir. The son in this case may claim maintenance, not as a matter of right, but grace.—*Tanna, March 15th,* 1856.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 1, l. 11; (2) f. 55, p. 2, l. 1.

REMARK.—*See* the preceding case.

Q. 3.—A deceased Gosâvî has left a wife and a disciple. Which of these is the heir?

A.—The wife will be the heir. The disciple cannot succeed, but if the custom of the sect requires that the disciple should succeed, he may be allowed to do so. The wife in that case will be entitled to maintenance only.

Khandesh, November 30th, 1859.

REMARK.—Regarding the Gharbâri, or married Gosâvî, *see* Steele, Law of Caste, App. B. paras. 6 and 42 ff.

Q. 4.—A Gosâvî, either of the sect of the Purî, Girî, or Bhârathî, acquired a Vatan like that of a Pâtil or Kulkaraṇî. Can it descend to his or his wife's disciple?

A.—Among the Gosâvîs of the above-mentioned sects, a disciple is as good an heir as a son among other people. If a disciple was not nominated by the male Gosâvî, his wife may nominate one to succeed to her estate in the same manner as a widow among other classes is allowed to adopt a son. No objection seems to exist to such a proceeding.

Khandesh, October 21st, 1848.

AUTHORITY.—Vyav. May. p. 142, l. 4.

Q. 5.—The parents (of the Kuṇabî caste) offered their son of the age of three months to a Gharbâri Gosâvî (married

Gosâvî). Before the child was initiated in the rites of the sect, the Gosâvî died. His wife, however, called the members of her sect, and presented a turban to the child, and placed him on the seat of the deceased. The nephew of the deceased taught him certain incantations and shaved his head. Is this not sufficient to entitle him to a certificate of heirship of the deceased?

A.—If the deceased Gosâvî's wife and nephew have done all that was required to qualify a successor to a Gosâvî according to the customs and rules of the sect, the certificate applied for may be given to him. Among the Vânaprasthas, Brahmachârîs, and Sannyâsîs of the ten different tenets, the succession takes place by disciples. The Gosâvîs and Vairâgîs follow the same tenets, and should be treated accordingly.—*Ahmednuggur, March 28th,* 1849.

AUTHORITY.—Vyav. May. p. 142, 1 2 and 8

III.—HEIRS TO A GOSÂVIṆÎ, OR FEMALE GOSÂVÎ.

Q. 1.—A female Gosâvî died. Which of the following will be her heir:—Her Guru, namely the preceptor, or the one who initiated her into the doctrine and practices of the sect; her Guru's son; her husband's disciple; her second or "Pâṭ" husband's disciple; her Gurubhâû, or the one who belongs to the same fraternity to which her Guru belongs?

A.—According to the custom of the sect of Gosâvîs, a well-behaved disciple will be the heir of the deceased. If she has made a gift of her property to her Guru, he can take it. If there is neither of these with the necessary qualifications, the disciple of her second husband must be preferred to her Guru.—*Ahmednuggur, February 24th,* 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 59, p. 1, l. 13; (2) Vyav. May. p. 142, l, 8.

REMARK.—*See* Steele, Law of Caste, App. B. paras. 21 and 20.

Q. 2.—Can a woman of the Gosâvî sect, who is under the vow of celibacy, nominate a disciple? And can her preceptor or Guru be her heir?

A.—A virtuous woman of the sect can nominate a disciple, and if a disciple is virtuous he can succeed as heir. The Guru may take such property as may have been duly transferred to him, but in the absence of a properly qualified disciple, the property will go to the Sirkar.

Ahmednuggur, August 22*nd*, 1847.

AUTHORITY.—Vyav. May. p. 142, l. 4 and 8.

REMARK.—*See* Steele, Law of Caste, App. B. paras. 21 and 38.

SECTION 2.—HEIRS TO A JANGAMA.

INTRODUCTORY REMARK.

The Jangamas are the priests of the Lingâyata sect, who pretend to have renounced the world, like the Sannyâsîs. But the laws referring to the latter cannot be applied to them for the same reasons as in the case of the Gosâvîs. For an account of their doctrine and history, *see* H. H. Wilson, Works, Ed. Rost, Vol. I., pp. 218—230; and of their customs, Steele, Law of Caste, p. 105 ff.

Q. 1.—A Brahmachârî Jangama, holding the hereditary office of Paṭṭâdhikârî died. The question is whether the successor to the office should be a Brahmachârî (unmarried) or a married Jangama?

2. A man alleges that the office was conferred upon him by the deceased. The question is, whether his eligibility to the office will be effected by the performance or omission of the ceremony called the Jangama-Dîkshâ (*a*).

3. The head Maṭha is presided over by a Brahmachârî Jangama, and there is an inferior Maṭha, which is also presided over by persons of the same class. The Brahmachârî of the inferior Maṭha died, and has left no disciple. Can the Brahmachârî of the head Maṭha succeed to the inferior Maṭha?

(*a*) Dîkshâ = Initiation.

A.—1. A man cannot succeed to a Paṭṭâdhikârîship, unless he is his Dharma-brother, or fellow-student living in the same dwelling. He must further be a Brahmachârî living in a college, and a Vîra-Śaiva, who is the most pious of the seven classes of the Śaivas or the worshippers of Śiva. A married man, although he is a fellow-student, cannot be an heir of a Paṭṭâdhikârî.

2. The answer to the second question is, that if it be proved that the man who claims to be an heir of the deceased is possessed of all the qualifications above-mentioned, and the Paṭṭâdhikârî on his death-bed conferred the office upon him with the ceremony called the "Triordha-Dîkshâ," his claim should be admitted.

3. The answer to the third question is, that if the Paṭṭâdhikârî of the head Maṭha possesses all the qualifications, and if he has a right derived from long established custom, he may be allowed to succeed.

Sholapoor, December 3rd, 1856.

AUTHORITY.—Mit. Vyav. f. 59, p. 1, l. 13.

REMARKS.—According to Steele, Law of Caste, p. 105, the head of the Maṭha (Paṭṭâdhikâri) appoints his successor, or the disciples elect a new Paṭṭâdhikâri with the sanction of the caste, Zamîndârs or Government.

In some Maṭhas the Jangamas are married. *Ibid* p. 106.

There is a good account of the usual origin of a Maṭha in *Sammantha Pandara* v. *Sellappa Chetti* (*a*) referred to above.

SECTION 3.—HEIRS TO A JATI.

INTRODUCTORY REMARK.

The Jainas are divided into Yatis or Jatis, religious devotees, and Śrâvakas, lay-brethren. As the Jainas deny the authority of the Vedas, they belong to the Pâshaṇḍas, heretics, and their devotees, consequently, are not subject to the laws of the Sannyâsîs. Regarding the history and doctrines of the Jainas, *see* H. H. Wilson, Works, Ed. R. Rost, Vol. I. pp. 276—369; and regarding the practices of the Yatis, *ibid.* p. 317 ff. For rules and customs as to the succession to Gurus, *see* Steele, Law of Caste, p. 103.

(*a*) I. L. R. 2 Mad. 175.

Q. 1.—(1) A Jati died leaving two disciples. They may have effected a partition of the property of their Guru or left it undivided. Afterwards the senior disciple died, leaving a disciple. The questions are, whether this disciple can claim a moiety of the property of his grand-Guru? or whether it will go to the brother-disciple of the last deceased?

(2) A Jati first became a disciple of one Guru, and afterwards of another by the ceremony called "Sipuj," and assumed the name of Datta. Subsequently he called himself by a name in which his first and the second name were compounded. Is the Jati to be considered a disciple of the first Guru? and can he inherit from his Guru in preference to his brother-disciple?

A.—(1) The Sâstra declares that the best disciple is the heir of his Guru. The two disciples, having effected a partition of their Guru's property, became separate. Afterwards one of them died. His disciple therefore is the legal heir. If the Guru's property had not been divided, yet the right to an equal share of it on the part of each of the two disciples is inherent, and the disciple of the deceased should be allowed to take whatever share belonged to his Guru.

(2) The Jati, who became a disciple, first of one and then of another Guru by the ceremony called "Sipuj," cannot be considered to have deserted his first Guru. He still calls himself by the name which his first Guru gave him. He cannot therefore be considered to have forfeited his right of inheritance.—*Surat, September 29th,* 1849.

AUTHORITY.—Mit. Vyav. f. 59, p. 1, l. 13.

Q. 2.—A Guru of the Srâvaka sect has applied for a certificate declaring him to be the heir of a disciple of his Guru-Bhâû. The applicant has kept a woman. Is his right to inherit from the deceased affected by this circumstance?

A.—A Guru is like a Sannyâsî, and fornication on his part is contrary to the Śâstra and the usages of the Jaina

sect. A Guru addicted to such a vice forfeits his right of inheritance.—*Surat, October 28th,* 1850.

AUTHORITIES.—(1) Mit. Vyav. f. 59, p. 1, l. 13; (2) Yoga Chandrikâ.

SECTION 4.—HEIRS TO A NÂNAK SHÂHÎ.

Q. 1.—A man of the Nânak Shâhî sect died. There are his Guru-Śishyas and Guru-Bhâûs. Which of these should be considered his heir?

A.—The sect founded by Nânak Shâhî is not recognized by the Śâstra. It has recently come into existence. The persons of that sect are Śûdras, whose property cannot be inherited either by their Gurus or Sishyas, and others connected merely by the similarity of their tenets. The property should be taken possession of by the Sirkâr.

Poona, July 4th, 1851.

AUTHORITY.—Vyav. May. p 142, l. 2.

REMARKS.—1. Regarding the tenets and history of the Nânak Shâhîs, *see* H. H. Wilson, Works, Ed. R. Rost, Vol. I. p. 267 ss.

2. The Śâstri seems to intend that the Nânak Shâhî, being Śûdras, cannot be placed under the rules regarding the inheritance to a Sannyâsî. But it by no means follows that for this reason the property is to be considered heirless. According to what has been said in the Introductory Remark to Chap. V. Sec. 1, the case ought to be decided according to the custom of the sect.

SECTION 5.—MÂNBHÂÛ.

Q. 1.—There are two sects of Mânbhâûs. The individuals of the one lead a life of celibacy, and the individuals of the other marry. Among the former, are preceptors and disciples the heirs of each other; and among the latter, are sons and other relations the heirs?

A.—There is no provision in the Śâstra regarding the sect, and the question therefore must be decided according to the customs of the sect.

Ahmednuggur, October 27th, 1848.

Q. 2.—Can a disciple of the "Malri" caste be the heir of a Mânbhâviṇi (a woman who had embraced the tenets of Mânbhâû) ?

A.—If the man of the Malri caste was made a disciple according to the custom of the sect, he can be the heir.

Khandesh, October 11th, 1852.

Q. 3.—A "Guru Bahîṇa" of a man of the Mânbhâû sect died. He claims her property. Can it be given to him even if the Guru is said to be living in another country ?

A.—There is nothing in the Sâstras regarding the sect. Their customs, therefore, whatever they may be, should be respected.—*Ahmednuggur, October 16th,* 1850.

Q. 4.—A woman had two sons, named Saybowa and Sukhadeva. The woman, though originally a Sûdra, adopted a Mânbhâû for her Guru. Her younger son Sukhadeva also chose the same Guru, so that according to the custom of the sect, the mother and the son became Gurubhâû and Gurubahîṇa (brother and sister) of each other. Saybowa had selected a different Guru. The mother, after her initiation into the sect, built a house. Subsequently she and her son Sukhadeva died. The latter has left a disciple. By the custom of the Mânbhâû sect a Gurubhâû becomes heir. The question therefore is, whether the disciple of Sukhadeva, who was the Gurubhâû of his mother, or the son of Saybowa, should inherit it ?

A.—According to the Sâstra, the son or the grandson is the heir to the property of his mother.

Khandesh, February 10th, 1851.

Authority not quoted.

SECTION 6.—HEIRS TO A VAIRÂGÎ.

INTRODUCTORY REMARKS.

Regarding the history and tenets of the Vairâgîs, *see* H. H. Wilson, Works, Ed. R. Rost, Vol. I. p. 184 ff.

Regarding their customs *see* also, Steele, Law of Caste, pp. 102, 433 ss. Vairâgîs so-called are sometimes found in occupation of temples, as amongst the Shenvî Brâhmans in Bombay. They in some cases hold the temple property after the manner of true mahants, and appoint chelâs, subject to approval by the panch or committee of the Vairâgîs of the other temples in the island. In other cases the property is held by trustees for the temple, and the quasi-mahants' appointment of a successor is little or nothing more than a recommendation of him as worshipper to the trustees in whom as representatives of the caste, owners of the temple, the right of nomination is really vested. The practice varies as to the direct ownership of the endowment, as to its management, as to the removeableness of the worshipper, and the hereditary descent of his office to chelâs whether nominated or not, and has seldom acquired in any institution the consistency and permanence requisite to a custom to be recognized by Courts of law.

The Vairâgîs are Vaishnava mendicants, following either the doctrines of Râmânanda or of Nimbâditya, Kabîr, Dâdû, and other teachers. They receive Śûdras and women into their community, and for this reason they can neither be considered real Sannyâsîs, nor be subjected to the laws of the Dharmaśâstra. It would however seem that the married Bhaṭ Vairâgîs, mentioned by Mr. Steele, form an exception, and are simply Gṛihasthas or householders

SECTION 6 (1).—HEIRS TO A VAIRÂGÎ (*a*).

Q. 1.—Who is the heir of a deceased Vairâgî ?

A.—If the deceased has left any property, his disciple, and if there is no disciple, one of his sect will be the heir. A Vairâgî, however, can give away his property to any one he chooses.—*Surat, August* 1*st*, 1815.

Authority not quoted.

(*a*) A disciple who leaves his Guru without permission and goes away, manifesting an intention to be permanently absent, is not entitled to a share in the succession, *Soogun Chund et al* v. *Gopal Gir et al*, 4 N. W. P. R. 101. This occurs not unfrequently, as the chelâs go about to seek a better settlement. They cannot again become chelâs in the proper sense, but they sometimes attach themselves to mahants or quasi-mahants as assistants, and get nominated or elected as successors.

REMARKS.—1. *See* Steele, Law of Caste, p. 109, 1st Edn.; p. 103, 2nd Edn.

2. A Vairâgî may retain his property. (*a*)

Q. 2.—Can a disciple of a Vairâgî be his heir?

A. The Sâstra takes cognizance of the succession by a disciple of a Sannyâsî, but not of a Vairâgî. The custom, therefore, should be the rule in the case of the latter sect.

Poona, December 26th, 1854.

Authority not quoted.

Q. 3.—One Bhagvândâs performed the funeral rites of the deceased Âtmârâm Bâvâ Vairâgî. The heads of the Vairâgî sect called the "Mahants," who had come on the occasion, recognized Bhagvândâs as the successor of the deceased. Should he or the sister of the deceased be considered the heir?

A.—According to the usages of the sect, Bhagvândâs is the heir, by reason of his being a properly qualified disciple. The sister, though a Sapiṇḍa relation, is not the heir.

Ahmednuggur, November 1st, 1847.

Authority not quoted.

REMARK.—See *Mohunt Sheopnokash Doss* v *Mohunt Joyram Doss.* (*b*)

Q. 4.—There were two half-brothers of the Vairâgî sect. One of them held a certain estate. On his death his son succeeded. On the death of the son, the other brother came into possession. On his death, his son-in-law succeeded and remained in possession for about 16 years. He performed the funeral rites of his father-in-law. The brother who first succeeded to the estate left a daughter. She has applied for a certificate of heirship. Can her claim be admitted?

A.—According to the usages of the Vairâgî and the Gosâvî sects, a virtuous disciple has a better title to succeed than a "Sapiṇḍa" relation. The disciple who performed the funeral

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(*a*) *Jagannath Pal* v. *Bidyanand*, 1 Beng. L. R. A. C. 114.

(*b*) 5 C. W. R. 57, Mis. A.

rites of the deceased will therefore inherit, if he be a virtuous man. The claim of the deceased's niece, who applies for a certificate, should be rejected as being contrary to the usages of the sect.

Ahmednuggur, August 13th, 1847.

REMARKS.—Virtuous here means not merely of good moral conduct, but of adequate capacity to profit by instruction, Vîram. Tr. p. 203, though in fact the Vairâgîs are often grossly ignorant.

2. The adopted son of a Vairâgî, who yet mingles in worldly affairs, may succeed to his property. (*a*)

(2).—GURU.

Q. 1.—Can the Guru of a deceased Vairâgî be his heir?

A.—Yes.—*Khandesh, February 5th,* 1857.

AUTHORITIES.—(1) Vîram f. 309, p. 2, l. 10; (2) Vyav. May p. 142, l 7.

REMARK.—If such is the custom of the caste, and not, as the Śâstri seems to think, according to the Dharmaśâstra. See *Jugdanund Gosamee* v. *Kessub Nund Gosamee et al* (*b*)

(3).—THE FELLOW-STUDENT.

Q. 1.—Can the Gurubhâû be the heir of a deceased Vairâgî?

A.—Whatever property may remain after the performance of the obsequies of the deceased should be made over to the Gurubhâû, if the disciples are not to be found.

Ahmednuggur, April 10th, 1846.

Authority not quoted.

Q. 2.—A Vairâgî of the Ramavat sect died. There are his nephew and a Gurubhâû. Which of these will be the heir?

A.—According to the customs and usages of the sects of the Vairâgîs and the Gosâvîs, the Gurubhâû will be the heir.

Ahmednuggur, January 16th, 1849.

Authority not quoted.

(*a*) *Mohunt Mudhoobun Doss* v. *Hurry Kishen Bhunj,* C. S. A. R. for 1852, p. 1089.

(*b*) C. W. R. for 1864, p. 146.

(4).—THE FELLOW-STUDENT'S DISCIPLE.

Q. 1.—Can a disciple of a Gurubhâû be the heir of a Vairâgî?

A.—No one can be the heir of a Vairâgî except his immediate disciple. If none such is to be found, Government should take the property of the deceased, after defraying the expenses of his funeral.—*Ahmednuggur*, 1845.

Authority not quoted.

REMARK.—Contradicted by the answers to the preceding Questions.

Q. 2.—Can a Vairâgi marry? and can his wife be his legal heir?

A.—Marriages are allowed among the Vairâgis, and the wife of one of that sect is his legal heir.

Ahmednuggar, April 6th, 1846.

Authority not quoted.

CHAPTER VI.

PERSONS DISABLED TO INHERIT (*a*).

SECTION 1—PERSONS DISEASED IN BODY OR MIND.

Q. 1.—A man has been blind of both eyes for about 16 years. He lives with his son. The son incurred some debt for the support of his family. A creditor attached the son's house, which was his ancestral property. The blind father applies for the removal of the attachment. Should it be granted?

(*a*) The Smṛiti Chandrikâ, Chap. V. p. 9, teaches that the epithet 'incurable' being attached only to 'disease,' the other qualifications, though not congenital or permanent, exclude if apparent at the time of partition (becoming possible). Loss of caste does not now deprive of heritable capacity, Act. XXI. of 1850. *Honamma* v. *Timmana Bhaṭ*, I. L. R. 1 Bom. 559.

The Roman law, after the establishment of Christianity, deprived heretics of heritable and testamentary rights. *See* Cod. Lib. I. Tit. V. l. IV.

A.—If the blindness of the father is not curable he can only claim maintenance. He has no right to the property, and consequently his application is not admissible. The debt, which was incurred on account of the family, must be paid from the property of the family.

Ahmednuggur, October 9th, 1850.

Authorities.—(1) Vyav. May. p. 161, l. 5 and 7 (*see* Auth. 5); (2) p. 164, l. 6; (3) p. 175, l. 8; (4) f 19, p. 2, l. 3; (5*) Mit. Vyav f. 60, p. 1, l. 13:—

"'An impotent person, an outcast and his issue, one lame, a mad man, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them from participation.' 'An impotent person,' one of the third gender (or neuter sex). 'An outcast,' one guilty of sacrilege or other heinous crime. 'His issue,' the offspring of an outcast. 'Lame,' deprived of the use of his feet. 'A mad man,' afflicted by any of the various sorts of insanity, proceeding from air, bile, or phlegm, from delirium or from planetary influence. 'An idiot,' a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong. 'Blind,' destitute of the visual organ. 'Afflicted with an incurable disease,' affected by an irremediable distemper, such as marasmus or the like." (Chap. II. Sec. 10, paras 1, 2.) Under the term "others" are comprehended one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree, and a person deaf, dumb, or wanting any organ. (Colebrooke, Mit. p. 360; Stokes, H. L. B. 455).

Remark.—In the case of *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh,* (*a*) it was admitted that a woman's insanity at the time of her mother's death excluded her from the inheritance, but opened it to her sons. (*b*) In *Daee* v. *Poorshotum Gopal* (*c*) it was ruled that a blind widow does not succeed to her husband's property. In the case at 2 Macn. H. L 42, it is not specified whether a son, excluded in favor of a daughter, was insane from birth or not. In Coleb. Dig. Bk. V. T. 320, 321, 326, 331 Comm., Jagannâtha seems to contemplate the defect that excludes as congenital, though it is not so stated; and so as to blindness and lameness. In the present case, the property having actually vested, the texts cited do not seem to deprive

(*a*) 13 M. I. A. 519.

(*b*) *See* also *Prem Narain Singh* v. *Parasram Singh,* L. R. 4 I. A. 105.

(*c*) 1 Borr. R. 453.

the owner. The answer to the next question appears equally applicable to this one. In *Musst. Balgovinda et al* v. *Lal Bahadoor et al* (*a*) it is ruled that subsequent insanity does not cause a forfeiture. *See* Introduction to Book I. p. 155, *supra*.

Q. 2.—A blind man inherited certain property. It cannot be ascertained whether he and his brothers have separated. Are the blind man's sons and brothers entitled during his life-time to take the management of the property into their hands ?

A.—The Śástras do not provide that a blind man may be dispossessed of his property. If he is unable to take care of the property, those who are united in interests with him, as his brothers and sons, have a right to take charge of it.

Poona, January 16th, 1845.

AUTHORITIES.—(1*) Mitâksharâ, f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (2*) Mit Vyav. f 60, p 2, l. 7 :—

"But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Colcb. Mit. p. 363; Stokes, H L. B. 457.)

REMARKS.—1 If the man was blind at the time the inheritance would have devolved upon him, that circumstance would, according to some opinions, act as a disqualification *See*, however, the cases noticed under the head "PERSONS DISQUALIFIED TO INHERIT," in the Introduction. Only sons by birth and Kshetrajas are mentioned as taking the place of a disqualified father, not sons by adoption. His sons, if he had any, would take his share

2 In Bengal it was ruled that a son born to a deaf and dumb man after the grandfather's death could not inherit (*b*) *See* the case of *Baboo Bodhnarain Singh* v *Baboo Omrao Singh*, (*c*) above, as to a woman's insanity. A blind woman may dispose by will of property to which she is absolutely entitled. (*d*)

(*a*) C. S. D A R. for 1854, p 244.

(*b*) *Pareshmani Dasi* v *Dinanath Das*, 1 Beng L. R. A. S. C. 117.

(*c*) 13 M. I. A. 519.

(*d*) *Bai Benkor* v. *Jeshankar*, Bom. H. C. P J. for 1881, p. 271.

Q. 3.—Can a man claim a share of his ancestral property, if he is not completely blind?

A.—A man not completely blind does not forfeit his right to a share.—*Rutnagherry, December* 12*th*, 1850.

AUTHORITY.—Vyav May. p. 161, l. 5.

REMARKS.—1. For the Śâstras mention only a BLIND man as unfit to inherit. *See* the definition of 'a blind man' in the passage of the Mitâksharâ quoted under Q. 1.

2. For the Bengal Law, *see Mohesh Chunder Roy et al* v. *Chunder Mohun Roy et al.* (*a*)

Q. 4.—A man was born lame. The creditors of his brothers having obtained decrees against them attached the property of the family. The lame man has filed a suit for the removal of the attachment from a portion of the property alleged to be his share. The question is, whether a lame man can claim his share of the common property at a time when he is about to be deprived of maintenance?

A.—A sufficient means of maintenance should be reserved for the lame member of the family, and the rest sold for the satisfaction of the decrees of the creditors. (*b*)

Rutnagherry, May 19*th*, 1853.

AUTHORITIES.—(1) Vyav. May. p. 161, l. 5 (*see* Auth 2); (2*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec 1, Q. 1).

Q. 5.—If a man's brother's son is afflicted with black leprosy, can he claim his share of the family property from his uncle, who is united in interests with him? If not, can his mother claim it? If neither can, will it be obligatory upon the uncle to support the mother and her son affected with the

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(*a*) 23 C. W. R. 78.

(*b*) This and other cases of maintenance are discussed in *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, to the effect that the active members may deal with the whole property in honest transactions for the common benefit. *See* above, pp. 248, 263, 264.

disease ? If the share which they otherwise would have claimed is not sufficient to provide a suitable maintenance for them, can the uncle be obliged to make it up from his own means ?

A.—A person, afflicted with black leprosy, and his mother have no right to any share. If the share which would have fallen to them is not sufficient to provide a suitable maintenance for them, the uncle must make it up from his own means.—*Rutnagherry, August 1st,* 1855.(*a*)

AUTHORITIES.—(1*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q 1); (2) Vyav. May. p. 161, l. 3 and 8 (*see* Auth. 1); (3) p. 164, l. 1 :—

Devala : "When the father is dead (as well as in his lifetime), an impotent man, a leper, a mad man, an idiot, a blind man, an outcast, the offspring of an outcast, and a person fraudulently wearing the token (of religious mendicity) are not competent to share the heritage." (Borradaile, p. 133 ; Stokes, H. L. B. 109).

REMARK.—It is only in a virulent form that leprosy disqualifies. (*b*)

Q. 6.—Can a dumb or a mad man claim the property of his ancestors, or does his claim extend to a maintenance only? Should the persons so defective be married? If they die leaving widows, have their widows the same right of adoption as other widows ?

A.—If a person is mad or dumb from the time of his birth, he cannot claim the property of his ancestors, though he may claim a maintenance from it. There is no objection to a person of this description being married. His widow may adopt a son.—*Tanna, January 20th,* 1857.

AUTHORITIES.—(1) Mit Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI Sec. 1, Q. 1 ; (2*) f. 60, p. 2, l. 4 :—

(*a*) This case illustrates what is said above, Introd. pp. 238, 248, 249.

(*b*) *Muttuvelayuda* v. *Parasakti,* M. S. R. for 1860, p. 239 ; *Anant* v. *Ramabai,* I. L. R. 1 Bom. 554.

A leper could not inherit in Normandy, nor could he inherit gavelkind land in England down to the reign of John. *See* Elton's Ten. of Kent, 96.

"For Manu says : It is fit, that a wise man should give all of them food and raiment, without stint, to the best of his power; for he who gives it not shall be deemed an outcast." (Manu IX. 202 ; Coleb. Mit. p. 363, Chap. II. Sec. 10, para. 5; Stokes, H. L. B. 456).

(3*) Mit. Vyav. f. 60, p. 2, l. 12 :—

"Their childless wives, conducting themselves aright, must be supported" (*a*). (Coleb. Mit. p. 363, Chap. II. Sec. 10, p. 14; Stokes, H. L. B. 457).

REMARKS.—*See* Q. 2. There is no special rule regarding adoptions to be made by the widows of men excluded from inheritance; but *see* Q 2, and Mit. Chap. II. Sec. 10, pl. 9, quoted under Q. 8. If the excluded person cannot adopt so as to give a heritable right, neither, it would seem, can his widow. *See* Q. 8.

2 A deaf and dumb man having been excluded from an inheritance which was taken by his brother, a son subsequently born to the former was held not entitled to the share of his father which he might have obtained if born before his grandfather's death. (*b*)

Q. 7.—A deceased person has left a son who is insane. His nephew has applied for a certificate of heirship. Can it be granted ?

A.—As the son is insane, and as the nephew and he are united in interests, there is no objection to the nephew being declared an heir.—*Rutnagherry, August 20th,* 1846.

AUTHORITY.—Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1).

REMARK.—Subsequent insanity does not cause forfeiture. (*c*)

(*a*) *Gangabai* v. *Naro Moreshvar et al*, S A. No. 94 of 1873, Bom. H C P. J. F. for 1873, No. 95.

(*b*) *Bapuji* v. *Pandurang*, I. L. R. 6 Bom. 616, citing *Kalidas Das* v. *Krishan Chundra Das*, 2 B. L R. 103 F. B. *See* Q. 8. The blood is in a manner attainted as under the English common law in a case of treason or felony, but only as to rights of inheritance subsequently arriving at completion.

(*c*) *Must Balgovinda et al* v. *Lal Bahadoor et al*, Calc. S. R. for 1854, p. 244.

Q. 8.—A son of an insane Śûdra has brought an action for the recovery of certain immoveable property, consisting of land held in Inâm and other tenures, alleged to belong to his grandfather. The question is, whether he has a right to do so?

A.—A son of an insane person has a right to sue for the recovery of immoveable property of his grandfather.

Tanna, October 30th, 1856.

AUTHORITIES —(1) Mit. Vyav. f 50, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q 1); (2*) f. 60, p. 2, l. 7 :—

"The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Colebrooke, Mit. p. 363, Chap. II Sec. 10, para. 9; Stokes, H L. B. 457.)

REMARKS.—It has been ruled that a man having been disqualified when the succession opened, his sons not then born or begotten are also excluded from the inheritance. (*a*)

2. In the case of *Ram Soondar Roy* v. *Ram Sahaye Bhugut,* (*b*) a suit was brought on behalf of a lunatic to set aside a sale of family property by his son. Had the lunatic been sane his suit would have been barred by limitation. It was held that as he was entitled only to maintenance under Mit. Chap. II. Sec 10, paras 6 and 9, he had not a *locus standi* to sue for the property of which in a partition he would get no share His suit was dismissed. In Bombay it is probable that if any fraud on his right could be proved his maintenance would be made a charge on the estate. (*c*)

(*a*) *Pareshmani Dasi* v. *Dinanath Dass*, 1 B. L R. 117 A. C.; *Kalidas Das et al* v. *Krishan Chundra Das,* 2 B L. R. 103 F B. *See* Mit. Ch. II. Sec X paras 9-11; Datt. Chand. Sec. VI. para. 1; Coleb. Dig. Bk. V. Chap. V T. 320, 326 Comm; Vishṇu, XV, 35, 36. By custom in some castes adoption by a disqualified person or by his wife on his behalf, with or without the consent of relatives or of the caste, is allowed. *See* Steele, L. C. 43, 182.

(*b*) I. L. R. 8 Cal. 919.

(*c*) *See* above, pp. 248, 264.

SECTION 2.—ILLEGITIMATE CHILDREN (*a*).

Q. 1.—Can an illegitimate son of a deceased Gujarâthî Brâhman succeed as a legal heir to his property, when there is no other heir of the deceased ?

A.—An illegitimate son of a Brâhman, a Kshatriya, or a Vaiśya, cannot be a legal heir of his father. He and his mother, if well behaved, can claim a maintenance only from the property of the deceased. The rest of the property should be given to the Sapiṇḍa relations. If the property belongs to a learned Brâhman, it should, in the absence of relations, be given to learned Brâhmans. A king has a right to take intestate property when it does not belong to a learned Brâhman.—*Ahmednuggur, September 23rd,* 1847.

AUTHORITIES.—(1) Manu IX. 155 (*see* Auth. 2); (2*) Mit. Vyav. f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1); (3*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec. 14 I. A. 1, Q. 1, p. 463).

REMARK.—At present a Brâhman's property escheats to the Crown. See *Collector of Masulipatam* v. *Cavaly Venkut Narainappa* (*b*); *see* also Chap. II. Sec. 3.

Q. 2.—A Brâhman died without male issue. A "Sapiṇḍa" relation of his performed his funeral rites. The deceased has left three sons by a kept woman. They alleged that they rendered useful service to the deceased, and obtained from him the gift of his property. In support of this

(*a*) In the case of *Muttuswamy Jagavera Yettappa* v. *Venecataswara Yettaya,* 12 M. I. A. 203, a maintenance was awarded to an illegitimate son of a brother. An illegitimate son of a Khatri, one of the three regenerate castes, by a Śûdra woman, cannot succeed to the inheritance of his putative father, but is entitled to maintenance out of his estate, *Chuoturya Run Murdun Syn* v. *Saheb Purhulad Syn,* 7 M. I. A. 18. The child of an incestuous intercourse has no right of inheritance, *D. Parisi Nayudu* v. *D. Bangaru Nayudu,* 4 M. H. C. R. 204; nor has the child begotten in adultery, *see* pp. 83, 415, *supra* ; *Rahi* v. *Govind,* I. L. R. 1 Bom. 97. But he is entitled, among the Śûdras, to maintenance out of his father's estate, *Viraramuthi Udayan* v. *Singaravelu,* I. L. R. 1 Mad. 306.

(*b*) 8 M. I. A. 500.

allegation they have no documentary evidence to adduce. Who should be considered the heirs ? the sons or the "Sapiṇḍa" relations who performed the funeral rites ?

A.—The son of a woman kept by a man of the Brâhman, Kshatriya, or Vaiśya castes, cannot be his heir. With regard to these three castes, a relation of a deceased person is his heir. If an illegitimate son of any of these castes be a useful servant, he may be allowed a suitable maintenance. He can also keep whatever property the deceased may have given him in free gift. In the case under reference, the sons could not produce any documentary evidence to prove the alleged gift, and as a gift of this kind would not be legal, the sons cannot be considered the heirs of the deceased, but if they are obedient servants, they may be supported.—*Tanna*, 1847.

AUTHORITIES.—(1*) Mit Vyav f. 55, p. 1, l. 11 (*see* Chap. II. Sec. 3, Q. 1; (2*) Vyav. May. p. 140, l. 1 (*see* Chap. II. Sec 14 I. A. 1, Q. 1, p. 463).

REMARKS.—1. If it could be proved that the deceased had made a gift of his property to his illegitimate sons, the gift would be legal, since an unmarried man may do what he likes with his property.

2. A man of one of the superior castes may make a grant to an illegitimate son for his maintenance, which an after-born legitimate son cannot disturb (*a*) The rule is general as to any gift completed by possession. (*b*)

SECTION 3.—PERSONS LABOURING UNDER MORAL DEFICIENCIES.

a.—THE ENEMY OF HIS FATHER.

Q. 1.—A father says that his son is inimically disposed towards him; that he not only abuses him, but assaults

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(*a*) *Rajah Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

(*b*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 630; *see above, p. 263.*

him, and threatens him with death; that he once actually attempted his life and drove him out of his house, telling him to perform the Srâddha of his grandfather in a temple; that he is very ignorant and has dissipated a good deal of the ancestral property; and that if a share of property should now be given to him he would squander it also. The father therefore wishes that his son should not be allowed to claim a share of his property, but a maintenance only. Suppose the father has shown that certain of his accusations are substantially true, should the son therefore be prohibited from claiming a share, and should it be decided that he could claim nothing more than a maintenance? If, on the contrary, it appears that the father hates the son, and contrives to deprive him of the share of the property, that he abuses and assaults his son, and that what the son does is merely in self-defence, can the son then claim a share of the ancestral property from his father? What is the definition of enmity towards one's father? and is a person entertaining it to be deprived of all share in his father's property only, or in all property, whether it be his father's or that of his ancestors?

A.—A person who entertains enmity towards his father, (*a*) and the one who labours under the defect of impotency, &c., are precluded from claiming shares. If the son is shown to be ill-disposed towards his father, or insane, or too ignorant to be trusted with property, he cannot claim any share, but maintenance only. If the father hates, abuses, and assaults his son, and the son does the same for self-defence, he cannot be said to be the enemy of his father. If the father contrives to deprive him of his rights, the father must be considered the enemy of his son. If the enquiry into the matter shows that the son is not an adversary of his father, he can claim from his father a share of the property of his ancestors. The enmity towards one's father is not exempli-

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(*a*) A father cannot disinherit a son properly adopted except for special reasons, *Daee* v. *Mothee Nathoo*, 1 Borr. at p. 87.

fied in the Śâstras, but it is merely said that a son who hates or injures his father is his enemy (*a*).

Rutnagherry, August 24th, 1850.

Authorities.—(1*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (2*) f. 50, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q 1); (3) Vyav. May. p. 161, l. 8 (*see* Auth. 1); (4) p. 94, l. 1; (5) p. 94, l. 2 (*see* Auth. 2); (6) p. 84, l. 4; (7) p. 91, l. 2 :—

"The father and sons are equal sharers in houses and lands derived regularly from ancestors; but sons are not worthy (in their own right) of a share in wealth acquired by the father himself, when the father is unwilling." (Borr. p. 54; Stokes, H. L. B. 48).

Remarks.—1 A son by birth or adoption can, for adequate reasons, be disinherited; but the course of devolution prescribed by the law cannot be altered by a private arrangement; on the son's disherison the son's son becomes his grandfather's lawful heir. (*b*)

2. A son was disinherited and afterwards restored, in *Musst. Jye Koonwar* v. *Bhikaree Singh*. (*c*)

3. The sons of outcasts born before their fathers' expulsion are not outcasts but take their fathers' places. Sons born after expulsion are outcasts, but Mitramiśra says a daughter is not, for "she goes to another family," Vîram. Tr. p. 254. (*d*) That man is in a special degree an enemy of his father who cannot or will not perform the religious ceremonies by which the father is to benefit, *see* Coleb. Dig. Bk. V. T. 320, Comm. Comp. Vîram. Transl. p. 256.

(*a*) "*Jure etiam pro tacite exheredato habebitur qui grave crimen commiserit in patrem si nulla sunt condonatœ culpae indicia,*" Grot. L. II., C. VII. 25, and the references to the Civil Law. Translation :—"He is also held as tacitly disinherited by operation of law, who has been guilty of a grave offence against his father, there being no proof of subsequent condonation." The Roman law imposed no restraints on an unamiable father. At Athens it seems to have been much the same down to Solon's times. Thenceforward public notice of disinheritance had to be given. *See* Schoemann, Ant. Gr. 502. Zachariae His. J. Graec. Rom. Tit. II. shows the gradual modifications of the patria potestas.

(*b*) *Balkrishna* v. *Savitribai*, I. L. R. 3 Bom. 54.

(*c*) 3 Mor. Dig. p. 189, No. 27.

(*d*) With this may be compared the early English law exempting already born children from their father's outlawry which the afterborn ones had to share. *See* Bigelow, Hist. of Proc. p. 348.

b.—PERSONS ADDICTED TO VICE.

Q. 1.—A man has a son, but as he was addicted to gambling and opium-eating, the father has constituted his grandson his next heir. Can he legally do so?

A.—It is quite legal for the father to disinherit his son on the ground of his misconduct, and to appoint his grandson to be his heir.—*Ahmedabad, March 7th,* 1856.

Authorities.—(1) Mit. Vyav. f. 45, p. 2, l. 8; (2*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (3) Vyav. May. p. 163, l. 3:—

"If there be other sons endowed with good qualities the inheritance is not to be taken by a vicious one; for says Manu—'all those brothers who are addicted to any vice lose their title to the inheritance.'" (Borr. p. 132; Stokes, H. L B. 109.)

Remark.—This opinion has in several forms been repeated in other cases. It cannot however be received without a safeguard against caprice and an appeal to the Civil Court. *See* 1 Str. H. L. 157.

Q. 2.—A Paradeśî had acquired some moveable and immoveable property before his death. He had a wife and two sons. One of these sons was addicted to gambling and other vices. He contracted some debts and died. The property of the Paradeśî was not divided. His deceased son had acquired no property. The question is, whether the creditor of the deceased son can recover the debt from the Paradeśî's property? The mother of the deceased son states that her son was a man of bad character, and therefore he was not entitled to any share of his father's property. Is her objection legal?

A.—The son was addicted to gambling and other vices. The debt contracted by him was not on account of the family. The creditor cannot therefore have his claim satisfied from the deceased's share of the common property. The objection of the mother that her son is not entitled to any of the father's property is valid.—*Khandesh, August 7th,* 1849.

Remark.—*See* the preceding case. "The father shall not pay his sons' debts; but a son shall pay his father's." Nârada, Part II. Chap. III. sl. 11; so held in the case of *Udaram* v. *Ranu Panduji et al.* (a)

(a) 11 Bom. H. C. R. 76.

Q. 3.—A man had four sons. One of them was a man of bad character. The father therefore excluded him from all participation in his property, and left a direction in his will that the share due to him should be given to his son. The son protested against the validity of the will on the ground that his father was 60 years old at the time of the will, that his hand used to shake, and that the will does not bear his signature. Is it lawful in a father to assign only maintenance to his son, and to bestow his share upon his grandson ?

A.—A father is at liberty to distribute the property acquired by himself among his sons in such a manner as he pleases. If one of his sons is insane, or addicted to vicious habits, or hostile, or disobedient to his father, he cannot be allowed a share of his father's property, but a maintenance only. His share would properly be given to his son. The will is not invalid merely because the father being very old could not sign it himself, but desired some other person to sign it for him.—*Ahmednuggur, January 25th,* 1859.

AUTHORITIES.—(1) Vyav. May. p. 163, l. 3 (*see* Chap. VI. Sec. 3 *b*, Q 1); (2) p. 161, l. 7 and 8; (3) f. 47, p. 1, l. 7; (4) f. 47, p. 2, l. 15; (5) f. 46, p. 2, l. 2; (6) f. 50, p. 1, l. 1; (7) f. 22, p. 1, l. 2; (8) f. 32, p. 1, l. 9; (9) f. 32, p. 2, l. 5 and 8; (10) f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (11) Mit. Vyav. f. 60, p. 2, l. 1:—

Nârada also declares:—" An enemy to his father, an outcast, an impotent person, and one who is addicted to vice, take no share of the inheritance, even though they be legitimate; much less if they be sons of the wife by an appointed kinsman." Mit. Ch. II. Sec. X. para. 3. (Colebrooke, Inh. p. 361.)

REMARK.—The father has no right to disinherit any one of his sons without reason, and consequently a will to this effect is void according to Hindû Law. (*See* Bk. II. Chap. I. Sec. 2, Q. 4, 5, 8.) Mitramiśra quotes Âpastamba to the effect that an outcast is deprived of his right to inherit, and Bṛihaspati and Manu (*see* Q 1) to show that a son incapable of offering funeral oblations is disqualified for the inheritance which is the proper remuneration for the performance of this duty. "Those," he says, "who are incapable of performing the rites enjoined by the Śruti and the Smṛiti, as well as those that are addicted to vice are disentitled to shares." Vîram.

Transl. 256. Hence degradation from caste caused an extinction of property, (*a*) but without serving as a cause of retraction when the share had once been assigned and taken. (*b*)

c.—ADULTERESSES AND INCONTINENT WIDOWS.

Q. 1.—Can a man's wife, who has been guilty of adultery, lost her caste and left her husband, be his heir ?

A.—If the ceremony of Ghaṭasphoṭa (divorce) has been performed, the wife cannot be the heir.

Ahmednuggur, June 17*th*, 1816.

AUTHORITY.—Vyav. May. p. 134, l. 6 :—

"The wife, faithful to her husband, takes his wealth; not if she be unfaithful; for it is declared by Kâtyâyana :—'Let the widow succeed to her husband's wealth, provided she be chaste.'" (Borr. p. 100 ; Stokes, H. L. B. 84.)

REMARK.—A wife guilty of adultery cannot inherit from her husband, whether the Ghaṭasphoṭa has been performed or not. But there must be positive proof or at least *very well grounded* suspicion. (*c*)

Q. 2.—Can the wife of a deceased Vairâgî, who forsook him without obtaining a written permission from him, and conducted herself as a prostitute for 12 years, become his heir ?

A.—No.—*Dharwar, March* 16*th*, 1860.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 6; (2*) Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 *c*, Q. 1)

Q. 3.—A widow bore a son two years after her husband's death. Can she claim the property of her husband ?

A.—A widow of bad character has no right to claim the property of her husband.—*Dharwar, May* 10*th*, 1850.

(*a*) *See* P. C. in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. at p. 146.

(*b*) *Ibid.*

(*c*) *Ramia* v. *Bhgi*, 1 Bom. H. C. R. 66.

AUTHORITIES.—(1) Mit. Vyav. f. 56, p. 2, l. 5; (2*) Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 *c*, Q. 1.)

REMARK.—*See* below, Q. 6, Remark.

Q. 4.—A deceased person has left distant cousins, the descendants of the fourth ancestor, and a widow, who, on account of her incontinency and pregnancy after the death of her husband, has been refused communication with the caste. Which of these will be his heir?

A.—Should the cousins and the deceased have lived together as an undivided family, the cousins will be the heirs. If they were separate, the widow of the deceased, notwithstanding her bad character, will be the heir.

Poona, August 31*st*, 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 60, p. 2, l. 2; (3*) Vyav. May p. 134, l. 6 (*see* Chap. VI. Sec. 3 c, Q 1).

REMARK.—The widow cannot inherit if she has been guilty of adultery before her husband's death. For the effect of her incontinence after his death, *see* Q 6.

Q. 5.—Can a Brâhman widow, who is guilty of adultery claim her husband's vatan?

A.—No; by her misconduct she has forfeited her right.

Ahmednuggur, 1845.

AUTHORITY.—Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 c, Q. 1).

Q. 6.—A woman of the Dorik caste, having lost her husband, became the mistress of a man of (another) Śûdra caste, and had a daughter by him. Can she claim to be the heir of her husband?

A.—A woman who was chaste at the death of her husband becomes his heir.—*Khandesh, January 4th*, 1851.

AUTHORITY.—Vyav. May. p. 134, l. 4; Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. According to Strange, El. H. L., adultery divests the right of a widow to inherit after it has vested. *See* Steele, 35, 36, 176.

2. On the other hand, the Śâstri's opinion seems to be supported by the Vîramitrodaya, where it is said, f. 221, p. 2, l. 8 :—"And these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made, a resumption of the divided property does not take place, because there is no authority (enjoining such a proceeding)." It is only through an extension by inference of the rule of exclusion that it is made to include females, who are therefore equally entitled to the benefit of the exception with the males specified, *see* Vîr Transl. 253, which allows an outcast to recover his rights by performing the proper penance. *See* Mitâksharâ, Chap. II. Sec. 10, pl. 6; Stokes, H L. B 456. Colebrooke, quoted in 2 Strange, H L 272, lays down the principle that after the estate has once vested it can be forfeited only by loss of caste. A woman would in general be expelled from caste for proved incontinence, and hence Sir T. Strange (p. 164) has inferred that a widow holds "*dum casta fuerit*" only; but the authorities quoted by Colebrooke do not support the view that any forfeiture of property necessarily attends expulsion from caste. It would follow as a necessary consequence in the case of a member of an undivided family, as all the property would be appropriated by those members who remained in communion with the caste; but this would not be so in the case of a separated person. (*a*)

3. The Mitâksharâ, while it excludes the outcast from participation, adds :—"But one already separated from his coheirs is not deprived of his allotment," Mit. Chap. II. Sec. 10, pl. 5, 6; Stokes, H. L. B. 456. And now by Act XXI. of 1850, expulsion from caste causes no deprivation of any right of inheritance. At the same time a widow, who remarries, forfeits her widow's estate under Act XV. of

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(*a*) Under the English Law, Freebench, as it is called, "is generally an estate for life. In many manors it is forfeited by incontinency or a second marriage . . . . If a widow is found guilty of incontinency she loses her freebench unless she comes into Court riding upon a black ram and repeats certain words," 1 Cruise's Dig. 285.

The widow takes as dower a moiety of gavelkind lands, but her estate is divested by her remarriage or incontinency. Elt. T. of Kent, 87.

1856. Thus subsequent unchastity does not divest her, but remarriage does. (*a*) In the case at 2 Macn. Prin. and Prec. of Hindû Law, 19, the Śâstri seems to have held that subsequent incontinence defeated the widow's estate, but "an estate once vested by succession or inheritance is not divested by any act which before succession or incapacity would have formed a ground for exclusion from inheritance." (*b*)

4. Subsequent unchastity does not divest an estate vesting in a mother. (*c*) In the case of *Advyappa* v. *Rudrava*, (*d*) it is ruled that incontinence does not affect a daughter's succession to her father's estate among Lingâyats. *See* same case, p. 118, as to the similar rule in the case of a mother. This was followed in *Kojiyadu* v. *Lakshmi*. (*e*) The disqualification of an incontinent mother to inherit from her son is expressly declared in *Ramnath* v. *Durga*. (*f*) It does not prevent a widow's inheriting from her maternal grandmother. (*g*) Incontinence is held to prevent one widow getting her share from the other. (*h*) Compare 2 Macn. H. L. 133, cited in the Introduction; compare also the case under the Bengal Law of two daughters inheriting jointly from their father, and on the death of one leaving a son while the other is a childless widow, the latter's inheriting, notwithstanding a state has supervened which would have originally been a disqualification. (*i*) The daughter's right to inherit arises in case of a disqualification of the widow through incontinence. Smṛiti Chandrikâ, Chap. X. Sec. 2, para. 22.

5. In *Honamma* v. *Timanabhat et al*, (*j*) it is laid down that a bare maintenance awarded as such is not forfeited by subsequent

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(*a*) *Parvati* v. *Bhiku*, 4 Bom. H. C. R. 25 A. C. J.; *Abhiram Das* v. *Shriram Das et al*, 3 Beng. L. R. 421 A. C.; *S. Matangini Debi* v. *S. Jaykali Debi*, 5 *ibid*. 466.

(*b*) P. C. in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. 115, in appeal from 13 Beng. L. R. 1. So *Bhawani* v. *Mahtab Kuar*, I. L. R. 2 All. 171; *Nehalo* v. *Kishen Lall*, I. L. R. 2 All. 150.

(*c*) *Musst. Deokee* v. *Sookhdeo*, 2 N. W. P. R. 361.

(*d*) I. L. R. 4 Bom. 104.

(*e*) I. L. R. 5 Mad. 149.

(*f*) I. L. R. 4 Calc. 550.

(*g*) *Musst. Ganga Jati* v. *Ghasita*, I. L. R. 1 All. 46.

(*h*) *Rajkoonwaree Dassee* v. *Golabee Dassee*, C. S. R. for 1858, p. 1891.

(*i*) *Vyav. Darp.* 170; *Amrit Lal Bhose* v. *Rajoneekant Mitter*, L. R. 2 I. A. 113.

(*j*) I. L. R. 1 Bom. 559.

incontinence. Sir T. Strange, 1 H. L. 172, thought it was doubtful. At 2 Str. H. L. 310, Colebrooke, referring to Mitâksharâ, Chap. II. Sec. 1. p. 17, says that brethren are not bound to maintain the unchaste widow of their childless brother. Several cases to the same effect are cited in Norton, L. C. 37. The Vyavahâra Mayûkha, Chap. IV. Sec. 8, pl. 6 and 8, and the Mitâksharâ, Chap. II. Sec. 1, pl. 7, relying on a passage of Nârada, seem to consider that unchastity, distinguishable from the mere perverseness of pl. 37, 38 of Mitâksharâ, Chap. II. Sec. 1, causes a forfeiture of the right to maintenance. So too the Vîram. Tr. p. 143, 153, 174, 219, and the Smṛiti Chandrikâ, Chap XI. Sec. 1, par 49. Good character is insisted on as a condition of the right by the Śâstri; above p 354, Q. 25. The distinction between the two degrees of misconduct is very clearly taken in Mitâksharâ, Chap. II. Sec. 10, pl. 14, 15 (*see* also Coleb. Dig. Bk. V. T. 414, Com.), from which it appears that in the case of wives of disqualified persons, those merely perverse or headstrong, must be supported, but not those actually unchaste. The case of an adulterous wife and mother are provided for by special texts, and Mitramiśra insists on the distinction, Vîram. Tr. p. 153. The outcast mother is not outcast to her son, and the outcast wife is not a trespasser in her husband's house (*a*) though to be kept apart: Nârada, Pt. II. Chap. XII. sl. 91; Manu, cited in 2 Macn H. L. 144. In his answer to Chap. IV. B. Sec. 1, Q. 1, the Śâstri seems to have considered that a woman of abandoned character could claim no more than maintenance out of her mother's estate. A share or an allowance assigned to a widow in an undivided family by way of maintenance is resumable on her grossly misbehaving, according to the Smṛiti Chand. Chap. XI. Sec. 1, paras. 47 and 48. The view here taken has very recently been confirmed by the decision in *Valu* v. *Ganga* (*b*) in which the Court declined to follow *Honamma* v. *Timanabhat*.

6. The adulteress may claim bare subsistence from her husband only, Smṛiti Chand. Chap. XI. Sec. 1, para. 49, but not while she lives apart, (*c*) nor can a woman, who has obtained a *Soḍa-chiṭi* (divorce)

(*a*) *The Queen* v. *Marimuttu*, I. L. R. 4 Mad. 243.

(*b*) Bom. H. C. P. J. 1882, p. 399.

(*c*) A claim for maintenance by a wife was disallowed, she not having shown sufficient reason for her desertion or absenting herself from her husband, *Narmada* v. *Ganesh Narayen Shet*, Bom. H. C. P. J. for 1881, p. 215. This applies equally to any wife wrongfully withdrawing, *Kasturbai* v. *Shivajiram Devkuran*, I. L. R. 3 Bom. at p. 382.

from her husband, sue him for maintenance. (*a*) An unjustified withdrawal from her husband suspends her right; (*b*) a severer rule applies to a wife guilty of other misbehaviour. (*c*) A daughter living apart from her father for no sufficient cause cannot exact maintenance from him (*d*).

7. It is an offence punishable under the Penal Code, Sec. 494 as to the woman, under Sec 497 as to the man, to marry the wife of a Hindû not divorced and without the first husband's consent, *Reg.* v. *Bái Rúpá.* (*e*) A woman thus married is entitled to maintenance (as a concubine,) *Khemkor* v. *Umiashankar*; (*f*) so is a concubine, *Vrandavandas* v. *Yemanabai.* (*g*)

(*a*) *Bhasker* v. *Bhagu*, S. A. No. 298 of 1876, Bom. H. C. P. J. F. for 1876, p. 273. A divorced woman is not entitled to maintenance, *Muttammal* v. *Kamakshy Ammal et al*, 2 Mad. H. C. R. 337.

(*b*) *Mudvallappa* v. *Gursatava*, S. A. No. 307 of 1872, Bom. H. C. P. J. F. for 1872, No. 1; *Narmada* v. *Ganesh Naranyanshet*, *supra*; *Viraswami Chetti* v. *Appaswami Chetti*, 1 M. H. C. R. 375; *Sidlingapa* v. *Sidava*, Bom. H. C. P. J. File for 1878, p. 77; S. A. No. 307 of 1872; *Mudvalappa* v. *Gursatava*, B. H. C. P. J. File for 1873, p. 1. According to Steele, L. C. p. 32, repudiation without maintenance is allowable only in those cases which involve complete loss of caste, such as adultery with a man of lower caste, procuring abortion, or eating forbidden food. In other cases a penance restores the erring wife to her position. Should the husband desert his wife she is entitled to maintenance to the extent of one-third of his property, *Ramabai* v. *Trimbak Ganesh Desai*, 9 Bom. H. C. R. 283, and *Gangaba* v. *Naro Moreshwar*, Bom. H. C. P. J. for 1873, No. 95. *See* Coleb. Dig. Bk. IV. T. 72. In the answer at 2 Str. H. L. 309, the Śástri says that a son must give his mother a bare subsistence even though she be an adulteress. Colebrooke quotes the Mit. Ch. II. Sec. 1, para. 7, to show that brethren are not bound to maintain their brother's unchaste widow. He doubts if there is an authority imposing on the son a legal obligation to support an adulterous mother; but Manu and other ṛishis prescribe the duty under all circumstances. *See* above, pp. 263, 356, and Manu II. 225, 235.

(*c*) *Shriput* v. *Rádhábái*, Bom. H. C. P. J. F. 1881, p. 163; *Narmada* v. *Ganesh Narayan*, *supra*.

(*d*) *Ilata Shavátri et al* v. *Ilata Narayanan Nambudiri*, 1 M. H. C. R. 372.

(*e*) *See* to the same effect *Reg.* v. *Kassan Goja*, 2 Bo. H. C. R. 117.

(*f*) 10 Bom. H. C. R. 381.

(*g*) 12 Bom. H. C. R. 229.

Q. 7.—A widow, who had no sons, and who was faithless to her husband, assigned her husband's immoveable property as security for a debt due to his creditor. Her sister-in-law objected, on the ground of the inability of a faithless wife to mortgage her husband's property. What are the rules of the Śâstras on the subject ?

A.—A woman, who has no sons and is guilty of adultery, cannot have any claim to her husband's moveable or immoveable property, although he may have lived separate from other members of his family. Those, who are his legal heirs, entitled to take his property, should liquidate his debt.

Ahmednuggar, September 3rd, 1847.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 *c*, Q. 1); (2) p. 135, l. 7; (3) p. 155, l. 5; (4) p. 159, l. 5; (5) p 181, l. 5; (6) Mit. Vyav. f. 12, p. 1, l. 10.

Q. 8 —Can a widow, who has re-married, inherit the property of her former husband ? If the widow has some children by her first husband, and if they are left under the protection of her husband's brother, can the brother in his capacity of guardian claim his deceased brother's property, or should it be given to his widow who has re-married ?

A.—A widow, who re-marries, cannot be considered a faithful wife. She cannot therefore claim the property of her first husband. If she has some children by her first husband, and if they are left with her husband's brother, he can claim the property of the deceased.

Sadr Adâlat, July 30th, 1849.

REMARK —The case would fall under Act XV. of 1856, and the Śâstri's decision seems to agree with Sec. 2 of that Act. *See* also Chap. II. Sec. 6 B.

A DIGEST

OF THE

HINDU LAW

OF

INHERITANCE, PARTITION, AND ADOPTION;

EMBODYING THE REPLIES OF THE ŚÂSTRIS
IN THE COURTS OF THE BOMBAY PRESIDENCY,

WITH

INTRODUCTIONS AND NOTES

BY

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BOOK II.

THE LAW OF PARTITION.

BOOK II.—PARTITION.

INTRODUCTION.

Definition.

§ 1. The Law of Partition is the aggregate of the rules, which, when a Hindû family, (*a*) living in union, separates, determine the duties and rights of its several members with respect to the common property and liabilities. (*b*) The

(*a*) In the case of *Raj Bahadur* v. *Bishen Dayal*, I. L. R. 4 All. 343, it was recently held that the Hindû law applies of its own force only to an orthodox Hindû. This rule literally applied would exclude from the operation of the Hindû law Jains, Lingâyats, and other sects of dissenters But Hindûism is a matter of race as well as of religion, and the Hindû law, as we have seen, allows all classes of Hindûs to be governed by their own customs when these differ from the general law. This is the basis of the customary law of castes (see *Mathurâ Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545), according to the Hindû view of the matter, and the indulgence extends even to the established usage of a family. In the case referred to, the High Court at Allahabad found a similar rule applicable to a Hindû family half-converted to Mahomedanism, as a law of "justice, equity and good conscience," and upheld a claim for partition according to the Hindû law, because as to inheritance the family had adhered to that law. The case of *Abraham* v. *Abraham*, 9 M. I A. 195, is cited, but that of the Khojas and Memons, Perry, Oriental Cases, 110, is not referred to. Cutchi Memons and Khojas retain by custom some Hindû laws of Inheritance, but are otherwise governed by the Mahomedan law ; *in re Haji Ismail*, I. L. R 6 Bom. 452 ; *Ahmedbhoy Hubibhoy* v *Valleebhoy Casumbhoy*, *ib.* 703. Mere apostasy does not free from the Hindû marriage-law. See *Government of Bombay* v. *Ganga*, I. L. R. 4 Bom. 330 ; Act. XXI of 1866. In Madras a view has been taken which would enable an association for almost any purpose to give itself rules analogous to those of the ordinary Hindû law. *See* below the case of the dancing women.

(*b*) By the Civil Law, partition is regarded as a kind of exchange. Hence an hypothecation of any share, validly created, subsists on all the shares after partition. "The doctrine of the old French law was, on the other hand, that a partition had no relation either to the contract of exchange, or to the contract of sale ; that it was not in the nature of a purchase-deed (*titre d' acquisition*), but only had the

basis of this law is the family. Property in common is regarded as an attribute or consequence of the relation of community of origin, not union of property as the source of the rights and duties of the co-sharers. A mere association in estate (*a*) will not make the subjects of it members of a

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effect of determining and limiting to certain subjects the indefinite share which, before the partition, each co-heir or other co-proprietor had, in the mass of the property, divided. According to the distinction to be found in the writings of so many French Jurists and in the Code itself, the instrument of partition was '*un acte déclaratif*,' not '*un acte translatif de propriété*'" P. C. in *Coustau* v. *Hewetson*, L. R 6 P. C. at p. 412, Poth. Tr. de V. Pt VII. Art. 6, 7

The former of these two theories somewhat resembles that of the Bengal law, as given in the Dâya Bhâga, Chap I. paras. 8, 35 (Stokes, H. L B. 181, 193). The ownership of sons arises, according to Jîmûtavâhana (para 11), only on the death of their father, and there exists *per my et non per tout*, 'a several though unascertained right in each co-parcener' (1 Macn. H L. 5), being as to each limited to a particular share, which is merely distinguished individually from the others by the act of partition, *see* Jaganrâtha in Coleb Dig Book V. T 2 Comm.; 1 Str. H. L 201. This view is contested by the Vîramitrodaya, Transl. p. 2, and by some even of the Bengal writers, as may be seen from Colebrooke's notes, but on it rests the recognised right of an undivided co-parcener to deal with his own share by way of sale or mortgage. The Mitâksharâ on the other hand assigns to the sons a common ownership with their father by birth (Mit. Chap. I. Sec. 1, para 23; Stokes, H. L B. 371), which extends, in the case of each co-sharer, to the whole, so as to prevent any one singly from dealing even with a part (para 30; 1 Macn. II. L. 5), and then partition is the mutually exclusive concentration on particular portions of the individual ownerships previously extending in mutual concurrence over the whole property (para. 4). Compare the Smṛiti Chandrikâ, Chap. XII. para. 9, and the Viramitrodaya, Transl. p. 3, 19, 42. On the death of a parcener "without male issue, his share becomes extinct, because no partition has taken place in the family, and there has consequently been no ascertainment of the share of each parcener." See *Udaram Sitaram* v *Ranu Pandoji*, 11 Bom. H. C. R. 76; *Narsinhbhat* v. *Chenapa Ningapa*, S. A No. 205 of 1877, Bom H C. P. J. F for 1877, p. 329.

(*a*) The mutual relations of members of a united family are sharply distinguished from those of mere partners, *Samalbhai* v. *Someshwar et*

joint family, but their being members of a joint family makes their estate and their acquisitions, except in special cases, common property. (*a*) The dissolution of the union makes joint property in this sense impossible except after a re-union. Separate rights of the members take the place of the undiscriminated common right, and the shares are determined according to the branches and sub-branches proceeding *inter se* from the common stem. (*b*)

The Mitâksharâ, (Chap. I. Sec. I. para. 13) explaining the familiar text as to the sources of ownership, says that Inheritance "relates to unobstructed and Partition to obstructed inheritance." The exposition in the Vîramitrodaya is that "unobstructed" relates to a right of ownership actually subsisting in the lifetime of one from relationship to whom it arises, and "obstructed" to one only ready to come into existence on the death of the obstructing owner, or a

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al, I L R 5 Bom 40; and the Vîram. quoted below, though the association of the latter is recognized as much more intimate than under the European laws Partnership however must now be governed by the Indian Contract Act IX of 1872 On the division of a caste the Courts have sometimes declined jurisdiction in a quarrel concerning a partition of the caste property, as being a caste question excluded from cognizance by Reg. 2 of 1827, Sec. 21, see *Girdhar* v. *Kalya*, I L. R 5 Bom. 83 As to the last point *see* Act XIV. of 1882, Sec. 11, and *Vasudeo* v. *Vamnaji*, I. L. R 5 Bom. 80. Without such a provision the decisions of the castes would be subject to revision by the King's Courts according to the Hindû law, *see* 2 Str H L. 267, and it is not infrequently a question whether a caste decision, so-called, has been properly arrived at; *Murári* v. *Suba*, I. L R. 6 Bom 725 As to the incidental cognizance of a religious question, by a Civil Court reference may be made to *Krishnasami*, v *Krishnama*, I. L R 5 Mad p 313, and to *Brown* v. *Curé of Montreal*, L R 6 P C p 157; as also to *Dhurrum Singh* v. *Kissen Singh*, I L. R. 7 Calc. 767.

(*a*) Comp Laveleye, Prim. Prop. 181 ss.

(*b*) Comp Maine, Early Hist. of Inst p. 79, and *Ballabhdás* v. *Sundardás*, I. L. R. 1 All 429. *See* the Vîram. Transl. p. 168, 162; Vyav. May. Chap. IV. Sec. 2.

partition by several such owners. Thus inheritance would apply to the sons taking collectively the aggregate patrimony, partition to collaterals taking the same estate, not previously vested in them, according to their shares, or a mother taking on a partition by sons. (*a*)

The intimate connexion of the laws relating to the two subjects has frequently been recognized. "Inheritance," in the sense of a right coming into active existence only at a preceding owner's death does not apply to the most frequent and important cases of inheritance under the Hindû law as conceived by the Mitâksharâ and its followers. The growth of a family is regarded as like the growth of a banyan tree, each new male offshoot of which immediately becomes a part of the whole, capable, when the parent stem perishes, of continuing the existence of the aggregate of which it then becomes the most important, perhaps the sole remaining element. The Hindû lawyers of the Western School accordingly treat of Partition under the title of Dâyavibhâga, regarding the contents of which *see* Introduction to Bk. I., pp. 57 ss.

Vijñâneśvara's definition of the word "Partition" is defective, (*b*) since it does not touch on the duties and liabilities of the co-parceners, which, as the subsequent treatment of this Title shows, are apportioned in the act of Partition just as clearly as the shares of the common property.

SUBDIVISION.

§ 2. The subjects which the law of Partition presents for consideration, therefore, are:—

I. The family living in union,

II. The separation of such a family,

III. The common property to be distributed,

(*a*) *See* above, p. 67; and below, Bk. II. Chap. II. Sec. 2. *See* also the Mâdhaviya, pp. 4 ss.

(*b*) *See* Mit. Chap. I. Sec. 1, para. 4.

IV. The common liabilities to be distributed, and

V. The duties and rights arising from the separation.

The evidence of Partition, though it forms strictly no part of the law of Partition, may be included under this head for convenience sake, and in deference to the custom of the Hindû lawyers, who always treat it under this title.

I. THE FAMILY LIVING IN UNION.

§ 3. The normal state of a Hindû family is one of union. (*a*) The rule holds as to the family of a Sûdra in

(*a*) *Gobind Chunder Mookerjee* v *Doorga Parsad Baboo*, 22 C. W R. 248, and the cases there cited by Sir R. Couch, C. J.

"The common abode of brethren is preferable while the parents are alive, as likewise after their death." Vîram. Tr. p. 52. "But if increase of religious merit (by sacrifices) be desired, then partition should be made." *Ib.* See *Neelkisto Deb* v. *Beer Chunder Thakoor*, 12 M. I. A at p. 540.

As to the case of a younger brother gradually admitted by the elder to a participation in his business, *see* the reply of the Śâstris in *Abraham* v. *Abraham*, 9 M I. A. at p 235; *Vedavalli* v. *Nárâyana*, I. L. R 2 Mad. 19 *See* Maine, Anc. Law, Chap. VIII. p 261 ss. In *Boologam* v. *Swornam*, I L. R 4 Mad 331, and some other cases it seems to be held that dancing girls living chiefly by prostitution are capable of forming a joint family. The invested earnings of two sisters were held not to be "gains of science" partible with the rest of the family, but self-acquired impartible property of the two gainers A true joint family could not possibly spring from a prostitute mother, but the family might possibly "constitute themselves parceners after the manner of a Hindû joint family," as in the case cited above, p. 4, (*g*).

Joint tenancy under the English law arises only from some act of the parties (*see* Cruise, Dig. Tit. XVIII Chap 1): joint tenancy by inheritance is not recognized, though co-parcenership is The joint estate of a united Hindû family differs in some respects from both. Thus, the co-sharers, unlike English co-parceners, have, under the Mitâksharâ, an entirety of interest, and along with a limited representation (*supra* pp 65 ss.) there is a *jus accrescendi*. On the other hand a joint tenant can dispose of his own share, and thus sever the joint tenancy, which the Mitâksharâ does not allow without the assent of

which illegitimate sons are members equally with those who are legitimate, though entitled on partition to only one half of the shares taken by the latter. (*a*)

The group thus constituted is in most of its civil relations to those outside it regarded as a social unit with common interests and duties as well as in typical cases common sacrifices and a common household. In such a group, membership of which may be abandoned, as unanimity cannot in all things be secured, the predominant will must be that of the greater number or of those who can exert the greater energy. Thus it was said that a majority of united brothers may deal with the estate even by way of alienation of part of it for the obvious benefit of the whole. Where four brothers sold a small part to redeem a large one, the adopted son of the fifth brother was held bound by the transaction (*b*) though he had not assented to it. This is perhaps the necessary practical solution of the question arising from a conflict of wishes

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the other co-sharers in a united family. *See* for the present law pp. 167, 206, and *note*. Partition of a joint tenancy could not be enforced under the English common law prior to the Statutes of 31 and 32 Hen. VIII., but a writ of Partition was given to co-parceners by the Common Law.

To the intimate union of the Hindū family may be traced the widely spread *benami* system under which one person, usually a near relative, purchases property in the name of another. A father not distinguishing his own interests from those of his son, invests money or establishes a business in the name of the latter as born under a favouring star. Next comes a similar purchase for the purpose of securing the investment against future chances Finally arises a system of fictitious ownership. The Courts, looking to the facts, decline to recognize generally in a purchase by a Hindū in the name of a son an intended advancement of the son as under the English law. The presumption is in favour of a purchase for the benefit of him who supplies the price. See *Naginbhai* v. *Abdulla*, I. L. R. 6 Bom. 717 ; *Gopu Krist Gosain* v. *Gunpersaud Gosain*, 6 M. I. A. 53 ; Indian Trusts Act. II. of 1882, Sec. 82.

(*a*) *Sadu* v *Baiza and Genu*, I. L. R. 4 Bom 37.

(*b*) Ratnagiri, 5th June 1852, M.S.

amongst co-equals. The doctrine of the older jurists, however, seems to have been that a complete consent of all concerned was requisite (*a*) to an effectual volition touching the common property or interests except in cases expressly provided for. (*b*) The need for unanimity in common acts is still so strongly felt that it is said the consent of all the co-heirs is requisite to justify expenditure from the common estate even for the funeral ceremonies of a father, (*c*) and the legal identity of the several members of the joint family is so complete under the law of the Mitâksharâ, that a single member cannot, according to the Śâstris and to Colebrooke, (*d*) deal directly with any part of the common property. His gift or bequest of any portion is inoperative (*e*).

(*a*) *See* above, p 221, note (*c*).

(*b*) *See* Bk II. Chap. II, Sec 1, Q 8; *see* below as to the cases, and also above, p 289, note (*a*).

(*c*) Borradaile's Collection, Lithog. p. 37.

(*d*) 2 Str H. L. 339, 432, 449.

(*e*) *Hurrcewulubh Gungaram* v. *Keshowram Shcodass*, 2 Borr 7; *Ichhâram* v. *Prumanund, ibid* 515; *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Gangubái* v *Ramanná*, 3 *ibid.* 66 A. C. J. (gift to a daughter); *Rámbhat* v *Lakshman Chintáman*, I. L. R. 5 Bom 630; Coleb Dig. Bk. V. T. 173, Comm.; Smṛiti Chandrikâ, Chap VIII. page 20; *Ganga Bisheshar* v. *Pirthi Pal*, I. L. R. 2 All. 635; *Chamaili Kuar* v. *Ram Prasad, ib.* 267; *Unooroop Tewary* v. *Lalla Bandhjee Suhay*, I L R. 6 Calc. at p. 753 Sacrifices, to the completeness of which some expenditure is requisite, can be performed by any member of a united family only with the assent of the others. *See* the Dharmasindusâra, as quoted by Goldstücker (On the Deficiencies, &c, p. 40) The Vîramitrodaya, concurring in the view that it is of the essence of a sacrifice to part with property that is distinctly one's own, says that notwithstanding the joint ownership of his sons a father may do this without their permission on account of his (administrative) independence and their dependence. Mitramiśra, however, seems to think that where there is a proprietary right there may be, for sacrificial purposes at any rate, an effectual relinquishment of that right by the individual, though it be attended with sin. According to this view members of joint families would be free from obstruction in dealing with their own interests. Vîram. Tr.

Viśveśvara and Bâlambhatta, in commenting on the Mitâksharâ, Chap. I. Sec. 1, pl. 20 (Stokes, H. L. B. 373),

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p. 14; *infra* Bk II. Chap. I. Sec 2,Q 4. This is cited in *Lakshman. Dádá Náik* v *Rámchandra Dádá Náik*, L. R 7 I A at p. 195, and the power of alienation is called "an exceptional doctrine established by modern jurisprudence." The subordinate joint ownership of the Hindû wife in her husband's estate does not interfere with his free disposal of it or confer any right of disposal on her, *see* Vîram. Transl p 165; Coleb Dig. Bk II. Chap IV T 28, Comm ; 2 Str. H. L. 7, 16, though her maintenance must be provided for. In Bengal, however, she is recognized as entitled to a share against a purchaser in execution, *Badri Roy* v *Bhawat N Dobey*, I L R. 8 Calc 649

The consent of brethren is necessary to a gift at a mother's obsequies, 2 Str. II. L. 339, according to the Śâstri, on whose reply however *see* the Notes *loc. cit.* Thus a joint family can act only collectively At 2 Str II. L. 419 the Sâstri of the Recorder's Court, Bombay, says "An undivided family having no power individually, but collectively only, no member can, without the concurrence of all, express or implied, dispose of any thing," and such is the purport of the Mit Chap. I. Sec 1, para 30; above, p 478. *See* also *Chuckun Lall Singh* v. *Poran Chunder Singh*, 9 C W. R 183 "An individual cannot alien his real estate to the prejudice of his heirs," Sutherland in 2 Str. H. L 13, 145 But an occupant under Government may, without assent of the heirs, resign his holding (*Arjuna* v *Bhavan et al*, 4 Bom H C. R 133 A. C. J ; *Davalatâ et al* v. *Bern bin Yádoji et al*, *ibid.* 197 A. C J), on account of the special relations created by or constituting occupancy, *Gundo Shiddheshvar* v. *Mardan Sáheb*, 10 *ibid* 423 ; *Gheldbái* v *Pranjivan*, 11 *ibid.* 222, *Tarachand* v. *Lakshman*, I L. R. 1 Bom 91. A member of an undivided family in Madras cannot sell even his own share save in an emergency, according to the cases quoted in the note to *Gangubai* v *Rámanná*, 3 Bom II C R. at p. 68, A. C J. But he has this power over what may come to his share in a partition according to *Villa Butten* v. *Yamenamma*, 8 Mad II C. R 6, and the cases cited by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad*, L R 6 I A. at p 101

When one co-parcener had sued a stranger for part of the patrimony and failed, and a subsequent suit is brought by one elected manager in the name of all for the same property, a question of *res judicata* arises. Its proper solution may perhaps be referred to this, that the one who sued thereby set up a separate right, and having failed, cannot sue for it again; and as he could dispose effectually of his own interest this is to be deemed transferred to the defendant even

take this as unquestioned ; and the passage quoted below from Yâjñavalkya (*see* PROPERTY NATURALLY INDIVISIBLE), shows that the author was still under the dominion, to some extent, of the notion of land being properly impartible, and of its being inalienable, at any rate, without the assent of every co-owner. (*a*) The language of the Privy Council is to the same effect with regard to the incapacity of a single member. (*b*) But Colebrooke having said that in case of an alienation for valuable consideration, "equity would perhaps award partition" to the alienee, (*c*) the Courts have allowed execution against the common property, to ascertain the undivided share and make it available to the creditor, whether expressly charged or not, and have even recognized the logical consequence (*d*) that a single coparcener may alien or incumber his own share for valuable consideration, though not gratuitously, (*e*) the vendor thus acquiring a right to a

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though the manager's suit should be successful. *See* Bréton Const de la chose Jugée. But a simpler solution is to be found in regarding the single sharer as an essentially different "persona" from the collective one, and the latter as not affected by the act of the former. A suit for property as allotted to the plaintiff in partition does not bar a subsequent suit for partition, *Shivram* v *Narayan*, I. L R 5 Bom. 27.

(*a*) *See* Mit. Chap. I. Sec 1, para. 30; Stokes, H. L B. 376; and the Vivâda Chintâmaṇi, p. 309. *See* below, Sec. 5 B.

(*b*) *Mussl. Cheetha* v. *B. Miheen*, 11 M I. A. 369, quoted below. *See* too *Rambhat* v. *Lukshman*, I L. R 5 Bom. 630, *sub fin.* and the cases there quoted.

(*c*) *See* 2 Str H. L 350, 434.

(*d*) See *Ponnappa Pillai* v. *Pappuvâyyangâr*, I. L R. 4 Mad. at p 56, *et seq.*

(*e*) *Vásudeo Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Rangapa* v. *Madyapa et al*, S. A No 537 of 1873, Bom. H. C. P. J. F for 1874, p. 171. The High Court of Bengal declined to accede to this principle in *Sadâburt Prasád* v. *Phoolbúsh Koer*, 3 B. L. R. 31, but as the liability of the share for its owner's debts has now been established by *Deen Dayal's* case, L. R 4 I. A. 247, it would seem that the same consequences must follow in Bengal as elsewhere *See* the

partition. (*a*) Whether before a partition of interests agreed to by the parties or decreed by a Court, the purchaser's right is more than an inchoate one seems doubtful. The purchaser is said to become a tenant in common, (*b*) but still his right has to be worked out by partition, (*c*) and it may be said that until the partition of interests is completed there is no individual interest on which the alienation can take effect, (*d*) or which will not become absorbed by survivorship on the sharer's death. (*e*) The view of the Judicial Com-

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remarks of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Prasad*, L. R. 6 I. A. at pp. 102, 104. In *Musst. Phoolbash Koonwar* v. *Lalla Jogeshwar Sahay*, their Lordships expressly refrained from deciding this question, *see* L. R. 4 I. A. 7, 21, 26, 27, but in *Suraj Bunsi Koer's* case it is clearly laid down that even on a bond which could not have been enforced after the obligor's death against his co-sharers (in that case sons) an attachment and order for sale create a charge in favour of the judgment creditor on his debtor's undivided interest which is not extinguished by the debtor's subsequent death and his brother's survivorship. In Madras a decree obtained against a member of a united family does not, according to *Ravi Varma* v. *Koman*, I. L. R. 5 Mad. 223, bind the family property in the hands of the other members after his death. "The interest," it was said, "survived to the other members," and did not "enure as assets of the deceased in the hands of the appellant." In the case however of a father succeeded by sons the Judicial Committee have declared that the estate taken by the latter is assets for paying the debts of the former, *see* above pp. 167, 207, and as to attachment in execution *see* below, note (*e*).

(*a*) *Udárám Sitárám* v. *Ránu Panduji et al*, 11 Bom. H. C. R. 76; *Palanivelappa Kaundan* v. *Maunáru Náikan et al*, 2 Mad. H. C. R. 416; *Sitârâm Chandrashekhar* v *Sitârâm Abâji*, S. A. No. 379 of 1874, Bom. H. C. P. J. F. for 1875, p. 140; *Máhádoo bin Jánuá* v. *Shridhar Bábáji*, Bom. H. C. P. J. F. for 1874, p. 114; and *Vrijabhukhandás Kirpárám* v. *Kirpárám Govandás*, Bom. H. C. P. J. F. for 1879, p. 263.

(*b*) *Udárám Sitárám* v. *Ránu Panduji*, 11 Bom. H. C. R. at p. 81.

(*c*) *Ib.* 72; above, p. 168. A decree for partition does not, it was said, effect a severance so long as it is under appeal, *Sakhárám Mahádev* v. *Hari Krishna*, I. L. R. 6 Bom. 113.

(*d*) See *Ravi Varma* v. *Koman*, I. L. R. 5 Mad. 223, cited below.

(*e*) See *Suraj Bunsi Koer* v. *Sheo Prashad*, L. R. 6 I. A. at p. 109, and comp. *Kotta Rámasami Chetty* v. *Bangari Sésham Náayanivâru*,

mittee however appears to be that an attachment in execution creates a charge. (*a*) *See* further on this subject below, SEPARATION, Bk. II., Introd. Sec. 4 C, Sec. 5 A, Sec. 6 A.

Where one of the members of a joint family has disappeared those who remain may deal with the common property in any way consistent with good faith (*b*).

One only of two or more united co-parceners cannot enhance rent against the will of another, or oust a tenant of the family (*c*), or recover his own estimated fractional

I. L. R. 3 Mad. at p. 167; *B. Krishna Ráu* v. *Lakshmana Shanbhogue*, I. L. R. 4 Mad. at p. 306, where it is considered that attachment for sale of a coparcener's share severs his interest so as to make it available in case of his death before satisfaction of the decree If a distinct charge on the common estate is thus constituted it may admit of question whether that is quite consistent with the decree for ousting the purchaser in execution of a manager's share in *Maruti Narayan* v. *Lilachand*, I. L. R. 6 Bom. 564. Property sold or attached under a decree against a father stands on a peculiar footing, which is discussed below.

(*a*) *Suraj Bunsi Koer* v. *Sheo Prashad*, *supra*, and *O. Goorova Butten* v. *C. Narainsawmy*, 8 Mad. H. C. R. 13.

(*b*) *Rámchandra Sadashiv* v. *Bagaji Bachaji*, Bom. H. C. P. J. F. for 1878, p 134.

(*c*) *Krishnaráo Jahágirdár* v. *Govind Trimbak*, 12 Bom. H. C. R. 85; *Madhavrav* v. *Satyana et al*, S. A. No. 225 of 1875, Bom. H. C. P. J. F. for 1876, p. 8; but *see* also *Krishna Rav et al* v. *Manaji et al*, 11 Bom. H. C. R. 106. Under the English Law it was held that any one of several joint landlords could by notice end a tenancy, *Doe* v. *Summerset*, 1 B. & Ad. 135, *Doe* v. *Hughes*, 7 M. & W. 139. The tenancy seems to be regarded as dependent on a continuous and complete volition, while in India the relation created by contract has usually been treated as requiring a new and complete volition to change it.

Thus one of several co-owners even after a partition of interests without a physical distribution of the estate, cannot, without the assent of the others, increase the rent of tenants or eject them. *Báláji Bhikáji Pingé* v. *Gopal bin Rághu Kuli*, I. L. R. 3 Bom. 23; *Guni Mahomed* v. *Moran*, I. L. R. 4 Calc. 96; *Raghu bin Ambu* v. *Govind Bahirao and others*, Bom. H. C. P. J. for 1879, p. 446. Notice by some co-sharers only of enchancement of rent has in Bengal been held sufficient; see *Chuni Singh* v. *Hera Mahto*, I. L. R. 7 Calc. 633.

share of the joint property from a stranger. (a) He cannot alone sue to set aside a charge created by another (b).

"The rights of the coparceners in an undivided Hindû family governed by the law of the Mitâksharâ, which consists

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But the decision was by three judges against two. Comp. *Gopal* v. *Macnaghten*, *ib.* 751; *Akojee* v. *Vadelal*, Bom. H. C P. J. 1882, p. 320.

According to the English common law a compulsion needs the concurrence of all entitled, see *Atwood* v. *Ernest*, 13 C. B. 881, compared with the cases above cited; but an acceptance or assent may be by one, *Husband* v. *Davis*, 10 C. B. 645. Comp. *Krishnarao* v. *Manajee*, 11 Bom. H. C. R. 106.

Some only of the sharers were allowed, contrary to the wish of another sharer, to eject an intruder in *Radha Prashad Wasti* v *Esuf*, I L R 7 Calc 414 In Bombay it would perhaps be held that the outsider holding with the assent of a sharer was in the same position as if put into possession by him. See *Mahabalaya* v. *Timaya*, 12 Bom H C R 138 In *Reasut Hossein* v. *Chorvar Singh*, I. L. R 7 Calc. 470, it was held that some only of several joint lessors could not take advantage of a condition of re-entry. *See* also *Alum Manjee* v. *Ashad Ali*, 16 C. W. R. 138; *Gokool Pershad* v. *Etwari Mahto*, 20 C. W. R 138; *Nundun Lall* v. *Lloyd*, 22 C. W. R 74 C. R. In *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narâyanan*, I. L. R. 3 Mad. 234, it is said that all interested in pressing the claim must be joined as plaintiffs, or if they refuse, as defendants. *See* Code of Civ. Proc. Sec. 26, 28, 32; Indian Contract Act IX of 1872, Sec. 45; and compare *Alexander* v. *Mullins*, 2 Russ. & M 568.

The same general principle is recognized in *Krishnamma* v. *Gangarao*, I L. R. 5 Mad. 229, in which it was held that one of several sharers of a village could not enforce on a tenant a patta (memorandum of rent payable) for his separate share of the total rent due by the tenant for his holding. In *Kalidas Kevaldas* v *Chotalal et al*, Bom. H. C. P. J. 1883, p. 31, it was ruled that all the members of a united family must be joined as plaintffs in a suit for a trade debt. An express assent to a suit by a manager was held insufficient. Reference is made to *Ramsebuk* v. *Ramlal Kundoo*, I. L. R. 6 Cal. 805, and *Dularchund* v. *Balramdas*, I. L. R. 1 All. 454.

(a) *Nathuni Mahton* v. *Manraj Mahton*, I. L. R. 2 Calc. 149.

(b) See *Rajaram* v. *Luchman*, 12 C. W. R. p. 478, cited and approved in *Mussumut Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*, L. R. 3 I. A. at p. 26. The greater force of the prohibitive than of the active element in a composite will is generally recognized. Goudsmit, Pand. 75.

of a father and his sons, do not differ from those of coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindû law imposes upon sons, and the fact that the father is in all cases naturally, and in the case of infant sons necessarily, the manager of the joint family estate." (*a*)

The joint family is usually represented in external transactions by a managing member or members. The managership naturally belongs to a father during his life and capacity for affairs, and then to the eldest member qualified. (*b*) The elder brother may take the management, unless the others intimate their dissent. (*c*) A manager's right to bind the family estate by transactions or by charitable gifts rests on the consent, express or implied, of the members. (*d*) The manager's transactions for the common benefit bind the several members in favor of one dealing with him in good

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(*a*) *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 100. The "obligation" arises, according to the Hindu authorities, only on the father's death. *See* below.

(*b*) Steele, L. C. 153, 178; Manu IV. 184; *Bhaoo Appajee Powar* v. *Khundojee wulud Appajee Powar*, 9 Harr. 106; *Bulákhidáss* v. *Ghama*, Bom. H. C. P. J. for 1880, p. 224; *Bhágirthibái* v. *Sadáshivráv Venkatesh*, Bom. H. C. P. J. for 1881, p. 155; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 I. A. at p. 101; *Bábáji Máhádáji* v. *Krishnáji Devji*, I. L. R. 2 Bom. 666. These cases show also what is comprehended in a "family necessity." For further texts *see* Vyav. May. Ch. IV. Sec. IV. para. 7.

(*c*) Steele, L. C. 53; 2 Str. H. L. 331.

(*d*) 2 Str. H. L. 333, 335, 339, 342. On the peculiar position of the manager according to Hindu law, reference may be made to *Chuckun Lall Singh* v. *Poran Chunder Singh*, 9 C. W. R. 483; and *S. M. Rangaumani Dási* v. *Kasinath Dutt*, 3 B. L. R. 1 O. C. J. *See* also below, V. Sec. 7 A. A certificate to collect debts under Act XXVII. of 1860 may be refused to a Karnavam (or manager) of a Malabar Tarwâd to whom the members refuse their confidence on account of his being a judgment debtor to the Tarwâd, *Madhava Panikar* v. *Govind Panikar*, I. L. R. 5 Mad. 4. Comp. Steele, L. C. p. 54.

faith, (*a*) a want of which may be indicated by the unusual character of the transaction. (*b*) A lessee from one member as manager is not discharged by a receipt for rent passed to him by another member, (*c*) though under a lease from the

(*a*) *Aushutosday* v. *Moheschunder Dutt et al*, 1 Fult. at p. 382; *Tándavaráya Mudali* v. *Valli Ammal*, 1 Mad. H C. R. 398; *Davlatráo Máne v Narayanráo Máne*, R. A. No. 51 of 1876, Bom. H. C. P. J F. for 1877, p 175; *Gundo Mahadev* v. *Rámbhat*, 1 Bom H. C. R 39; *Nahálchand et al* v. *Magan Pitámbar*, Bom. H. C. P. J. F for 1879, p. 332; *Johurra Bibee* v. *Sree Gopal Misser*, I. L. R. 1 Calc 470; *Náráyanráo Dámodar* v. *Bálkrishna Mahádev Gadre*, Bom H C. P. J F. for 1881, p. 293; *Chuni Singh* v. *Hera Mahto*, I. L. R 7 Calc. at p 642. *See* Coleb. Dig. Bk. II Chap IV. T. 54, Comm. *ad fin*; 2 Strange, H. L 342, 343; *Kashee kishore Roy* v. *Alip Mundul*, I L. R. 6 Calc. 149.

(*b*) *Báji Shámráj* v. *Deo bin Báláji*, Bom. H. C P. J. F. for 1879, p 238; 1 Str. H. L 202; see *Hanuman Prasad Panday* v *Babooee Munraj Koonweree*, 6 M I A at p. 412, and *Kottu Ramasámi Chetti* v. *Bangári Séshama*, I. L. R 3 Mad. at p. 164 *et seq.*, and *Ponambilath Parapravan Kunhamod Hajee* v. *Ponambilath Parapravan Kuttiath Hajee*, *ib.* 169.

(*c*) *Dada Ravji* v. *Bhau Ganu*, S. A. No. 279 of 1875, Bom. H. C. P. J. F for 1876, p. 11; *Poshun Ram et al* v. *Bhowanee Deen Sookool et al*, 24 C. W. R 319. See *Sangáppá* v. *Sáhebánna*, 7 Bom H. C. R. 141 A. C. J., and *Krishnaráo Rámchandra* v. *Mánáji bin Sayáji*, 11 B. H. C R. 106, 110; *Akoji Gopal* v *Hirachand*, Bom H C. P. J. 1882, p. 320; *Jadoo Shat* v. *Kadumbinee Dassee*, I. L. R. 7 Calc. 150; and Coleb. Dig. Bk. II. Chap. IV. T. 54 Comm. *ad fin.* For the English law see *Robinson* v. *Hoffman*, 4 Bi. 562, and *Leigh* v. *Shepherd*, 2 Br. and Bi. 465; *Doe Dem Green* v. *Baker*, 8 Taunt. 241.

Payment to one of several co-sharers frees the tenant as shown in *Krishnaráo Rámchandra* v. *Mánáji bin Sayáji*, 11 Bom. H. C. R. 106. A suit by one co-creditor, except on the ground of collusion of a co-creditor with the debtor, cannot in general be maintained under the English law, but he can give an effectual discharge; and under the systems derived from the Roman Law he may sue alone for the whole. *See* Evans's Pothier, I. 144, II. 55 ss. As to debtors *in solido* one may properly represent all in paying but not in resisting payment, or in making adverse admissions or a compromise, *see* Evans's Poth. II. 67. All co-sharers must be served with notice of intended foreclosure,

members jointly he is. As to the limitations on a manager's authority, see *Gopalnarain* v. *Muddomutty*, (*a*) *S. Sreemutty* v. *Lukhee Narain Dutt et al*, (*b*) and *Suraj Bunsi Koer's* case, *supra*. A widow managing for her infant son, like any other manager when minors are interested as co-parceners, (*c*) can deal with the property only to meet existing necessities, but the other party is protected by good faith and reasonable inquiry, (*d*) and in *Trimbak* v. *Gopal Shet* (*e*) good faith and reasonable inquiry seem to have been thought enough to justify and validate transactions with a member only supposed to be a manager acting for the common interest of

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Norender Narain v. *Dwarka Lall*, L R. 5 I. A. 18 Under the Indian Contract Act IX. of 1872, Sec. 43, any one of several joint promisors may be compelled to perform the whole promise and may then force the others to contribute. Whether a group of successors however is in this position seems at least doubtful. The Hindû law does not seem to impose any "solidarity" of obligation on them except as members of a united family. Comp *Doorga Persad* v *Kesho Persad Singh*, L. R 9 I. A. 27, 31.

The co-sharers who have colluded with a tenant to defraud a co-sharer may on that ground be sued by him in common with the tenant for the share of the rent due to the plaintiff, *Doorga Churn Surmah* v. *Jampa Dossee*, 21 C. W. R 46, and *Kalee Churn Singh* v *E Solano et al*, 24 C. W. R. 267, and see *Akoji Gopal* v. *Hirachand*, Bom. H. C P J. 1882, p. 320.

(*a*) 14 B. L. R. 21, 49 (not perhaps quite assented to in Bombay).

(*b*) 22 C. W. R. 171

(*c*) See *Saravana Tévan* v. *Muttayi Ammál*, 6 Mad. H C. R. at p. 371. *Durgapersad* v *Kesho Persad Singh*, I. L. R. 8 Calc. at pp 661-662; S. C. L. R. 9 I. A 27. *See* Steele, L. C. p. 174-5

(*d*) *Hunoomanpersaud Panday* v. *Musst Babooee Munraj Koonweree*, 6 M I A. 393; *C Colum Comara Vencatachella Reddyar* v. *R Rungasawmy S. J. Bahadoor*, 8 *ibid.* at p 323; *Dalpatsing* v. *Nándbhái et al*, 2 Bom H. C. R. 306; *Kashinath* v. *Dadki et al*, 6 *ibid.* 211 A. C. J.; *Bái Kesar* v. *Bái Gangá et al*, 8 *ibid.* 31 A. C. J.; *Bái Amrit* v. *Bái Manik*, 12 *ibid.* 79; *Saravana Tevan* v. *Muttayi Ammal*, *supra*; *Ratnam* v. *Govindarajula*, I. L. R 2 Mad. 339.

(*e*) 1 Bom. H C R. 27.

the family. (*a*) In another case (*b*) the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son who by taking no steps for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit. (*c*)

In the common case of an ancestral trade descending to the members of an undivided family, the manager can pledge the property for the ordinary purposes of the business. He may also enter into partnership with a stranger, but not enter into a compromise of partnership differences by a division and transfer of the partnership property, to the possible prejudice of minor members of the united family. (*d*) A managing Khot has not authority to give up important rights vested in the members generally. (*e*) A manager, it has been said, is not at liberty to pay out of the estate his father's debts barred by limitation. (*f*) His authority to acknowledge a debt does not arise necessarily from his position but may be inferred from circumstances. Thus he cannot, without special authority, revive a claim against

(*a*) *See* the cases in note (*d*), p. 611; *Bábáji Sakhoji* v. *Ramset. Pandushet*, 2 Bom. H C. R. 23; *Gane Bhive et al* v *Kane Bhive*, 4 *ibid.* 169 A. C. J.; *Mahabeer Persad* v. *Ramyad Singh et al*, 12 B. L. R. 90; and the remarks below on Bk. II. Chap I. Sec. 1, Q. 5, Comp. *Doorga Persad's* case referred to below.

(*b*) *Anant Jaganath* v. *Atmaram*, 2nd App. 301 of 1881.

(*c*) *See* Act IX. of 1872, Sec 197.

(*d*) *Johurra Bibee* v. *Sreegopal Misser*, I. L. R. 1 Calc. 470; *Rámlal Thakursidás* v. *Lakshmichund et al*, 1 Bom. H. C. R. li. Appx.

(*e*) *The Collector of Ratnagiri* v. *Vyankatrav Narayan*, 8 Bom. H. C. R. 1 A. C. J. A father sued for a share of property as joint, and then entered into a *bona fide* compromise. His son subsequently renewing the claim was held bound by the transaction; *Pitam Singh* v. *Ujagar Singh*, I. L. R. 1 All. 651.

(*f*) *Gopalnarain Mozoomdar* v. *Muddomutty Guptee*, 14 B. L. R. 49.

the family barred by limitation. (*a*) The Hindû law, (*b*) however, insists strongly on the payment of a father's debt. It is the strongest of the obligations which devolve on the sons, and the pious duty resting on them (*c*) may perhaps be held to justify the satisfaction in such a case of a claim that could not be enforced. In the case of *Tilakchand* v. *Jitamal* (*d*) it was ruled that a barred decree against a father is a valuable consideration for a new engagement by a son, and that a representative is not bound to plead limitation whenever he can do so. This was approved in *Bhálá Náhaná* v. *Parbhu Hari*, (*e*) where a relation of a deceased husband sought to have the act of a widow set aside, by which she fulfilled his engagement made on the adoption of a son instead of setting up limitation as a ground for repudiating it. It would seem therefore that in Bombay at any rate a manager may discharge the religious obligation of the family out of its estate without having to make the loss good at his personal cost. (*f*) A contract by a manager of a Hindû family with a stranger by which he seeks with the stranger's connivance improperly to obtain for himself an undue share, is rescindible at the suit of the party defrauded, and is not enforcible even as between the contracting parties. (*g*)

(*a*) *Chimnaya Nayudu* v. *Gurunatham Chetti*, I. L. R. 5 Mad. 169.

(*b*) *See* Coleb. Dig. Bk. I. Chap. V. T. 185, 186; and above, Introd. to Bk. I. p. 102.

(*c*) See *Udaram* v. *Ranu*, 11 Bom. H. C. R. 76, 84.

(*d*) 10 Bom. H. C. R. 206, 213.

(*e*) I. L. R. 2 Bom. 67, 71.

(*f*) An executor may pay a barred debt, *Lowis* v. *Rumney*, L. R. 4 Eq. 451, and set off against the share of a next of kin a barred debt due by him to the estate, *Re Cordwell's Estate*, L. R. 20 Eq. C. 644. So in India the representatives of heirs claiming a share in accumulations of interest on money in Court must submit to a set-off of barred debts due by them to the estate, *Lokenath Mullick* v. *Odoychurn Mullick*, I. L. R. 7 Calc. 644.

(*g*) *Ravji Janardhan* v. *Gangadharbhat*, I. L. R. 4 Bom. 29.

The cases already referred to will have shown that there is much uncertainty as to the position of members of united families with respect to the property in relation to their co-members and the creditors of co-members and persons with whom the co-members have contracted obligations. It cannot, in many cases, be said with confidence whether the transactions of an alleged manager bind the whole family or not, or whether in a particular instance a member suing or sued is to be deemed a representative of all, and if not what are the precise relations to the family estate which arise through litigation at its several stages between him and strangers with or without liens or ostensible liens on the property. In the case of the transactions of a father and of suits against him as affecting his sons' interests, along with his own, in the family property, a special source of complications has been found in the doctrine by which, in recent years, the pious duty of paying a deceased father's debt not of a disreputable kind has been translated into an authority of the father to burden the estate or dispose of it for satisfaction of such a debt, and a right on the part of creditors to enforce, during the father's life, at the cost of his sons, the moral obligation which, under the Hindû law, cannot arise for them until his death. The father is usually manager. Sometimes after borrowing money for proper purposes he colludes with his sons in trying to evade the obligation by asserting that it was obtained under such circumstances that the family estate is not answerable for it. (*a*) The son may have acquiesced in his father's transactions. It does not seem possible to reduce the decisions of recent years on such questions as these to exact harmony; but the questions recur so frequently that it will be useful to collect and compare the chief conclusions arrived at by the several High Courts and by the Judicial Committee. These will be considered as they bear on the ordinary co-parceners

(*a*) See *Oomedrai* v. *Hiralal*, quoted in *Hanooman Persad's* case, 6 M. I. A. at p. 418.

inter se, on the manager, on the father and son, and on strangers connected with them in these several capacities in the way of litigation or of voluntary transactions.

In the recent case of *Ramsebuk* v. *Ramlall Koondoo* (*a*) at Calcutta, it seems to be intimated that when a joint family carries on trade all the members must join as plaintiffs in a suit arising out of the trade. The claim was held barred because some of the members of the family had not been joined as plaintiffs until the suit as to them was barred by Sec. 22 of Act XV. of 1877, though instituted by other members within the period of limitation. (*b*) In several other cases the law has been held to be expressed in the less exacting proposition that where there is no manager all the members of a united family must be joined or be effectively represented in a suit brought to affect the common property; (*c*) but where there is a manager acting honestly, or where there has been an effectual representation, all may be bound, though not individually made parties. (*d*) In one case infants were held liable for a share though the manager had had no right to defend the suit in their name (*e*).

(*a*) I. L. R. 6 Calc. at p 826. Followed in Bombay in *Kalidas* v. *Chotalal*, H. C. P. J. 1883, p. 31. Comp. 2 Str. H. L. 331 ss.

(*b*) *See* further below, IV. LIABILITIES ON INHERITANCE. Compare the case of *Goodtitle dem King* v. *Woodward*, 3 B. and Ald. 689.

(*c*) See *Rájárám* v. *Luckman*, *supra*; *Norender Narayan* v. *Dwarka Lal*, L. R. 5 I. A. 18, 27; *Reasut Hossein* v. *Chorwar Singh*, I. L. R. 7 Calc. 470; see *Radha Proshad Wasti* v. *Esuf*, *ib.* 414; *Akoji and Gopal* v. *Hirachand*, Bom. H. C. P. J. 1882, p. 320.

(*d*) Coleb. Dig. Bk. II. Chap. IV. T. 54; *Jogendro Deb Roy* v. *Funindro Deb Roy*, 14 M. I. A. at p. 376; *Mayárám Sevrám* v. *Jayvantrav Pandurang*, Bom. H. C. P. J. F. for 1874, p. 41; *Náráyan Gop Habbu* v. *Pándurang Ganu*, I. L. R. 5 Bom. 685; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 236; *Radha Kishen Man* v. *Bachhaman*, I. L. R. 3 All. 118. *See* below, SEPARATION.

(*e*) *Doorga Persad* v. *Kesho Persad*, L. R. 9 I. A. 27.

Of this class of suits it had previously been said by the Judicial Committee (*a*) that when the members have not conflicting interests there are cases "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." It was held in *Mayaram Sevaram* v. *Jayvantrav Pandurang*, (*b*) that a son had been sufficiently represented by his father in a suit on a mortgage. A father having sued for a share of property as joint and then entered into a *bonâ fide* compromise, his son subsequently renewing the claim was held bound by the transaction, (*c*) and more recently that nephews had been represented by their uncle. (*d*) Similarly in *Bissessur Lall Sahoo* v. *Maharajah Lachmessur Singh* (*e*) it was held that decrees which "are substantially decrees in respect of a joint debt of the family and against the representative of the family," "may be properly executed against the joint family property." (*f*) At Allahabad it has been held that where the family property hypothecated by a father for family purposes had been sold in execution of a decree against him alone the sons could not recover their shares from the purchaser. (*g*) The learned Judges say that the decision of the Privy Council is an authority for holding that when a suit is brought to recover a family debt against a member of a joint Hindû family it may be assumed that

(*a*) *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*, 14 M I. A. p. 376.

(*b*) S. A. No. 435 of 1873; Bom. H. C. P. J. F. for 1874, p. 41.

(*c*) *Pitam Singh* v. *Ujagar Singh*, I. L. R. 1 All. 651. (It is not said whether at the time of the earlier suit the son was a minor.)

(*d*) *Náráyan Gop Habbu* v. *Pandurang Gannu*, I. L. R. 5 Bom. 685.

(*e*) L. R. 6 I. A. 233, 237.

(*f*) *See* above pp. 168, 169, and *Umbica Prosad Teewary* v. *Ram Sahay Lall*, I. L. R. 8 Calc. 898.

(*g*) *Ram Narain Lal* v. *Bhavani Prasad*, I. L. R. 3 All. 443.

the defendant is sued as a representative of the family, (*a*) and also for holding "that......decrees......substantially......in respect of a joint debt......may be properly executed against the family property." In a subsequent case (*b*) it has been held that adult members presumed to know of a mortgage by a father for family purposes and not protesting, (*c*) and not afterwards asking to be made parties to a suit on the mortgage against the father alone, are bound by the decree (*d*).

This seems to put the liability of sons arising from transactions of their father and from suits against him on the ground of representation through their acquiescence. (*e*) The same doctrine has been applied in Bombay where there had been a conscious and willing participation in benefits obtained. (*f*) Thus the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son, who by taking no step for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit, (*g*) but the presumption has not been carried to the length in any ordinary case of excusing one who would impose a liability

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(*a*) This doctrine was rejected at Calcutta in *Ramphul Singh* v. *Deg Narain Singh*, I. L. R 8 Calc at p. 523. As to a suit against a father's instead of a son's widow, see *Siva Bhagiam* v. *Palani Padiachi*, I. L. R. 4 Mad 401

(*b*) *Phul Chand* v. *Man Singh*, I. L. R. 4 All. 309.

(*c*) In *Upooroop Tewary* v. *Lalla Bundhjee Sahay*, I. L. R. 6 Calc. 749, the son wilfully stood by allowing the creditor to suppose he assented. *See* I. L. R. 8 Calc. at p. 524.

(*d*) This obligation in the case of a mortgage is denied at Madras. *See* below.

(*e*) In *Phul Chand* v. *Luchmi Chand*, I. L. R. 4 All 486, the father as manager of a family firm was sued for business debts. Family property was sold in execution of the decree, and his infant son was held bound on account of the capacity in which his father had been sued. For Bombay see *Rámlál's* case, 1 Bom. H. C. R. App. pp. 52, 72.

(*f*) *Anant Jagannátha* v. *Atmárám*, S. A. 301 of 1881.

(*g*) *See* Act IX. of 1872, Sec. 197.

on a member of a family from making him a party to the transaction or the suit. Even at Allahabad it was formerly held that the mere sale of the rights and interests of one as father of a joint Hindû family does not include the shares of his sons even though he could dispose of those shares. (*a*) A suit against the father alone on a mortgage by him as manager was thought to bind the family, but a sale in execution of his interest not to bind the shares of the sons. (*b*) In *Chamaili Kuar* v. *Ram Prasád,* (*c*) it was held that good faith in the purchaser did not validate his purchase from a father who sold for an immoral purpose during his son's minority. The principle was adhered to that one co-sharer could not dispose of the joint estate or any part of it, and that the father could not as manager sell the estate merely for his own self-indulgence, of which information was accessible to the purchaser. Similarly at Calcutta it was said that a son could not ordinarily be affected by a suit against the father alone. But on the ground that he had acquiesced for several years in the mortgagee's possession he was not allowed to recover his share sold in execution to the mortgagee. (*d*)

In the same case it is said that a father can dispose of the whole ancestral estate, or at least that it is the duty of the son to pay all his father's debts out of the estate equally during the father's life as after his death. The liability thus stated stands quite apart from acquiescence and rests on a transfer to the time of the father's life of a duty to pay his debts which the Hindû authorities expressly impose only after his death.

These and many other cases are considered in the judgment of Field, J., in *Ramphul* v. *Deg Narain Singh,* (*e*)

(*a*) *Nanhak Joti* v. *Jaimangal Chaubey,* I. L. R. 3 All. 294.

(*b*) *Deva Singh* v. *Ram Manohar,* I. L. R. 2 All. 746; *Bika Singh* v. *Lachman Singh, ib.* 800. *See* also *Chandra Sen* v. *Ganga Ram, ib.* 899.

(*c*) I. L. R. 2 All. 267.

(*d*) *Laljee Suhoy* v. *Fakeer Chand,* I. L. R. 6 Calc. 135, 139.

(*e*) I. L. R. 8 Calc. 517.

and the conclusions he arrives at are that a "father may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral," but that where the father has not "aliened or mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son as well as the father must be made a party to the suit," failing which the consequent sale of the father's interest does not affect that of the son. *Girdhari Lal's* case is explained as one in which the father, acting as manager, mortgaged the family estate, and the debt not being an immoral one (*a*) the interest of the son as well as the father was bound by the transaction. The question of whether the son could be bound by a decree in a suit to which he was not a party "was not raised ...... and therefore nothing was decided on this point." In *Deen Dayal's* case it is pointed out the question was raised, and the father's interest only having been sold the issue of legal necessity for the original debt was pronounced immaterial.

Badri Roy v. *Bhagwat Narain Dobey* (*b*) seems to agree with the one just referred to. In it a son, a widow and a grandmother of a defendant were allowed to recover their shares (*c*) from a judgment creditor who had purchased in execution of a money decree. But the purchaser having taken an assignment of a prior decree on a mortgage against the same defendant they were held bound by that liability, they not having shown that the debt was contracted for

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(*a*) As manager the father was bound to act in the interest of the family, and any stranger dealing with him was bound to establish a fairly reasonable belief that this duty was observed as a condition of enforcing his transaction against the family. The question of immorality could, under the Hindû law, arise for the son only when it was a question of paying the debt of a father deceased or long absent. *See* below.

(*b*) I. L. R. 8 Calc. 649.

(*c*) As to the "shares" of the widow and grandmother, *see* above, p. 310, 338; and below, Sec. 7 A. 1 *a*, 1 *b*.

immoral purposes. The voluntary incumbrance and the decree obtained on it availed against the son, but not the sale in execution. (*a*) In *Upooroop Tewary* v. *Lalla Bundhjee Sahay* (*b*) on the other hand, it is laid down that though the moral duty resting on the son gives effect to a father's alienation of the estate as against the son and his share while the son is an infant, yet when the son is an adult the father cannot, even to pay off his debts, dispose of the son's share without his consent. The assent might, it was thought, be implied from quiescence coupled with knowledge of the father's dealing. (*c*) In *Umbica Prosad Tewary* v. *Ram Sahay Lall* (*d*) it is said that by a decree against a father alone if he have been sued as representing the family his son's interests are generally bound. It does not seem to have been thought that the father need be sued specifically as representative, though without such specification the sons could not know for certain that their property was aimed at. The case of *Suraj Bunsee Koer* (*e*) is relied on, but that decision saves the purchaser only if "the property was property liable to satisfy the decree if the decree had been properly

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(*a*) The Madras doctrine is the reverse of this, *see* below.

(*b*) I. L. R 6 Calc. at p 753. *See* next note

(*c*) It may be noted that the Mitâksharâ and other authorities do not, even after the father's death, impose the duty of paying his debts on his son until the son attains his majority. *See* below, and 2 Str. H. L. 279. A managing member and those dealing with him are bound to have regard to the interests of infant coparceners, *Saravana Tevan* v. *Muttayi Ammál*, 6 M. H. C. R. at p 379.

The provisions of the Hindû law exempting an infant while such from responsibility for ancestral debts, and limiting liability on account of a grandfather's debts to the amount of the principal, may be compared with the 10th Article of Magna Charta. By this interest is not to run during the minority of the successor, and the king himself is to obtain satisfaction only out of the moveables specifically charged. *See* Bracton, fol. 61 *a*.

(*d*) I. L. R. 8 Calc. 898.

(*e*) L. R. 6 I. A. 88.

given against the father." This of course involves the question in every case of what property under the circumstances was liable under a decree against the father alone, and generally of how far without specification he can be held to have represented his sons and co-owners of the estate.

The effect of the judgment in *Girdhârilal* v. *Kantoo Lall* on which all these judgments rest, must, as in other cases, be gathered from the language of the Judicial Committee in relation to the facts as they understood them. There was an ancestral estate alienated after the birth of a son to satisfy a decree against his father. The son sued on the ground that no part of the joint estate was alienable by the father. The creditor maintained that the whole had passed to him; and this view was taken by the Judicial Committee. In *Maddan Thakur's* case a particular part of the estate had been sold in execution of a decree against the father, and here too the son's claim was rejected. In these instances the divisible nature of the patrimony as a means of giving effect to the father's transactions was not asserted on either side, (*a*) but in *Deen Dayal's* case which followed, this divisibility of interests was made the basis of the decision. (*b*) The claim was one for which the son's share would undoubtedly have been liable had the son been made a defendant; but as the father only was sued, the nature of the obligation, as in itself binding or not binding the son, was pronounced immaterial. Only the father's own share, it was said, could thus be made answerable to the creditor. There may have been a possible question as between the father and other co-sharers, but this could not affect the relations of the father and the son *inter se*, and the son's rights only were insisted and adjudicated on. It would

(*a*) A *dictum* in *Syed Tuffuzool Hoosein Khan* v. *Rughoonath Persad*, 14 M. I. A. at p. 50, pronounces an undivided share liable for a decree, but "not property the subject of seizure (by attachment) but rather by process direct against the owner of it."

(*b*) So in *Rai Narain Dass* v. *Nownit Lall*, I. L. R. 4 Calc. 809.

seem therefore that, at any rate where there is no specification of a representative character ascribed to the father, a suit and a decree against him alone and a sale in execution of such a decree cannot generally be understood as binding the son's share except under special circumstances to be appreciated by the Court.

In *Suraj Bunsee Kooer's* case (*a*) the effect of *Girdhari's* case is stated on the highest authority as this: "It treats the obligation of a son to pay his father's debts unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son, either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court." The same judgment imposes on a purchaser in execution, as a condition of security against a son's claim, the obligation of seeing that the property sold in execution "was property liable to satisfy the decree if the decree had been given properly against the father," and the conclusion is (*b*): 1*st*, That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and 2*ndly*, That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. It will be observed that this judgment assumes that in some way the joint property does pass out of the family by the father's

(*a*) L. R. 6 I. A. 88, 105.

(*b*) L. R. 6 I. A. at p. 106.

conveyance, or by a sale in execution on a decree against him. This must mean "*primâ facie,*" for otherwise there could be no ground for a reclamation of the property by the son, which was successfully made in the case, on the ground that the debt had been improperly incurred, and that the purchaser in execution had notice of the objection to the sale taken on that account. As to whether in a case in which the property has not been sold the son can be made answerable in his share for the father's debt needlessly but not viciously incurred, this judgment is silent. But where the whole estate is made liable by the father's alienation, or a decree against him, no purpose could be served by maintaining a law exempting the son and his share in the estate from direct proceedings. In these therefore as well as in suing to recover his part of the patrimony sold as his father's he must for consistency's sake now be called on to prove that the transaction sued on was an immoral one, or gave effect to an immoral one, within the knowledge of the plaintiff suing on it. Should the son however not be joined as a defendant with his father it must be observed that in *Deen Dayal's* case the property had "passed out of the family" equally as in *Girdhari's* case, and it was on the finding liable for the debt; but still the judgment in the case says that "whatever may have been the nature of the debt the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor."

In *Suraj Bunsee Kooer* v. *Sheo Prasad Singh* (*a*) it is said on this point that "it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition." Probably what was meant was that *even* in the case of a separate debt the sale under a decree was good as against the judgment-debtor's own share, and such was the effect of

(*a*) L. R. 6 I. A. 88, 103.

the decision on *S. Bunsee Kooer's* appeal. The other question of the father's transactions binding the son as to the son's share in the patrimony in all cases in which he cannot prove the transactions tainted with immorality, of which the purchaser had notice, was left to be governed still by *Girdhari's* case, subject only where a father had been sued alone, and not expressly as a representative, to the ruling in *Deen Dayal* v. *Jagdeep Narayan*. In the former of those cases it was said "The suit was brought by Kantoo Lall and Mahabeer, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property on the ground that the sale by the father was void." (*a*) It was supposed they must recover all or none. The incapacity of a co-sharer to deal alone with his share was down to *Deen Dayal's* case a received doctrine in Bengal, (*b*) and the creditor's remedy could be based only on the doctrine of a complete representation of the family as to its patrimony by the father. *Deen Dayal's* case broke down this conception by its incompatibility, and the essentially integral character of the patrimony on which both parties relied in *Girdhari's* case being abolished, the father's share could be attacked alone, and being open to attack alone was, subsequently to *Deen Dayal's* case, to be held as attacked alone unless other shares were specified, and their owners made parties defendant. If the father could be sued as their representative, it should at least be set forth that he was sued in that character as well as in his own person, (*c*) in order to bind other interests than his own separable share.

(*a*) L. R. 1 I. A. at p. 329.

(*b*) See *Musst. Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*, L. R. 3 I. A. at pp. 22, 26; *Raja Ram Narain Singh* v. *Pertum Singh*, 11 B. L. R. at p. 401.

(*c*) How a son may be ruined by his father's mere improvidence or imbecility when he has not the opportunity of guarding his own interest, may be seen in *Luchmi Dái Koori* v. *Asman Singh*, I. L. R. 2 Calc. 213.

In Madras the same questions have recently been learnedly and elaborately discussed. (a) The result is concisely stated by Kindersley, J. "The true doctrine of Hindû law appears to be that the obligation of the son to pay his father's debts does not arise until the father's death. It is the duty of the father, as long as he lives, to pay his own separate debts. But the cases of *Girdhari Lall* and *Muddun Thakoor* go further and rule that even in the undivided father's lifetime, where there has been a decree against the father for debts which were neither immoral nor illegal, and ancestral immoveable property has been sold in execution of such decree or under pressure of such execution, the son cannot recover against a *bonâ fide* purchaser for value. The cases of *Girdhari Lall* and *Muddun Thakoor* appear to imply that a son is responsible for his father's debts even in the lifetime of the father." It is only necessary to add to this that satisfaction of this responsibility is thus far limited to the share of the son in the patrimony, and does not extend to his other property. (b) In the Court of First Instance the ruling in *Deen Dayal* v. *Jagdeep Narayan* had been applied to the case, as the decree and execution had been obtained against the father alone. (c) Of this there is hardly any discussion in the judgments, but seeing that it introduced a modification of the law of actions as conceived in *Girdhari's* case it was important that effect should be given to it, especially since in Madras, as in Bombay, the creditor's equity to enforce partition having long been recognized, (d) a suit against a father alone might most

(a) *Ponappa Pillai* v *Pappuvayangár*, I L R 4 Mad. 1–73

(b) The Mitâksharâ is emphatic in declaring that the son's responsibility, where it exists, arises from sonship, though no property may have come to the son, Comm on Slokas 47 and 50 of the Vyavahârâdhyâya of Yâjñavalkya (translated in the Appendix to this work). So the Vyav. May Chap. V. Sec. 4, para. 14.

(c) *See* however *Sivasankara Mudali* v. *Parvati Anni*, I. L. R. 4 Mad. 96. *Girdhari Lall's* case is said not to apply to a nephew coparcener; necessity must be proved, *Gangulu* v. *Ancha Bapulu*, *ib*. p. 73.

(d) *Suraj Bunsee's* case, L. R. 6 I. A. at p. 102.

reasonably have been held to have had this remedy in view. As observed by Kernan, J., (a) "there can be no doubt that a person not a party to a suit is not bound by the decree by way of estoppel, and it is open to him to impeach the title of the purchaser on any ground legally sufficient." It may be added that one person or his property cannot be affected by proceedings against another not his representative and whose interest is distinguishable. (b) This was the decision as between a living father and son in *Deen Dayal's* case, and it seems to have afforded a "ground legally sufficient" in *Ponappa's* case for impeaching a sale under proceedings in which the son or the son's interest was not named. Such seems too to be the effect of the still more recent decision in the *Subramaniyayyanas'* case on a suit upon a mortgage executed by an elder (managing) brother in renewal of one by the deceased father, and a decree and sale in execution against that brother alone of the family property. (c)

One curious result of the Madras decisions seems to be that the creditor who takes from the father a mortgage as security for his claim puts himself in a worse position than one who relies on the simple obligation. The latter by suing the father alone may bind the whole family and its estate, while the former must join all the sons as defendants in order to

(a) *Ponáppa Pillai* v *Pappuvayangar,* I. L. R 4 Mad. at p. 71.

(b) Thus in *Ponáppa's* case it was said that in a suit on the mortgage the coparceners could not be bound unless made parties so as to give them an opportunity of redeeming. See *Chockalinga* v. *Subbaraya,* I. L. R 5 Mad. at p. 135, wherein it was ruled that a decree on a hypothecation against a father could not operate against his sons not made defendants; and *Dasaradhi* v. *Joddumoni, ib.* 193, where redemption was allowed against a sale under a decree on a mortgage against a manager.

(c) *Subramaniyayyan* v. *Subramaniyayyan,* I. L. R. 5 Mad. 125, by three judges against two, who would have allowed the younger brother to recover his share only on paying his share of the mortgage debt.

foreclose their rights by his suit on the mortgage. Yet it is not altogether obvious if a suit directed against the father alone can bind the sons as co-owners why a suit against him as mortgagor (and owner) should not bind the sons as co-mortgagors; the power of representation by the father would seem as consistent with principle in the one case as in the other. What would be the legal position of the sons where the mortgagee had sold under a power of sale in a mortgage by their father without calling on the sons to redeem is a point still to be decided. There is apparently no distinction in principle between such a sale and a sale under a decree in a suit on the mortgage. In every case of mortgage there is a personal obligation of the mortgagor (a) as a debtor, the mortgage being in its nature an accessory assurance; (b) and it would seem as competent to a father to sell through the agency of the mortgagee on a condition satisfied as to sell directly for the discharge of a similar debt, (c) which he may do in ordinary cases. But on the other hand if the son's interests cannot be sold through the Court without an opportunity to the sons of redeeming, neither ought they to be sold without a suit or formal notice to redeem served on the sons equally as on the father. Where under a decree against a father on a debt secured by a mortgage the mortgaged family estate had been sold "as the right, title, and interest" of the father, and there was nothing to show whether the execution was in virtue of the personal remedy or of the lien on the property, the sale was upheld against the sons seeking a partition with a view to recover their shares. The learned judges thought, apparently,

(a) *Wilson* v. *Tooker*, 5 Br Parl. cases, 193; *Goodman* v. *Grierson*, 2 B. & B. 274, 279; Com Dig. Tr. Chancery (4 A. 3).

(b) *See* Butler's note to Co. Litt. 205 *a*; Fisher on Mortg. lxxii, and per Lindley, J., in *Keith* v. *Burrows*, L. R. 1 C. P. D. at p. 731.

(c) *See* per Sir C. Turner, C. J., in *Ponáppa Pillai* v. *Pappuvayangár*, I. L. R. 4 Mad. 47. According to the Sadr Court the father could not alien the patrimony except under urgent necessity, *Muthumarien* v. *Lakshmi*, M. S. D. A. Dec. for 1860, p. 227.

that the sale had taken place to satisfy the personal obligation so far as this was in excess of what could properly be satisfied by the execution against the mortgaged property as such, (*a*) and that thus the sons' interests as distinguished from the father's were effectually disposed of as his, though in a sale expressly under the mortgage they would have been saved. (*b*) In a case in which the paternal and filial relation did not subsist as a ground for a special liability, the family property having been mortgaged by one member of an undivided family and sold, in execution of a decree against that one alone, to the judgment creditor, it was held that the latter had obtained a title only to the share of his own judgment debtor; that another member could recover his share from the purchaser put into possession of the whole; and that the purchaser could not set up the defence that the debt sued on was in fact one by which all the members were bound. (*c*) In another recent case it was ruled that the interest of a manager in a family estate was not assets for the satisfaction, after his death, of a decree obtained against him, but not plainly directed against other members of the united family. In the same case two sons were directed to satisfy the decree so far as it bore on their father to the extent of the assets inherited from him. But in these were not to be included his share of the joint family estate which they took by survivorship. (*d*) This view, though repeated in *Karpakambál* v. *Subbayyan*, (*e*) seems opposed to that expressed by the Judicial Committee in *Muttayan Chettiar's*

(*a*) An attachment and sale as for an unsecured debt are not necessary in giving effect to the specific lien created by a mortgage. *Dayachand* v. *Hemchand*, I. L R 4 Bom. 515.

(*b*) *Srinivása Nayudu* v. *Yelaya Nayudu*, I. L. R 5 Mad 251.

(*c*) *Armugam Pillai* v. *Sabápathi Padiáchi*, I. L R. 5 Mad. 12. This agrees with *Deen Dayal's* case, but, if the family were bound by the debt, seems hard to reconcile with *Ponáppa Pillai* v. *Pappuvayangár*, I. L. R. 4 Mad. 1. *See* above, p. 169.

(*d*) *Ravi Varma* v. *Y. Koman*, I. L. R. 5 Mad. 223.

(*e*) I. L. R. 5 Mad. 234.

case, (*a*) which for Madras must be conclusive. In the case of a decree against a father sought to be executed against property made over by him to his infant sons as compensation for an injury by him to their shares (*b*) it was held that such execution could not be had because the infant coparceners had not been parties to the suit, and that a suit could not be maintained against them (their father being alive) on the original cause of action, as this had been exhausted by the suit against the father. (*c*)

(*a*) Above, p. 169; L. R. 9 I. A. at p. 145

(*b*) This may have made it separate property; the sons indeed could not otherwise benefit by the release in their favour of the father's interest.

(*c*) See *Gurusami Chetti* v. *Samurti Chinna Chetti*, I L. R. 5 Mad. 37. For this Innes, J., refers to *King* v. *Hoare*, 13 Mees. & W. 494; *Brinsmead* v. *Harrison*, L R. 7 C. P. 547, and *Hemendro Coomar Mullick* v *Rajendro Lall Moonshee*, I. L. R. 3 Calc 353, as showing that a joint contract can be enforced but once, whence *a fortiori* the same rule applies to proceedings on an obligation arising from the relation of membership of a joint family.

In the case of ex parte *Higgins* in re *Tyler*, 27 L. J. Bank. 27, a remedy in bankruptcy against the joint estate was held barred by a previous suit against one of two partners which proved infructuous. But in that case Knight Bruce, L. J., said, "I feel myself almost ashamed to find myself differing from the Commissioner" (who had admitted the claim against the joint estate). In Comyns's Dig. (K. 4;) 1, 4 and (L. 9) the distinction is drawn that where damages are uncertain only one action can be maintained, but where the thing sought is certain even execution does not bar a suit against another obligor, *ex. gr.* on a bond. In *Drake* v. *Mitchell*, 3 Ea. at p. 258, Lord Ellenborough says that a judgment is but a security for the original cause of action and does not extinguish before satisfaction any collateral remedy available to the party. *Brinsmead* v. *Harrison* is discussed in ex parte *Drake*, L. R. 5 Ch. D 866, from which it will be seen that an infructuous judgment does not extinguish the original right in a case of trover or detinue. Although therefore generally "where there is *res judicata* the original cause of action is gone" (per Lord Selborne in *Lockyer* v. *Ferryman*, L. R. 2 App. C. 519), and election to sue B. bars a suit against C (see *Kendall* v. *Hamilton*, L. R. 3 C. P. D. 403), yet the primary right may not in all cases be converted or absorbed by a suit. Nor where the cause of action arising from non-fulfilment

In Bombay a somewhat different view of the law has been taken, and it may be that by a closer adherence to the Hindû authorities greater consistency has been maintained. In all ordinary cases alienation of the whole estate or of part of an impartible estate by a single co-sharer has been held

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of the corresponding duty is one which attaches in aliquot parts to several persons or as an aggregate to any one of several, but not to more than one does it seem that on principle one suit though infructuous should bar another seeking the same remedy in part or as a whole. The English law on this point merging a remedy against C in a judgment against B, rather imitates the earlier and ruder Roman law than its later and refined form. A "cause of action" is really a relation between persons, and the substitution of a different person as the subject of the right or of the obligation, makes the cause of action different too, unless the new party stands to the former one as a representative. As a representative he should be subject to the proceedings taken against his predecessor. Thus children, if represented by their father, should be liable on a decree against him; if not, they should not be guarded against a suit on what must be a different cause of action because of the change of parties.

The Roman law, while it allowed the plea of *res judicata,* allowed also the replication *de re secundum se judicata,* or judgment against the party pleading, even between the same litigants (Di. Lib. 44, Ti. II Lex. 9 § 1, and Voet's Comm *ad loc*), and under the English law it seems that a judgment as between the same parties is not a bar to a fresh suit unless it has negatived the right sued on (*see* Com. Dig. C L. 4) even though there may have been a verdict against the plaintiff (*see* per Bramwell, L. J., in *Poyser* v. *Minors,* L. R. 7 Q. B. D. at p 338). And under the Hindû law the rule is "one against whom a judgment had formerly been given if he bring forward the matter again, must be answered by a plea of former judgment." (Mit. Administration of Justice, Sec. 5, para. 10). This is exactly the rule of the middle and later Roman law, and does not help a defendant against a plaintiff who has gained a previous judgment. The law of procedure forbids a second suit on the same cause by a positive rule in order to shorten litigation, and it enables a judgment once obtained to be kept alive for 12 years, but these provisions between the same parties are rather a supersession of the general principle of jurisprudence, and cannot properly affect a suit by A. against C. on the ground of a prior suit by A. against B, except in so far as C. represents B, or else the remedy was alternative, and A. made an election by which C. was exonerated.

invalid as against the others. (*a*) This has been so even as regards a father. (*b*) His grant out of an inam village was held to require the attestation of his son to give it validity as against him, (*c*) the attestation being taken as a sign of assent. Where a man sought to alienate the patrimony this was defeated as to a moiety at the suit of his son. (*d*) Though the interests of sons in the family estate are liable to satisfy a father's debt, (*e*) yet if the father's interest has not been attached under a decree against him in his lifetime, the property passes on his death to his sons by survivorship, and the decree-holder can no longer execute his decree against the property. He must have recourse to a separate suit. (*f*) In the case of ordinary coparceners, alienations by them, or sale of their interests in execution of decrees, have been held good to entitle the purchaser to claim to the extent of their shares ascertained by partition, but no farther. (*g*) In this sense the purchaser becomes a tenant

(*a*) Mit. Chap. I. Sec. 1, para 30. Comp. *Mohabeer Pushak* v. *Ramyad Singh*, 20 C. W. R at p. 194

(*b*) Mit Chap. I. Sec. 1, para. 28. Comp. *Roja Ram Narain* v. *Pertur Singh*, 20 C. W. R 189.

(*c*) *Pandurang* v. *Naru*, Sel Rep. 186; *see* Steele, L C 68, 237, 400.

(*d*) *Dayashankar* v. *Brijvallubh Moteechund*, Bom. Sel Rep. 41. So *Gopalchand Pande* v *Babu Kunwar Singh*, 5 C. S D. A R 24; *Moteelal* v. *Mitterjeet Singh*, 6 C. S D. A. R. 71; *Mukoon Misr* v. *Kunyah Ojah*, 1 N. W. P. R. 275; *Rungamma* v. *Atchamma*, 4 M. I. A. 1.

(*e*) In Bombay the interests while still in their hands: there is not a charge in the strict sense as in the case of a specific lien See *Jamiyatram* v *Parbhudas*, 9 Bom. H.C R 116, and below, "LIABILITIES ON INHERITANCE," and compare the case of *Benham* v. *Keane*, 31 L. J., Ch. 129.

(*f*) *Hanumantha* v. *Hanumayya*, I. L. R. 5 Mad. 232, citing *Udaram* v. *Ranu Panduji*, 11 Bom. H. C. R 76; and *Narsinbhat Bapubhat* v. *Chenappa*, I. L. R. 2 Bom. 479.

(*g*) *Gundo* v. *Rámbhat*, 1 Bom. H. C. R 39; *Pandurang* v. *Bhasker*, 11 Bom. H. C. R. 72; *Udaram* v. *Ranu*, *ib.* 76; *Balaji Anant* v. *Ganesh Janardhan*, I. L. R. 5 Bom. 499

in common with the other parceners. (*a*) For the ordinary debts of a parcener his coparceners are not answerable. (*b*) His own share may be made answerable by proceedings taken and carried through to attachment during his life but not afterwards. (*c*) His gift or bequest of his share is invalid as the right to a severance of it is given to the purchaser or creditor only to prevent fraud. (*d*) In case of distress or to perform an indispensable duty a single coparcener may dispose of so much of the family property as is necessary for the occasion. (*e*) His debts incurred for such a purpose must be paid by all the parceners to the extent of the whole estate. (*f*) This applies even to the debt of a son as binding the father, though the latter is not generally responsible. (*g*) If the parcener be merely sued the coparceners are not affected by that, without a decree and an attachment of the estate for the realization of his share. (*h*) But this attachment enables the attaching creditor to proceed even though his debtor should die. (*i*) Nor can a purchaser of a share be defeated by subsequent proceedings for a partition to which he is not a party. (*j*)

(*a*) *Udaram* v. *Ranu*, 11 Bom. H. C. R p. 81; *Krishnaji Rájvádé* v. *Sitarám Jakhi*, I. L R. 5 Bom. 496.

(*b*) *Narsinhbhat* v. *Chenappa*, I. L. R. 2 Bom. 479; St L. C. 40, 217.

(*c*) *Udaram* v. *Ranu*, 11 Bom. H. C. R p. 85; *see* above, pp 606, 607.

(*d*) *Ib.* p. 80, and the cases there cited; *Suraj Bunsee Koer's* case, above, p. 625.

(*e*) Mit. Chap. I. Sec 1, para. 28; Steele, L C 54.

(*f*) *Mahadev* v. *Narain Mahadev*, 3 Morr. 346; Vyav. May. Chap. V. Sec. 5, para. 20; Coleb Dig Bk. V. Chap. VI. T. 373, Comm. *ad. fin.*; Bk I. Chap. V. T. 181, 193, 194; Bk. II. Chap. IV. T. 55; Poona Śâstri, 17th Aug. 1845, MS. 685; *see* 1 Str. H. L. 276; Steele, L. C. 219.

(*g*) Coleb. Dig. Bk. I. T. 214, 215; Steele, L. C. 40, 178.

(*h*) *Vásudev Bhat* v. *Venkatesh Sanbháv*, 10 Bom H. C. R. 139, 160.

(*i*) See *Suraj Bunsee Kooer's* case, *supra*; *B. Krishna Ráo* v. *Lakshmana Shanbhogue*, I. L. R. 4 Mad. 306.

(*j*) *Apaji Govind* v. *Naro Vital Gháte*, H. C. P. J. F. for 1882, p. 335.

Where the purchaser of a single coparcener's share has obtained peaceable possession, the Court treating him as a tenant in common has refused to oust him at the suit of the other coparceners. (*a*) Being in possession the single parcener has been supposed to be able to transfer the possession, where the transfer was not resisted, with such an accompanying right as was vested in himself. (*b*) This doctrine involves a certain difficulty, seeing that the existence of any distinct right in the individual coparcener, except a right to partition and its result, admits of question; and the occupation of a distinct part of the common property by one coparcener may be conceived as merely permitted by the family, and as to outsiders held on behalf of the family, not of the individual. (*c*) Such an occupation is to be regarded perhaps rather as a use of the property, occupied in virtue of the occupier's domestic relation to the aggregate family, than a true possession (*d*) implying an exclusion of others'

(*a*) *Mahábaláyá* v. *Timáyá*, 12 Bom H. C R 138; *Kállappa* v. *Venkatesh*, I. L R. 2 Bom. 676

(*b*) *Mahábaláyá* v. *Timáyá*, 12 Bom H. C. R. at p. 140.

(*c*) That the possession of a single parcener is *primâ facie* a derivative one ranking as the possession of all, see *Yusaf Ali Khan* v *Chubbee Singh*, 5 N. W. P. R 122; *Sheo Pershad Singh* v *Leelah Singh*, 20 C. W. R. 160; *Heeralal Roy* v. *Bidyadhur Roy*, 21 C. W. R. 343. Yet it was said that possession could not be recovered from a member excluding his co-sharers, *Govind Chunder Ghose* v. *Ram Coomar Dey*, 24 C. W R. 393 It would seem that they were entitled to co-possession A distinct exclusion of a co-sharer is incompatible of course with his retaining co-possession, and limitation begins to run against him in favour of those who then hold adversely to him, *Jowala Buksh* v. *Dharum Singh*, 10 M. I. A. at p. 535. A parcener retaining exclusive possession of a part for several years would thus expose himself to a presumption that a partition had been made allotting that part as his share to him, unless he could show his concurrent joint enjoyment of the estate at large. *See* below, Sec. 4 D., and Bk. II. Chap. IV.

(*d*) *See* Savigny, Poss. Secs. 11, 23, 25; Vin Abr. XVI. 454; Co. Lit. 277*a*; *Page* v. *Selfly*, Bull's N. P. 102*b*; *Doe* v. *Brightwen*, 10 Ea. 583; *Heeralal Roy* v. *Bidyadhur Roy*, 21 C. W. R. 343 C. R.

entrance and exercise of will within the given area. (*a*) The notion of a separable possession corresponds however to that of the single coparcener's total right as separable in thought and in law, though undivided, from the others so as to be a possible object of transactions, for if the co-ownership may be thus decomposed, so it seems may the co-possession of the members of a united family. (*b*) At this point the development of the idea of separable rights as combined by addition in the common right has stopped. A case in which a mortgagee of one parcener's share was put into joint possession with another parcener resisting the intrusion has not (*c*) been followed.

In the case of a manager he can bind the whole estate by transactions for its benefit (*d*) or which the other party reasonably thinks so. He is allowed a fair latitude of discretion. (*e*) In *Davlatrao* v. *Narayanrao* (*f*) it was said "a reasonable degree of latitude is allowed to the members of a Hindû family in the absence of......fraud or......profligacy, and the expenditure of a managing member whose acts (*g*) are not protested against, or checked by legal proceedings, is ordinarily presumed to be on account of the family, just as his acquisitions are made for its benefit." (*h*) The extent

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(*a*) A separate possession on behalf of himself alone, not on behalf of all, should apparently involve a liability to account, which is not recognized. See *Koncrrav* v. *Gurrav*, I. L. R. 5 Bom. 589.

(*b*) Compare the right arising in partition from separate occupation, below, Sec. 7 A. 1 b.

(*c*) See *Báláji Anant Rájádiksha* v. *Ganesh Janárdhan Kámáti*, I. L. R. 5 Bom. 499, and the cases there referred to; also *Máruti* v. *Liláchand*, I. L. R. 6 Bom. 564, and other cases quoted below.

(*d*) *Bulakhidas* v. *Ghama*, Bom. H. C. P. J. 1880, p. 224; Comp. *Kombi* v. *Lakshmi*, I. L. R. 5 Mad. at p. 207.

(*e*) *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 666.

(*f*) H. C. P. J. F. for 1877, p. 175.

(*g*) *i.e.* his known acts.

(*h*) Comp. *Tandavaraya Mudali* v. *Valli Ammal*, 1 Mad. H. C. R. 398, and *Hanooman Persad Pande's* case, 6 M. I. A. 393, as to the manager of a minor's estate.

of his general powers is well known in Hindû society. He may carry on a family business in the usual way (*a*) for the common benefit. (*b*) He may mortgage the common property for the common benefit and use of the undivided family. (*c*) But he is far from having unfettered power. (*d*) The person to whom he mortgages, and especially to whom he sells (*e*) any part of the patrimony is bound to all reasonable care, and where the interests of minors are concerned to extreme caution. (*f*) But even where the other coparceners are adults, charges incurred by a manager are binding except as against himself only when incurred for the needs of the family or with the assent, express or implied, of its members.(*g*) When the manager obviously exceeds reasonable limits those who deal with him do so at their peril, and no unfairness will be tolerated. Thus a contract with a manager defrauding the family is not enforcible (*h*) and the manager is not allowed to retain a double share in what he has acquired in that position. (*i*)

(*a*) Comp. *Joykisto Cowar* v. *Nittyanund Nundy*, I. L R. 3 Calc. 738.

(*b*) *Samalbhai* v. *Someshvar et al*, I. L. R. 5 Bom. 38.

(*c*) *Gundo* v. *Rambhat*, 1 Bom. H. C. R. 39.

(*d*) *Baji Shámráj* v. *Dev bin Báláji*, H C. P. J. F. for 1879, p. 238.

(*e*) *Trimbak* v. *Gopalshet*, 1 Bom. H. C. R. 27; Comp. Mit. Chap. I. Sec. I. para. 32; Steele, L. C. 54, 209.

(*f*) *Rámlál* v. *Lakmichand*, 1 Bom. H. C. R. at pp. 72, 73, Appx.; 1 Str. H. L 202; Comp *Kumarsami* v. *Pala N. Chetti*, I. L. R. 1 Mad. 385; *Chetty Colum Comara Venkatachella Reddyar* v. *Raja Rungasami*, 8 M. I. A. at p 323.

(*g*) 1 Str. H. L. 199; 2 *ibid* 344, 434, 457; Coleb. Dig. Bk. I. Chap. V. T. 180 ss; Bk. II. Chap. IV. T. 54, Comm. *sub fin*; *C. Colum Comara Venkatachella* v. *R. Rungasawmy*, 8 M. I. A at p. 323; *Bullakidass* v. *Ghama*, Bom. H. C. P. J. F. for 1880, p 224; *Babaji bin Mahadji* v. *Krishnaji*, Bom. H. C. P. J. F for 1878, p. 149.

(*h*) *Ravji Janardhan* v. *Gungádharbhat*, I. L. R. 4 Bom. 29.

(*i*) *Guruchurn Doss* v. *Goluckmoney Dossee*, 1 Fult. 165, a Bengal case, but agreeing with *Megha Sham* v. *Vithalrao*, cited below, Sec. 7 A; and *Daolatrao's* case, above, p. 634 note (*f*).

In suits against the family or to affect its common estate all the members must, under ordinary circumstances, be made defendants, (*a*) though under special circumstances the manager may *as* manager be sued so as to bind the whole family, (*b*) as indeed it would seem may a member not a manager, or not sued expressly as manager, but deemed under exceptional conditions to have represented the family.(*c*) Apart from such cases as these a suit and a decree against a manager individually affect only his own share in the common estate, even though he may have contracted the liability for the benefit of the family. That question it is thought cannot properly be disposed of without the several members being called before the Court, (*d*) and the sale of the "right, title, and interest" of the manager gives to the purchaser no more than is expressly sold. (*e*) Thus it was held that a decree obtained against the manager alone (not the father) and a sale under such a decree, did not bind the property beyond the manager's own share, (*f*) and that the brother of the manager ousted by the purchaser in execution

(*a*) *Annaya* v. *Hoskeri Ramappa*, H C. P J F. for 1875, p. 227; *Bhimasha* v *Ramchandarsha*, H. C P J. F. for 1878, p 286. As to suits by a family, *see* above, p. 608.

(*b*) *See* above, p. 615.

(*c*) *Narayan Gop Habbu* v *Pandurang Ganu*, I L R 5 Bom. 685, referring to *Jogendro Deb Roy Kut* v *Funindro Deb Roy Kut*, 14 M I. A at p. 376, and *Mayárám Sevarám* v *Jayavantrao Pandurang*, Sp Ap. No. 435 of 1873, I L R. 5 Bom 687.

(*d*) *Mahábaláyá* v *Timáyá*, 12 Bom. H C. R 139; *Idem bis* H. C. P J for 1879, p. 417; *Nhanu Lakshman Golam* v *Ramchandra Vinayak*, H C. P. J. F for 1882, p 277; *Baji Shamraj Joshi* v *Dev bin Balaji*, H. C. P. J. F. for 1879, p. 238

(*e*) Comp the case of a widow's estate only passing under a decree against her for arrears as a charge, *Baijun Doobey* v *Brij Bhookun Lal*, L. R. 2 I. A. 275.*

(*f*)* This is quoted and followed in *Kisansing* v. *Moreshwar*, Bom. H. C. P. J. 1882, p. 396, referring to *Deen Dyal's* case as conclusive that the son's interest does not pass by a sale in execution of the father's.

might recover possession of the whole (*a*) leaving the purchaser to work out his right by a suit for partition. (*b*) This is exactly the reverse of the rule in the case of a sale in execution of a decree against the father on an ordinary debt, as recently expounded at Madras. (*c*)

Subject to the foregoing observations the presumption in favour of the good faith of transactions entered into by a father (*d*)or uncle as manager of an ancestral estate is naturally somewhat stronger than in the case of more distant connexions or of women not familiar with business. (*e*) But even as to the father the principle laid down in *Suraj Bunsee Kooer's* case has always prevailed in Bombay. The family under the father's headship is like any other united

(*a*) In *Gopalasámi* v. *Chokalingam*, I. L. R. 4 Mad. 320, possession under a sale in execution against a *father* was held to throw on his son the burden of proving that the original debt was illegal or immoral. Compare *Gurusámi's* case quoted above

(*b*) *Máruti Náráyan* v. *Liláchand*, I. L R. 6 Bom. 564.

(*c*) *Velliyammál* v. *Katha*, I. L. R. 5 Mad. at p. 68, explaining *Ponappa Pillai* v *Pappuvayangár*, I. L. R 4 Mad. 1.

(*d*) See *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 667.

(*e*) As to a father, see *Bábáji Sakoji* v. *Ramshet Pandushet et al*, 2 Bom. H. C. R 23 As to an uncle see *Bhaoo Appajee* v *Khundojee*, 9 Harr. 104, and generally *C Colum Comara Vencatachella* v. *R. Rungaswamy*, 8 M. I. A at p. 323; *Tándaráya Mudali* v *Valli Ammal*, 1 M. H. C. R. 398; *Gour Chunder Biswas* v. *Greesh Chunder Biswas et al*, 7 C. W. R. 121 C. R.; *Musst. Nouruthum Kooer* v. *Baboo Gouree Dutt Singh et al*, 6 C. W. R. 193; *Heerachand* v *Mahashunker*, S. A. No. 3918, 6th July 1858; 2 Str. H. L 331, 348; *Shidrámapa Bálapa* v. *Shesho Janardhan*, S. A. No. 178 of 1874, Bom. H. C. P. J. F. for 1875, p. 61.

The manager is not to be called to a rigorous account, nor on the other hand to claim credit as against the family for disbursements in excess of his proper share on account of it, *Davlatráo Rámráo* v. *Náráyanráo Khanderáo*, R. A. No. 51 of 1876; Bom. H. C. P. J. F. for 1877, p. 175; see for Bengal *Abhaychandra Roy* v. *Pyari Mohan Juho et al*, 5 B. L. R. 347. An alienation by a Kartá is binding on any member who consciously stands by and sees

family except that the father is manager (*a*) by nature, unless disqualified or deposed, (*b*) and a manager whose transactions may be strongly presumed to be intended for the good of the family. (*c*) If however they are not for its good but plainly detrimental there is perhaps no case prior to *Narayanacharya* v. *Narso Krishna* (*d*) which makes the family estate liable because they are not otherwise immoral. (*e*) Any transaction

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the money applied without refusing to participate, *Madhoo Dyal Singh* v. *Golpar Singh et al*, 9 C. W. R. 511; *Ramkeshore Narain Singh* v. *Anand Misser*, 21 *ibid.* 12 C. R., and the case in Hay's Rept. 567; *Bhimasha bin Dongresha et al* v. *Krishnabai*, Bom. H. C. P. J. F. for 1878, p. 286. The ruling in *Rámlál* v. *Lakhmichand Muniram et al*, 1 Bom. H. C. R. li, lxxi. App., that the manager of a joint estate, the capital of a firm, has authority to deal with it for the purposes of the business, is cited and approved in *Johurra Bibee* v. *Sreegopal Misser*, I. L. R. 1 Calc. p. 475; *Samalbhai Nathubhai* v. *Someshvar Mangal and Hurkisan*, I. L. R. 5 Bom. p. 38; *see* Coleb. Dig. Bk. II. Chap. IV. T. 54, Comm.

(*a*) Above, pp. 604, 608. In Steele, L C. 238, it is said that the father's gift of immoveable ancestral property is invalid unless attested by the heirs.

The Hindu law generally requires the attestation of the members of the family enjoying an unobstructed right of inheritance (*i.e.* a quiescent co-ownership) to a dânpatra or deed of gift, to which, according to that law a conveyance for value is assimilated. *See* Vyav. May. Chap. II. Sec. I. para. 5; Coleb. Dig. Bk. I. T 19; above, p. 192, note (*c*). This attestation, as the document is ordinarily read out, implies assent to its contents, as formerly in England, *see* Coleb. Dig. Bk. II. Chap. IV. T. 33 Comm.; *Pandurang* v. *Naru*, Sel. Rep. 186; Introd. to Bk. I Sec. 9, p. 223 above, and the Śástri's opinion in *Doe.* v. *Ganpat*, Perry's O. Cases, at p 137.

In *Nagalutchmee Ammál* v. *Gopoo Nádarája Chetty*, 6 M. I. A. at p. 341, the Judicial Committee observe, "These witnesses, one and all, depose to the fact of the signature of these papers, to their being written from the dictation of the testator." &c.

(*b*) Vyav. May. Chap. IV. Sec. IV. para. 7.

(*c*) *See* above, p. 637 notes (*d*) and (*e*).

(*d*) I. L. R. 1 Bom. 262.

(*e*) See *Narayen* v. *Balkrishna*, I. L. R. 4 Bom 529, and comp. *Sham Narain Singh* v. *Rughoobindial*, I. L. R. 3 Calc. 508.

is forbidden which tends to reduce the family to want. (*a*) This has not been regarded by the usage of the Hindûs in Bombay as a merely pious precept, but as a law properly so called, (*b*) and has been relied on by the Courts against improper alienations and incumbrances of the patrimony. (*c*)

Applications for an interdiction (*d*) against a father could never be common amongst the Hindûs; but when a father was getting rid of the patrimony the Śâstri said that an interdiction might be obtained and the transaction rescinded at the suit of the son or of the united brother. (*e*) When a Joshi proposed to give away his vatan he was restricted to a small portion of it. (*f*) A father could for incapacity be superseded or set aside as manager in favour of his son. (*g*)

It appears therefore that the father as manager stands substantially in the same position as any other manager. The care of the family, the preservation of the common estate, and the payment of debts, are more especially incumbent on him. (*h*) In *Nagalutchmee Ammál* v. *Gopoo*

(*a*) *See* above, pp. 207, 203; Colcb. Dig. Bk. II. Chap. IV. T. 11, 18, 19; Vyása, cited Dâya Bhâga, Chap I. para. 45; Mit. Chap. I. Sec. 1, para. 27; *Id.* Comm. on Yâjñ. II. 47—50 in Appendix; 2 Str. H. L. 5, 12, 16.

(*b*) See *Bai Gunga* v. *Dhurmdas*, Bell, R. 16; 2 Str. H L. 449.

(*c*) In *Narsinha Hegde* v. *Timma*, Bom H. C P. J. 1882, p. 394, the District Judge was directed to inquire whether the creditor had *boná fide* supposed that the debt was incurred for the benefit of the family by the father.

(*d*) Mit. Chap. I. Sec. VI para. 9.

(*e*) Q. 1935, MS.

(*f*) Q. 711 MS. Comp 2 Str. H. L. 16, 12.

(*g*) *See* Steele, L. C. 178, 216; Vyav. May. Chap. IV. Sec. IV. para. 7.

(*h*) *Ramchandra D. Naik* v. *Dáda M Naik*, 1 Bom. H. C. R. 86 App.; *see* Yâjn. Bk. II. para. 46; Nârada, Bk. II. Chap. III. paras. 11, 12, 13; Manu IV. 257; Vyav. May. Chap. V. Sec. 4, para. 11.; Steele, L. C. 68. *See* H. H. Wilson, quoted below, Bk. II. Ch. I. Sec. 1, Q. 4, Remark.

Nádarája Chetty (*a*) the Pandits thought a will would be invalidated by a permission to adopt acted on. They say: "The will.........is valid.........the testator having thereby bequeathed a portion of his estate for the maintenance of his wife and other members of his family whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife, who was then pregnant, not being delivered of a son." The conditions give effect to the Hindû law against disinheriting a son, and in favour of the maintenance of dependants as a duty not to be evaded by means of a disposal of the estate by its owner. In the case of an ancestral estate it does not seem that the father can really be deemed owner in a sense that does not apply equally to any of his sons. No member of an undivided family "has a certain definite share," (*b*) much less has one co-owner a right as such to dispose of the whole.(*c*) The father's natural relation to his children entitles him at the same time to more than ordinary confidence. Hence it is that in such cases as *Babaji* v. *Ramshet* (*d*) the sons seeking to upset their father's alienation of family property were called on to prove that the transaction had been one not binding on their shares.(*e*) The authority to alienate was not thought wider in his case than in that of another manager; only his good intentions were rather more strongly presumed.

The doctrine of the Bombay Court appears to be warranted, not only by the case of *Suraj Bunsee Kooer*, but by what is

(*a*) 6 M. I. A. at p. 320. Comp. the case in note (*b*), p. 639 above.

(*b*) *Appovier* v. *Rama Subbayana*, 11 M. I. A. at p. 89; *Rangama* v. *Atchama*, 4 M. I. A. 103; *Girdhari Lal* v *Kantoo Lall*, L. R. 1 I. A. at p. 329.

(*c*) Mit. Chap. I. Sec. 1. para 24; Vyav. May Chap IV. Sec. 1, paras. 3, 5; Sec. 4, para. 4.

(*d*) 2 Bom. H. C. R 23. There is in many such cases a suspicion of fraud, as in the one referred to in *Hanooman Persad's* case.

(*e*) It may be noted that the Mitâksharâ distinctly imposes on a father's creditor the burden of making his case good against sons denying his claim; Comm. on Yâjñ. II. 50.

said in *Baboo Kameswar Pershad* v. *Run Bahadur Singh.* (a) "Their Lordships have applied those principles......to transactions in which a father in derogation of the rights of his son under the Mitâksharâ has made an alienation of ancestral family estate. The principle......is that......the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can......that the manager is acting in the particular instance for the benefit of the estate......a *bonâ fide* creditor should [not] suffer when he has acted honestly and with due caution but is himself deceived." This ought apparently to be conclusive as to the nature of the father's authority when dealing or affecting to deal with the joint property of himself and his sons. It would be so but for the difficulties created by other cases which, in order to enforce the obligation resting on sons after their father's death, have apparently assigned to the father a capacity of himself discounting that liability during his life by aliening the patrimony in ways not consistent with his duty as manager. In the case of *Kastur Bhavâni* v. *Appa,*(b) sons, including two minors, sued to recover ancestral lands sold by their father to pay a debt. The debt had been originally incurred by the grandfather. It was alleged to have been contracted or increased for immoral purposes, but this was not proved, though it was proved that the father was addicted to drinking. The District Court held the sale invalid except as to the father's share, as not having been proved to be necessary, but in the High Court it was re-established on the ground that the sons had not proved, as they were on their plaint bound to prove, that it was made for an immoral purpose, they having relied on that express ground. A misapplication of a trivial sum would, it was suggested, probably make no difference.(c)

(a) L. R. 8 I. A. at p. 11.

(b) I. L. R. 5 Bom. 621.

(c) Before the birth or the adoption of a son an owner may deal with the property free from question by a son subsequently born or adopted, *loc. cit.* and *Rambhat* v *Lakshman Chintaman,* I. L. R. 5 Bom. 630.

The cases of *Girdhari Lál* v. *Kanto Lál* (a) and of *Muddun Gopal Lál* v. *Mussamut Gowraubutty* (b) are referred to, but only on the point just noticed. As a mere member of a united family the father has been held answerable in his own share on a partition for his personal debts (c) in the same way as any other coparcener. This is shown by the cases already referred to. (d) A suit brought against a father alone will not in ordinary cases bind his sons as to the ancestral property. They must be made defendants if they are to be affected by the decree. (e) The principle extends to the case of a son born, and even to one adopted, *pendente lite.* (f) In this respect therefore the father stands on the same footing as an ordinary manager. A suit against him may affect the whole family in its estate, but this is exceptional, and a sale under a decree in such a suit could not in general extend to more than the father's own share on a partition.

Sons however must discharge their father's debt after his death. (g) Along with this there are precepts

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(a) L. R. 1 I. A. 321.

(b) 15 Beng. L. R. 264.

(c) See *Narayanrao Damodar* v. *Balkrishna*, I. L. R. 4 Bom. 529, 534.

(d) In the N. W. Provinces the same doctrine seems sometimes to have prevailed, see *Nanhak Joti's* case, above, p. 618. The Pandits at 14 of the N. W. P. S. A. Report for 1857, said that two sons could recover their shares of ancestral property sold in execution of a decree against the father unless the debt was incurred for the benefit of the family. In *Ramchandra and Lakshman* v. *Raoji Sakharam*, Bom. H. C. P. J. for 1882, p. 381, the issue sent down for trial was "Was the debt secured by the mortgage of plaintiff's father .... contracted for a legal and moral purpose?"

(e) *See* above, p. 168.

(f) See *Rámbhat* v. *Lakshman Chintaman Mayalay*, I. L. R. 5 Bom. 630, 635, where the owner's uncontrolled power of gift before, and his limited power after, the birth of a son are clearly defined by Sir M. Westropp, C. J.

(g) Vyav. May. Chap. V. Sec. 4, para. 12 ss.

laying the duty on him who takes the estate and exonerating the son kept out of it. (*a*) It is a reasonable inference that the estate taken by the sons is, as such, answerable in their hands (*b*) for the debts for which they are morally liable. (*c*) The liability is independent of assets where there are none, (*d*) and this affords an indication of the kind of debts that can properly be regarded as charges on the estate. (*e*) Those only which were excusably incurred are binding. (*f*) As the result is substantially the same it would seem that the father may make such debts a direct charge on the estate after his own death. (*g*) But for all instruments executed by the father as by others the general rules hold good which refuse them validity if made under disturbing influences which deprive them of the character of free and intelligent expressions of volition. (*h*) None of the texts however which establish this liability, nor any of the Commentators on them, say that a son's liability for his father's debts arises during the father's life. (*i*) Nor has any response of a Śâstri been found in favour of such a liability. There are

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(*a*) Vyav. May. Chap. V. Sec. 4, para. 16; Coleb. Dig. Bk. I. Chap. V. T. 171.

(*b*) *See* above, p. 77, 80.

(*c*) Vyav. May. Chap. V. Sec. 4, para. 13.

(*d*) *Ib.* Yâjñ. Bk. II. para. 51; Nârada, Bk. II. Chap. III. para. 6, quoted Coleb. Dig. Bk. I. Chap. V. T. 188; Steele, L. C. 312; 2 Str. H. L. 274, 277.

(*e*) "The obligation..............has respect to the nature of the debt, not...........of the estate," Judicial Committee in *Hanooman's* case, 6 M. I. A. 421.

(*f*) Manu VIII. 166, says: "if the money was expended for the use of his family." *See* Steele, L. C. 217.

(*g*) This is the effect of *Hanooman Parsad's* case (*see* above, p. 166), if it is generalized beyond the case of an ancestral debt made a charge by the father, which was all the Judicial Committee dealt with.

(*h*) Vyav. May. Chap. II. Sec. I. p. 10; Nârada, Pt. I. Chap. III. para. 43; Pt. II. Chap. IV. paras. 8, 9; 2 Str. H. L. 14.

(*i*) *See* above, p. 164; and below, Bk. II. Ch. I. Sec. 1, Q 5.

many texts which imply the contrary. Vishṇu says the sons or grandsons must pay when the debtor is dead or has been absent twenty years, that is when he may be presumed to be dead, not before. (*a*) Manu says simply when the father is dead. (*b*) Bṛihaspaṭi (*c*) says the sons must pay even in the father's life but only in cases in which he is incapable of acquiring property or retaining it. The exception here is conclusive as to the rule, at least as it was understood by the school that produced this Smṛiti, which is sacred everywhere. The same observation occurs as to Kâtyâyana's text (*d*) quoted in *Nárâyanachâryá's* case. (*e*) So too as to Nârada's text on the subject. (*f*) The whole series quoted by Jagannâtha imply a liability only after the father's natural or civil death or its equivalent, and so they have invariably been understood by native lawyers reading them with the context. The case may be stated even more strongly. There is no text imposing on sons a liability during their father's life for debts incurred even for the benefit of the family, (*g*) except in cases in which the father is not capable of managing the estate and affairs of the family, and the sons are. (*h*) It is impossible that of the numerous texts treating of debts contracted for the family and of the sons' liability as survivors of their father all should have omitted to mention their liability during the father's life had the liability been recognized. But the father is regarded as alone responsible, and alone having administrative control as the head of an

(*a*) 2 Str. H. L. 237; Vishṇu, Transl. page 45; Coleb. Dig. Bk. I. Chap. V. T. 168; 1 Str. H. L. 188; 2 *ib.* 237, 316; Steele, L. C. 34.

(*b*) VIII. 166.

(*c*) Coleb. Dig. Bk. I. Chap. V. T. 178.

(*d*) T. 177.

(*e*) I. L. R. 1 Bom. at p. 266.

(*f*) Pt. I. Chap. III. paras. 14, 15.

(*g*) *See* the answer to Chap. I. Sec. 1, Q. 5, below.

(*h*) *See* Yâjñ. Bk. II. para. 45; Coleb. Dig. Bk. I. Chap. V. T. 167, 168, 177, 178; 2 Str. H. L. 81, 277, 326.

undivided family.(*a*) Debts even for its benefit cannot, it is said, be contracted against his prohibition (*b*)—a doubtful proposition—but one which shows how his position was understood by a learned native lawyer. The Vyav. Mayûkha, the chief local authority in Bombay, (*c*) dwells elaborately on the debtor's obligations, but says nothing about any obligation of the sons except on their father's death or prolonged absence. (*d*) The Mitâksharâ itself, in commenting on the texts of Yâjñavalkya in the untranslated portion on "Vyavahâra," construes them as imposing a duty only after the father's death, his absence for twenty years, or on his imbecility. It then transfers the liability to the new head of the household if there is one, (*e*) or to the sons jointly if there is not.

It seems therefore that the decision in *Jamiyatram's* case, giving to the father in a united family virtually unlimited power over the whole ancestral estate, on condition only that his behaviour is not scandalous, cannot be rested on the Hindû law as the people have received it in Bombay. (*f*) The acknowledged authorities do not support it, and the usage of the people has conformed to these authorities. A reference to Steele's Law of Caste establishes this, (*g*)

(*a*) Comp Ellis in 2 Str. H. L 321, 326, and above, p. 281. On his death or incapacity the eldest son succeeds unless disqualified, as in ancient times he took the *patria potestas*. *See* Manu IX. 106 ss., 126.

(*b*) Coleb. Dig. Bk. I. Chap. V. T. 194. The Vyav. May. Chap. V. Sec. 4, para. 20, and the Mit., Chap. on Vyavahâra, prescribe the duty of payment without any qualification. *See* too Coleb. Oblig. p. 24; Vishṇu, Tr. p. 45, 46.

(*c*) *Sakharam* v. *Sitabai*, I. L. R. 3 Bom. at p. 367.

(*d*) Vyav. Mayûkha, Chap. V. Sec. 4.

(*e*) Comp. 2 Str. H. L. 252, 326.

(*f*) Comp. *Lallubhai* v. *Mankuvarbhai*, I. L. R. 2 Bom. at 418, 448; as to the force of this reception S. C. L. R. 7 I. A. 212, 237.

(*g*) *i.e.* by treating the liability for debts as one arising on the father's death in all places where the point occurs. Alienations without the assent of heirs are pronounced invalid, *ib.* 68, 238; or at most good only for the grantor's share and during his life, *ib.* 237.

and the MS. collection of Caste Customs made by Mr. Borradaile, while it shows that the father's debts were regarded as a burden on the estate in partition, does not assert any liability of the sons during his life. It appears indeed that in the great majority of castes the father's debt and the family debt are not distinguished. Partition against the father's will during his life is not allowed. (*a*) He is manager while capable, and all his debts are *primâ facie* incumbent on him alone, (*b*) passing to his sons only on his death subject to exceptions on the usual grounds. (*c*)

The decision in *Jamiyatram's* case conforms to that in *Girdharilal* v. *Kantoolal,* but the question remains of whether the latter expresses the Hindû law of Bombay. The father's share may be made separately available, as in Bengal it could not when *Girdharilal's* case was decided. The son's right is a co-ownership entitled to protection against a careless or designing creditor of the father; and there is no hardship in controlling the father's right to sell what he did not buy. When it is said that *Hanooman Pershad's* case " is an authority to show that ancestral property which descends to a father under the Mitâksharâ law is not exempted

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(*a*) *See* below.

(*b*) The absence of rules for a partition enforced by the sons in the father's life is an evidence of the comparatively late introduction of this doctrine. The same inference arises from the want of a rule for the partition of debts in a partition between the father and sons, which in the case of a partition amongst the sons only is always provided for. It seems that the three stages of development were (1) a moral claim of the sons and a still stronger moral duty of the father to preserve the patrimony; (2) an advance of the son's right to co-ownership, the father being still ex-officio manager; (3) the son's acquisition in virtue of co-ownership of a right to partition of the patrimony, comp. p. 209 above, and the Dâya Bhâga, Chap. II., Stokes, H. L. B. pp. 200 ss., and the Dâyakrama Sangraha, Chap. VI. *ib*. p. 511.

(*c*) The exceptions are not explicitly stated, no question having been put on that point. *See* Steele, L. C. 40, 178, 217.

from liability to pay his debts because a son is born to him," the remark occurs that their Lordships in the earlier case did dot decide as to debts in general, only as to an ancestral debt made a charge by the father. Secondly it may with deference be pointed out that the Mitâksharâ itself in dealing expressly with the subject in a chapter which was not before their Lordships on either occasion, treats of the payment of debts in such a way as to make it clear that no liability of a son for his living father's debt is recognized. The estate may be answerable, and the son's share in it, but simply through the father's authority as manager. This enables him to create burdens for purposes necessary and beneficial to the family, but not for other purposes though these should not be "immoral."(a) The point in *Hanooman Pershad's* case was that as an ancestral debt descended to the father he was *primâ facie* bound to pay it, (b) and hence justified in applying the ancestral estate to that purpose, (c) and therefore the manager for his infant son might properly recognize the charge as binding on him. The conversion of such an obligation inherited by a son into a liability to have all his property aliened by his father while they are both alive (d) in order to furnish means for the father's needless expenditure is a process which, so far as can be discovered, the "usage of the country" or the "laws and usages of the Gentoos," have not performed in Bombay.

(a) *See* above, p. 166 ff; Steele, L. C. pp. 40, 265.

(b) Amongst the Marâthâs this obligation extends to all debts incurred during the son's infancy, and to those incurred after his majority for Saṁsâr, or the discharge of moral and ceremonial duties. Steele, L C. 40.

(c) *See* Kâtyâyana in Vyav. May. Chap. V. Sec. 4, para. 14.

(d) The duty arises from "sonship" and must be discharged out of a son's own property. It rests therefore on a separated son. If then the "pious duty" towards a father deceased is convertible into a legal obligation to a father alive, with a corresponding right in the father, it would seem that the separated son's property equally with that of the son unseparated, may be disposed of by a father or sold in execution of a decree against him for a debt not "immoral."

The English connotation of the word "heir," as denoting one succeeding his ancestor but only succeeding, not participating with an equal right, is misleading in the case of a son's relation to his father as regards the Hindû "heir" so called.(*a*) The birth of a son necessarily causes a diminution of his father's estate, by the introduction of an owner in

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(*a*) *See* above, pp. 66, 238. This participation is not in theory limited to the ancestral estate: it extends to all immoveable property, with some special exceptions.

A father cannot, according to the doctrine of the Mitâksharâ, Chap. I. Sec. 1, para. 27, dispose of his immoveable property, even though acquired by himself, without the assent of his sons, except in a case of urgent need, Steele, L. C. pp. 39, 54. The reason given is the duty of providing for the family, and this must limit the administrative independence assigned to him over his acquisitions by Chap. V. Sec. 10, supposing the latter extends to immoveable property. Colebrooke seems to recognize this at 2 Str. H. L. 436. At p. 439 he states the same doctrine as undoubtedly that of the Smṛiti Chandrikâ, and at p. 441 as that of the Mâdhaviya. At p. 444 Sutherland says no part of the Dâya Bhâga (of Jîmûta Vâhana) is so unsatisfactory as that which maintains the right to dispose of self-acquired immoveables, and at p. 445 that according to the Mithila and the Benares (Mitâksharâ) Schools a man is free to give away only his moveable property. The Śâstri of the Recorder's Court at Bombay says, p. 449, that alienation of immoveable property is forbidden, and of moveable property also, except as to the surplus beyond the needs of the family. Such, he says, is the usage of the country, and this is confirmed by Steele, L. C. pp. 68, 211, though some castes maintain the power of the acquirer over his own acquisitions, *ib.* 237; and the authority of the manager is by some castes extended beyond the warrant of the sacred writings, *ib.* 53, 54, 209.

Though the power of a Hindû to deal as he pleases with his acquired property cannot now be questioned, Steele, L. C. 54, 211; above, pp. 193, 206, 209; it does not seem reconcileable with the principles of the Hindû law, as thus stated by high authorities, that a father should be at liberty to cast off his obligations to his family, or that he should be able not only to burden his sons with his debts after his death, but also to alienate even the ancestral estate in their despite during his life. The duty of the son to pay his father's debts is regarded by the Hindu law as a "pious obligation," and as such limited by the equally pious obligation of maintaining the family

common with the father, (*a*) and thenceforward the father's acts are those of a manager. His death throws a new burden on the son, as the son's birth partly divested the father's estate, but the death equally with the birth is a necessary condition of the jural change. (*b*)

It may be added that nowhere amongst the provisions of the Hindû law for enforcing payment of debts (*c*) is such a process as the attachment and sale of the lands of a family mentioned. Jagannâtha's discussion of the subject(*d*) makes it plain that the connexion between an owner and his land was conceived by the Hindû lawyers as by the earlier Romans (*e*) as separable only by his own volition, however that

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where the two duties come into competition, *see* above, p 207 ; below, Appendix; and Dâyakrama Sangraha, Chap. VI. para 5; Stokes, H. L. B p. 510; Vyav. May. Chap. IX para. 5, *ib.* p. 134 ; though the son must make any merely personal sacrifice.

(*a*) See *Râmbhat* v. *Lakshman Chintaman Mayâlay*, I. L. R. 5 Bom. at p. 635, per Sir M. Westropp, C. J., and the authorities there cited.

(*b*) *See* per White, J., in *Bheeknarain Singh* v. *Januk Singh*, I. L. R. 2 Calc. 438, 443. The son, if a minor at his father's death, becomes responsible only on attaining his majority, according to the Mit. and Vyav. May. *loc. cit.* *See* also 2 Str. H. L. 76, 80, 279. This indicates a personal obligation to be satisfied no doubt out of the estate if there is one, but not in the proper sense a charge on it as in the case of a specific lien legally created.

(*c*) For the process employed amongst the Marâthâs, *see* Vyav. May. Chap. IV. Sec 4, para. 7; Wilson's Glossary " Âsedha" ; Steele, L. C. pp. 74, 267. For the sacredness of the debtor's obligation for a debt incurred to celebrate one of the necessary ceremonies, *ib.* p. 60. By the ancient Common Law of England execution could not be had for debt or damages against the land or the person of the debtor, only against his chattels and corn, Coke, 2 Inst. 394 ; Co. Rep. Part III. 11 *b.*; Vin. Abr. Execution (M).

(*d*) Colcb. Dig. Bk. II. Chap. II. T. 24, Comm. *ad. fin.*; T. 27, 28, Comm.

(*e*) *See* Mommsen, Hist. Rom. Vol. I. p. 169, 311 ; Maynz, Dr. Rom. Sec. 243, 380. How very gradually the English law admitted the charging of the estate with debts may be seen in Blackstone's Comm. Bk. II. Chap. XIX.

might be influenced. Attachment and sale in execution therefore are entirely the creatures of British legislation. They belong wholly to the province of procedure; and the title sold cannot, it would seem, be enlarged beyond that vested by the substantive law in the party sued, and whose "right, title, and interest" as a Hindû father of a family is put up to auction to satisfy his creditor. (*a*)

Amongst the male members of an ordinary Hindû undivided family, a suit by one member against another for maintenance is not sustainable. The right arises only (in such a case) through disability to inherit (*b*), but it lies by a son against his father holding impartible property. (*c*) In such property is included a pension allowed as commutation for a resumed Saranjâm. (*d*) The father's maintenance is the first consideration. That being once provided for, the indigent sons have, according to the Hindû Law, a claim on the surplus, so far as it extends, for their maintenance. (*e*) In answer to Q. 1884 MS., the Dhârwâr Śâstri (6th October 1854,) says, "It is not right for a son, however young, to claim support from his father. But a father should afford a maintenance to a child, and, if there be hereditary property, to the extent of the son's share." The

(*a*) The great practical importance of this subject may be pleaded as a justification for dealing with it at such length. The authority said to be vested in the father to waste the patrimony so long as he avoids spending it on the acts included in "immorality," makes the position of every Hindû son in a state of union with his father unsafe. *Suraj Bunsee Kooer's* case, L. R. 6 I. A. at p. 100, says the son may claim a partition at will. Thus a motive and a means are held forth which tend at least to a complete break-up of the Hindû family system, and may lead to very serious consequences unless the whole subject is comprehensively dealt with by the legislature.

(*b*) *Himmatsing* v. *Ganputsing*, 12 Bom. H. C. R. 96; *Agursangji* v. *Gagji Khodabhaî, ibid.* 96 Note (*a*).

(*c*) *Himmatsing* v. *Ganputsing, ibid* 94.

(*d*) *Râmchandra Sakhârâm* v. *Sakhârâm Gopal*, I. L. R. 2 Bom. 346.

(*e*) *See* Coleb. Dig. Bk. V. T. 23, Comm.; 2 Str. H. L. 321; Steele, L. C. 40; Mit. on Yajñ. II. 175, translated in Appendix.

Śâstri seems to have relied on Manu, as cited in Coleb. Dig., Bk. V., T. 379, Comm., and 2 Macn. H. L. 114, to the effect that aged parents, a wife, and an *infant* son must under all circumstances be maintained; the last words of which being ambiguous (Coleb., Note *loc. cit.*) are differently taken in the Mitâksharâ. (*a*) In the case of *Ramchandra Dada Naik* v. *Dada Mahadev Naik,* (*b*) Sausse, J., after holding that a partition of the hereditary estate could not be enforced by a banker's son against his father, says "I do not think that the abstract question of the right of a son to enforce maintenance (in a Hindû sense) from his father arises here. If I thought it did I would overrule the demurrer, for there is no clearer duty imposed upon a Hindû father than that of giving 'food, raiment, and shelter' not only to a son but to any member of his family." (*c*)

§ 3A. A family living in union may be either (A) undivided (*avibhakta*) or (B) reunited (*saṁsrishṭa*).

A. An undivided family consists:—

1. Of an ancestor and his descendants (*d*).

2. The descendants of a common ancestor.

The descendants must be legitimate descendants of the body, or else legally adopted sons or their descendants, (*e*) except in the case of Śûdras, where illegitimate sons have a

(*a*) *See* Bk I. Chap. II. Sec. 1, Q. 2; 1 Str. H. L. 67; Smṛiti Chandrikâ, Chap. II. Sec. 1, paras. 31, 32.

(*b*) 1 Bom. H. C. R. App. at p. lxxxiv

(*c*) See *Suraj Bunsee Kooer's* case, *supra*, and the remark in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. at p. 193.

(*d*) Two widows, it has been said, succeed jointly to the estate of their deceased husband. But they do not form an undivided family in the proper sense, and they are perhaps regarded by the Hindû Law rather as holding several, though undiscriminated, shares in the property. *See* above Bk. I. Chap. II. Sec. 6 A. Q. 6, p. 124; 2 Str. H. L. 90.

(*e*) *See* 2 Str. H. L. 312.

capacity to form a united family *inter se,* probably also with their legitimate half brothers, (*a*) and at any rate have rights analogous to those of legitimate sons. (*b*) The right of descendants extends only to the third degree from an ancestor, living undivided and being the head of a family or of a particular branch. (*c*) Thus :—

(1). If A, A^1, A^2, A^3, and A^4 live together, and A^1, A^2, and A^3 predecease A, then A^4 will have no immediate claim to a share of A's property, *see* No. 1 in (*d*).

(2). If A^a, with his four descendants, A^b and A^c with their one and three descendants respectively, live together, and A^a's first, second and third descendants predecease A^a, and if A^a die afterwards, then A^{a4} will have no claim to a share of the family property, *see* No. 2 in. (*d*)

(*a*) *See* p. 382-3, Q. 10 and 12, Remarks.

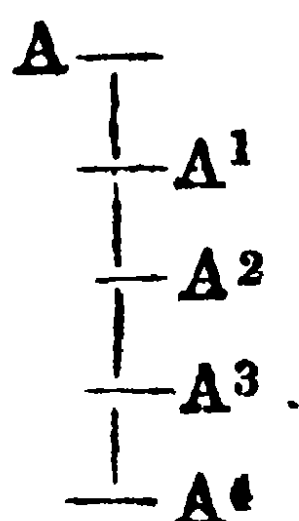
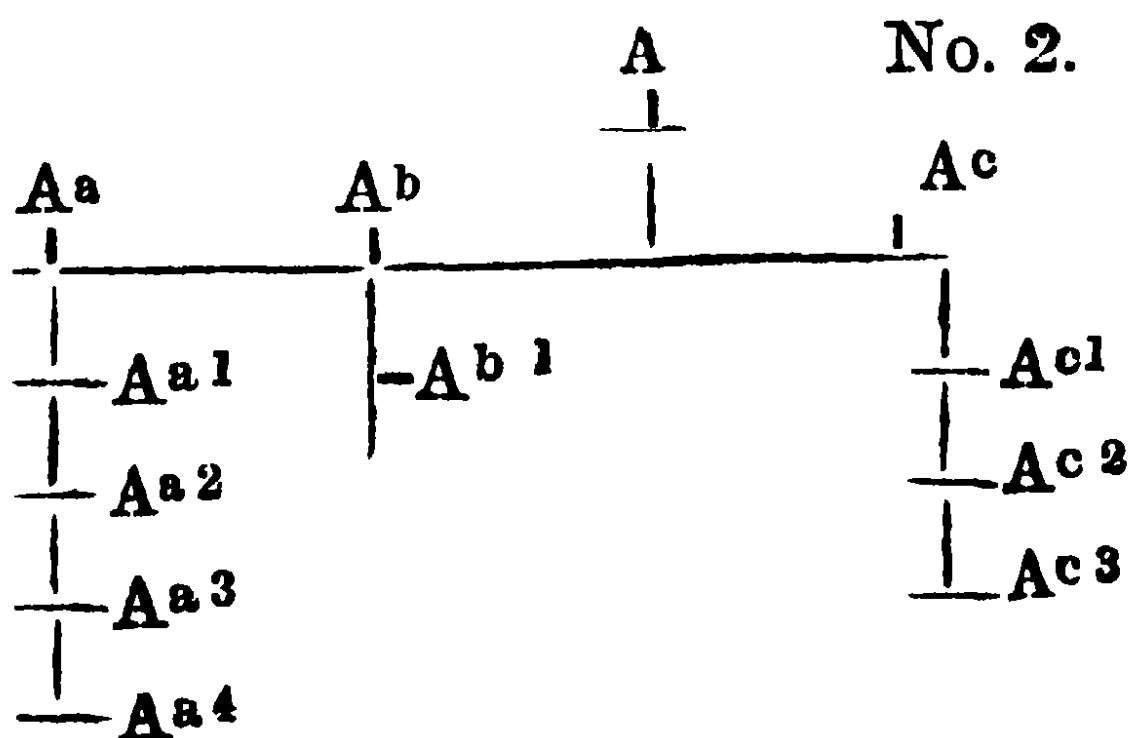
(*b*) As to the *paunarbhava,* or son by a twice-married woman, *see* Sutherland's Note, 2 Str. H. L. 208. The *Paunarbhû* is there classed in three divisions, differing, in description, from those given by Nârada, Pt II. Chap. XII. paras. 46 ss. As to the *svairiṇî* or disloyal wife, *see* Nârada, 1 c. paras. 50 ss. The heritable right and consequent right to shares in a partition of sons of paunarbhûs depends, Sutherland says, on local custom. *See* above Bk. I. Chap. II. Sec. 3, p. 386.

(*c*) *See* 2 Str. H. L. 327; Vyav. May. Chap. IV. Sec. 4, paras. 21, 22; Manu IX. 185; Coleb Dig. Bk. V. T. 81, 394, 396, Comm. Viśveśvara, in the Subodhinî on Mit. Chap. I. Sec. 1, p. 3, seems to admit that the doctrine of representation may be carried down even beyond the great-grandson, but the latter is generally admitted only after the near relatives, specifically enumerated as heirs.

(*d*) No. 1

A
— A^1
— A^2
— A^3
— A^4

No. 2.

A
A^a — A^{a1}, A^{a2}, A^{a3}, A^{a4}
A^b — A^{b1}
A^c — A^{c1}, A^{c2}, A^{c3}

The principle operating here is the same as that applying to the Law of Inheritance in an undivided family. (*a*) In the case at 2 Macn. H. L. 150, the maternal grandfather having given property to four brothers, the son of one of them, they having been united, was allowed to obtain a partition from his uncle, the survivor of the four. (*b*)

Males only can be the subjects of the full rights of coparceners. But women, *ex. gr.* wives, mothers, grandmothers, and daughters possess latent or inchoate rightsof participation, which become effective when separation takes place. (*c*) If a widow has been placed in possession of a part of the common estate in order to provide her with subsistence, she can be ousted only through a suit for a general partition, (*d*)

(*a*) *See* Book I. Introduction, p. 73.

(*b*) This case might perhaps be more properly referred to the principle stated below, Sec. 5 A, that a gift to united brethren without discrimiation constitutes joint property; but it illustrates the right of the co-members to enforce partition, even of recent acquisitions, ranking as joint estate. Had the gift been made in separate shares, the son of one donee would have had to claim by inheritance, not by partition.

(*c*) "The mother's right to a specific allotment arising only when a partition is made," Coleb. at 2 Str. H. L. 290. See ***Ramappa Naiken*** v. ***Śithammál***, I. L. R. 2 Mad at p. 186; ***Sibbosoondery Dabia*** v. ***Bussoomutty Dabia***, I L R. 7 Calc. 191; ***Narbadábái*** v. ***Mahádeo Náráyan***, I. L. R. 5 Bom. 99 (step-mother). According to the usage of some of the lower castes in Gujerâth the mother must take part in a partition by her sons: it cannot proceed without her co-operation or at least her consent. Many instances of this occur in Borradaile's Collection. *See* below "RIGHTS AND DUTIES ARISING ON PARTITION."

(*d*) ***Anpoornábái*** v. ***Máhádevráo Bahvunt***, R. A. No. 13 of 1872, Bom. H. C. P. J F. for 1872, No. 192. See ***Rajabái*** v. ***Sadu***, 8 Bom. H. C. R. 98 A. C. J., wherein a widow in possession was awarded maintenance before being evicted at the suit of an heir to her deceased husband. *See* also ***Vrandavandas*** v. ***Yamunabái***, 12 Bom. H. C. R. 229, wherein a concubine in possession was awarded maintenance under similar circumstances. *See* below "PARTITION BETWEEN BROTHERS," and Dâyakrama-Saṅgraha, Chap. VII. paras. 7-9; Stokes, H. L. B. 514.

in which she is entitled to the allotment of a son's share. (*a*)

The principle, limiting the participation of descendants from a common ancestor who live in union, is most explicitly stated in the Vîramitrodaya, f. 177, p. 1, l. 6 sqq. (*b*) :—

Kâtyâyana :—"Should one's own [brother] die before partition, his share shall be allotted to his son, provided he had received no livelihood from his grandfather. But that [grandson] shall receive his father's share from his uncle or from his [uncle's] son; but an equal share shall be allotted to each of the brothers according to law. Or his [the grandson's] son shall receive the share [in case his father be predeceased], beyond him [succession] stops."

One's own (*i e.*) brother His son (*i.e*) the brother's son. A livelihood (*i e*) a share As it is necessary to know what kind of share he shall receive, (Kâtyâyana) says, 'His father's share.' His son (*i.e.*) the great-grandson of the person whose estate is being divided, because the grandson has (already) been mentioned. Afterwards (*i.e.*) beyond the great-grandson, shall occur a stoppage; (*i.e.*) a stoppage of the succession. *The meaning is that the great-grandson's son does not receive a share.*

Hence Devala also says :—"Amongst members of a family who reside together, being undivided or after having been divided, (on a

(*a*) The Smṛiti Chandrikâ, admitting that the widow has an interest in the property, but denying to her a share of it as dâya, says that, when sons make a partition, the mother becomes entitled for her maintenance to so much only as, with her other property, will equal a share. Devâṇḍa Bhaṭṭa however admits that, according to the Mitâkshârâ, the widow's share *is* heritage (dâya), though there be sons. *See* the Smṛiti Chandrikâ, Chap. IV. para. 8 ff. As to daughters, *ibid.* para. 18 ff. and Chap. IX. Sec. 3, para. 11; and as to the widow's lien on property given to her for maintenance, *ibid.* Chap. XI. Sec. 1, para. 44 ff. Succession of the widow and of the daughter, in the absence of sons, is recognised by this author as inheritance. *See* Chap. XI. Sec. 1, paras. 15, 22; Sec. 2, paras. 3, 7, 9; Sec. 4, para. 19. The widow of a re-united coparcener has an equal right with that enjoyed by her deceased husband, *ibid.* Chap. XII. para. 34.

(*b*) Transl. p. 72.

first or) second (partition), shares of the common property shall be given (even) to the fourth (in descent). That is certain." (a)

'The meaning is, a distribution of shares shall take place down to the fourth (descendant) from the common ancestor.'

'From the words "residing together," it follows that this rule holds good even for persons who have made a partition, and afterwards live together upon reunion or the like.'

With this doctrine the Madanaratna agrees; but the Mayûkha (b) contends, that the passages of Kâtyâyana and Devala, quoted above, refer to reunited coparceners only. The Mayûkha's opinion is, however, based on a forced explanation of the term "avibhaktavibhakta" in Devala's passage. Nîlakaṇṭha takes it as a Karmadhârya compound, "those who were first undivided and became afterwards divided." The correct way to dissolve the compound is to take it as a 'Dvandva' or copulative compound. The correctness of the rule given above may be inferred also from the fact, that the great-great-grandson in the male line of a divided person inherits only as a Gotraja-relation, after the wife, daughters, &c. (c)

The distinction between the rights of male coparceners and of the female members of the family rests on this, that the rights of the former are immediate, arising on the birth of each, while those of the latter are contingent or dependent, having their source in the necessity for a provision for a marriage portion or maintenance. (d)

§ 3B. A REUNITED FAMILY.—A reunited family may, according to the Mitâksharâ, Chap. II. Sec. 9, para. 3, (e)

(a) *See* Colebrooke, Dig. Bk. V. Text 81; Manu IX. 210; Smṛiti Chandrikâ, Chap. VIII. paras. 15, 16.

(b) Borradaile, Chap. IV. Sec. 4, paras. 22 and 23; Stokes, H. L. Books, 53–54.

(c) Vyav. May. Chap. IV. Sec. 4, p. 22; Borradaile 59; Stokes, H. L. B. 53.

(d) On this point, *see* the beginning of this Introduction, and below, § 7 A. 1 b.

(e) Stokes, H. L. B. 452.

consist (1) of a father and his sons, (2) of brothers, and (3) of nephews and paternal uncles, who, having once separated, have agreed to combine their interests again. According to the Mayûkha, Chap. IV. Sec. 9, para. 1, (a) all persons, who once formed a united family, may reunite. This difference of opinion depends on a variance in the interpretation of a passage of Bṛihaspati, quoted Mit. l. c. para. 3. Vijñâneśvara takes it as an exhaustive enumeration of the persons capable of reunion, whilst Nîlakaṇṭha views it as a *dikpradarśana*, *i. e.* an indication of principle, extending to analogous cases. (b)

It has been held by the High Court of Bombay that the reunion must be made by the parties or some of them, who once lived in union. (c) *See* to the same effect Jagannâtha, in Colebrooke, Dig., Bk. V., T. 430.

II. Separation.

§ 4A. *Definition.*—Separation is the dissolution of the state of union or reunion, the continuance of which is based on the will or acquiescence of the united coparceners. (d)

§ 4B. *Separation, how effected.*—The separation of a family united or reunited may be effected :—

1 *By the will of all the members.*

2. *At the desire of one or more members only.*

(a) Stokes, H. L B. 91.

(b) As to the effects of reunion see *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403; *Rampershad Tewarry* v. *Sheochurn Doss et al, ibid.* 506.

(c) *Vishwanâth* v. *Krishnâji Ganesh et al*, 3 Bom. H. C. R. 69 A. C. J.

(d) According to the Malabar law descent is traced through females, and the joint property of the tarwâḍ is impartible. The interest of an individual member endures only for his life and is not available for payment of his personal debts or taken in inheritance by his offspring. The group of common maternal origin take the acquisitions of such members collectively. See *Ponambilath* v. *Ponambilath*, I. L. R. 3 Mad. 169.

[3. *By the Judgment Creditor of a member or the purchaser at an execution sale of his interest.*]

Times of Separation.—1. Separation by the will of all the members, whether undidvided or reunited, may take place at any time, provided there be no pregnant widow of a deceased coparcener. In that case it must be deferred until the delivery of the widow. (*a*) It cannot be prevented by third parties, however interested they may be in the estate, *e. g.* by creditors or mortgagees, since their equitable rights and remedies are not impaired. (*See* below, § 7 B. 1.)

2. As regards separation at the desire of one or several coparceners only, the head of a family, whether a father, grandfather, or great-grandfather may separate from his descendants at any time. (*b*)

A son living in union with his father, who is head of the family, may demand a separation and a division of the ancestral property at any time (*c*); of the

(*a*) May Chap. IV. Sec. 4, para. 37, and compare para. 35 ; Stokes, H. L. B. 56-7.

(*b*) Mit. Chap. I. Sec. 2, paras. 2 and 7 ; Stokes, H. L. B. 377-8 *See* also May. Chap. IV. Sec. 4, para. 8 ; Stokes, H. L. B. 49-50.

(*c*) Mit. Chap. I. Sec. 5, paras. 5—8 ; Stokes, H. L. B. 392-3 ; May. Chap. IV. Sec. 4, para. 4 ; Stokes H. L. B 48 ; Smṛiti Chandrikâ, Chap. VIII. p 20 ; *Nâglinga Mudali* v *Subbiramniya Mudali et al*, 1 M. H. C. R. 77 ; *Kali Pershad* v. *Ram Charan*, I. L. R 1 All. 159 ; *Phulchand* v. *Man Singh*, I L. R. 4 All. at p. 312. The late Supreme Court held that a son could not enforce a partition of ancestral moveable property, *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, 1 Bom. H. C. R. 76 App., I. L. R. 1 Bom. 563. *See* however, Mit. Chap. I. Sec 5, pl. 3 ; Stokes, H. L. B. 391 ; and Coleb. Dig. Bk. V. T. 92, whence it appears that according to the law-books the ancestral wealth (*dravya*) generally is subject to partition at the will of the son, though particular parts of it, as jewels, may be excepted. *See* also Coleb. Dig. Bk. V. T. 26, Comm. ; *Râjâ Râm Tewary et al* v. *Luchmun Pershad et al*, 8 C. W. R. 15 C. R. ; *Laljeet Singh* v. *Rajcoomar Singh*, 12 B. L. R. 373 ; *Suraj Bunsee Kooer* v. *Sheo Proshad Singh*, L. R. 6 I. A. at p. 100, and the cases therein cited ;

self-acquired property, under certain conditions only, (a) viz:—

a. If the father be indifferent to wealth, his wife past child-bearing, and the daughters married. (b)

b. If the father be incapacitated by bodily ailments, extreme age, insanity, or by addiction to vice, (c) or loss of caste. The last of these conditions would, however, now perhaps be inoperative, as loss of caste, according to Act XXI. of 1850, does not affect a man's civil rights. (d) A grandson, living in union with his grandfather, or a great-grandson with his great-grandfather, may similarly demand a partition, provided his own father, or his father and grandfather, be dead. Till then he cannot demand a partition notwithstanding his right in the property, because the

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above, p. 170, Section 8, ON THE LIMITATIONS OF PROPERTY. Mr. Ellis, at 2 Str. H. L. 321, adopting the Bengal Law that the father is not bound to divide, adds that he must maintain his son. At 2 Str. H. L. 323, Mr. Sutherland has overlooked Mit. Chap. I. Sec. 5, p. 8. (Stokes, H. L. B. 393.)

(a) 2 Str. H. L. 320.

(b) The doctrine, given here, is that of the Mitâksharâ as explained by the Subodhinî (Coleb Mit. Chap. I Sec. 2, note to para. 7; Stokes, H. L. B. 378). The Vîramitrodaya differs from this view by rejecting the division *a*, while the Mayûkha Chap. IV. Sec. 4, para. 3, Stokes, H. L. B. 48, divides *a* into two sub-divisions. Nârada, Pt. II. Chap. XIII. Sl. 2 ss, gives the following times, (1) after father's death, (2) when the father being old desires, (3) when the mother is past child-bearing, and the sisters married, (4) when the father's capacity or desire has ceased.

(c) The Mitâksharâ says, 'if he is addicted to vice.' The Vîramitrodaya explains this to mean 'loss of caste.' But it is probable that the Mit. means to include, besides loss of caste, the case of a notorious spendthrift and evil liver, as 'interdiction' is otherwise known to the Hindû Law. *See* above, pp. 194, 639; Mit. Vyav. Chap. I. Sec. 5, pl. 9; Stokes, H. L. B. 393. If a father has become incapacitated, or retired from worldly affairs, a son may become the representative of the family, 2 Str. H. L. 326; Steele, L. C. 178.

(d) *Tagore* v. *Tagore*, L. R. Suppl. I. App. p. 56.

intervening heir obstructs his complete title, (*a*) that is, intervenes between him and the full acquisition of it.

A son, a grandson, or a great-grandson may voluntarily separate, without receiving a full share, at any time. (*b*)

The law of the Mitâksharâ thus stated must be regarded as binding generally in Bombay as in the other provinces in which the authority of that work prevails. But it is subject to many exceptions according to the caste law of the parties. Thus amongst 82 of the 101 castes, from whom information was obtained by Mr. Steele at Poona, it was found that partition could not be enforced by a son against his father unless the father had acted improperly as manager. (*c*) It would seem therefore that in the usage of a large minority, at least of the people of the Dekhan, the rule of Baudhâyana (*d*) is still received as law. "While the father lives the division of the estate takes place (only) with his permission." In Gujarâth the castes, almost without exception or qualification, answered Mr. Borradaile's inquiries by denying the right to partition of a son against the wish of his father. Although the Śâstris therefore, as in Chap. I. Sec. 1, Q. 3, 6, below, generally follow the Mitâksharâ in recognizing a son's right to enforce partition, there is room for reasonable doubt as to whether it can be considered as finally established except amongst those castes or classes whose rights and duties in this particular have become the subject of judicial decision. Uniformity of the law is so desirable that the Courts will naturally desire to abide by the Mitâksharâ and the Mayûkha, (*e*) whose doctrine has been

(*a*) Mit. Chap. I. Sec. 2, paras. 1 and 7; Stokes, H. L. B. 377-8; Sec. 5, para. 3, note, *ibid.* 391; May. Chap. IV. Sec. 4, paras. 1—3, *ibid.* 47-48.

(*b*) Mit. Chap. I. Sec. 2, paras. 11 and 12, *ibid.* 380; May. Chap. IV. Sec. 4, para. 16, *ibid.* 51

(*c*) Steele, L. C. 216; *see ib.* pp. 405, 407.

(*d*) Transl. p. 224.

(*e*) *See* Bk. II. Chap. I. Sec. 1, Q. 1.

adopted by the Judicial Committee (*a*) but it is only fair to point out that custom does not appear to have more than partially accepted these authorities on the point now in question. On the one side are the Śâstris whose opinions are entitled to respect; but on the other are the answers given by the representatives of the castes themselves. Even amongst the Brâhmans the son's right does not seem to be fully admitted by any of the classes whose answers are preserved in Mr. Borradaile's collection; while amongst the lower castes the answers, without exception, so far as has been discovered, were either that the son could not enforce partition at all, or else that the father could retain so much as he wished of the ancestral property. (*b*) This would of course reduce the son's right to nothing. (*c*) In several cases the surviving mother's assent is said to be necessary to validate a partition after the father's death, and in nearly all it is set forth as a condition that she is to be provided for. (*d*)

(*a*) See *Suraj Bunsee Koer's* case, L. R. 6 I. A. at p. 100.

(*b*) So in Steele, L. C. 405, 407 ss.

(*c*) Amongst the Oudich Brâhmans of Broach and the neighbourhood it was said that there was no instance of sons having made a partition during their father's life The father dividing the property might retain as much as he wished for himself during his life, subject to the rights of his sons at his death; Borr. Lith. p. 59.

(*d*) This is in accordance with a tendency in many castes to favour the mother in the matter of succession. *See* above, pp. 99, 157, and Bk. I. Chap. II. Sec. 6A, Q. 19, 21, 23, 24, 26.

The (Bhargova Visa) Brâhmans of Surat said: " So long as the father lives his sons are not competent, without his consent, to divide the father's or grandfather's property." (Borr. Lith. p. 85.) So also those of Broach. (*Ib.* p. 127.) A similar rule was stated by the Srimâli Brâhmans of Surat and of the neighbourhood of Broach. (*Ib.* pp. 151, 182.) The Mewâra Chowraisi Brâhmans recognized a partition at the father's option during his life; but no instance had occurred of one against his will (*Ib.* p. 211) at Surat. At Broach no partition is allowed without his consent (*Ib.* p. 227.) The

A member cannot enforce a partial division (*a*). As to this, however, Sir R. Couch, C. J., in *Shib Suhaye Singh et al* v. *Nursing Lall et al* (*b*) says, "I did not intend to decide any such general question." But this is the recognised law

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Mewâra Bhuttee Tulubda Brâhmans of Surat allow no partition without the father's assent in his life either of his property or of the grandfather's. (*Ib.* p. 244) He may divide and then the sons during his life take what he has assigned to each. So amongst the Sachoura, and Waira, and Oonewal Brâhmans of Surat. (*Ib.* pp. 298, 319, 342.) The Brâhmans (Motola, Desaee Tur) of Oolpar stated a similar rule (*Ib* p. 267) as prevailing amongst them. At Broach amongst the Oonewal Brâhmans should a son separate himself the father sets apart a share for him. (*Ib* p. 363.) Amongst the castes below the Brâhmans, the assent of the father is set forth as indispensable amongst the following :—

Borr. Col MS.

Book G, p.	29	Bhaosar Cheepa Sooruti............	Surat.
	76	Do. Shravak (Tuppa Sect)...	Do.
	135	Sootar Punchallee Sooruti	Do.
	200	Do. Goojar Tulubda Sooruti..	Do.
	252	Do. Purdaisee Khatee	Do.
	296	Lohar	Ahmedabad.
	335–6	Sootar Lohar Sooruthiya	Surat.
	362	Khatree Vunkur Sooruti............	Do.
	410	Durjee Meeraee do.	Do.
	445	Malee Sonathiya do.	Do.
	475	Do. Moghreliya do.	Do.
	510	Kudiya do.	Do.
	541	Pukhalee do.	Do.
	568	Vansphora do.	Do.
	591	Do. Dukhani do.	Do.

(Continued next page.)

(*a*) *Nándábhai* v. *Náthábhai*, 7 Bom. H. C. R. 47, A. C. J. For the Bengal law, *see* the note of Sir W. Jones at 2 Str. H. L. 251. He thinks that the text of Manu IX. 104, "After the death of the parents &c." prevents a partition, even after the father's death, except with the mother's assent. *See* above, Sec. 3 A, and the case of *Lakshman* v. *Satyabhámábai*, I. L. R. 2 Bom. 494.

(*b*) 22 C. W. R. 354.

in Bombay, (*a*) and in the North-West Provinces. (*b*) The same rule holds good in respect to one or more members of

Borr. Col. MS.

Reference	Caste	Place
Book G. p. 609	Koombhar Goojurathi Sooruti ...	Surat.
636	Dhobee Rawatiya do.	Do.
699	Waghrees	Do.
719	Duphgur Rajpoot	...
745	Khalpa Puttuni	Surat.
773	Do. Khumbarti Sooruti	Do.
Book C. D. E, p. 16	Bruhm Kshatrees, &c.	Broach.
39	Kayusthus Valnik	Surat.
57	Do. Mathur	Do.
73	Sonee Dumuniya	Do.
89	Do. Tragun Javeeya	Do.
110	Lohar Bhownugguriya	Do.
128	Bharboonja Kayustha	Do.
144	Rajpoot Jadhowvanshi	Sabulgaon.
157	Purdesee Aliya.........................	Surat.
174	Salvee Sreemalee Veesa...	Do.
192	Koombhar Lar Sooruti	Do.
210	Sulat Sompoora do.	Do.
229	Mochee Kudiya Khumbarti	Do.
245	Bhurwar..................................	Do.
Book F., p. 28	Hujjam Mehsooriya..................	Do.
59	Soothar Vaisya........................	Do.
120	Hujjam Kalmooniya	Do.
165	Khutree Phurusrami	Broach.
201	Dher Tulubda	Surat.
229	Soothar Puncholee	Broach.
259	Brâhmans Kherwa Hoomunero...	Gour.

In no instance is there an admission of an unqualified right on the part of a son to enforce a partition and obtain a share.

The instances above tabulated are all drawn from the districts of Surat and Broach. The collection for Ahmedabad was not completed, or it has been lost.

(*a*) *Trimbak Dixit* v. *Nârâyan Dixit*, 11 Bom. H. C. R. 69; *Venkatesh et al* v. *Ganapaya*, R. A. Nos. 30 and 31 of 1875, Bom. H. C. P. J. F. for 1876, p. 110.

(*b*) *Mithoo Lall* v. *Golam Nuseer-ood-deen et al*, 4 Agra Rep. 276.

a family, consisting of brothers or collaterals only, (*a*) the whole property being brought into account, (*b*) so far as it is common. (*c*) The right to claim a partition is not lost by its non-exercise during six or seven generations. (*d*) A decree for partition produces an immediate severance of interests, subject however to the result of an appeal should one be made. An appeal seems to suspend or postpone the division until it is decided, according to the cases quoted below, Sec. 4 D. (*e*)

3. *Partition in Execution of Decrees.*—The creditor of an undivided coparcener may obtain execution of his decree against the share of his judgment debtor by enforcing a partition. (*f*) This is closely connected with the law now recognized in Bombay and Madras, that a parcener may

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(*a*) Mit. Chap. I. Sec. 3, para. 1; *Musst. Deowanti Koonwar* v. *Dwarkanath*, 8 B. L. R at p. 363, note; 2 Str. H. L. 358.

(*b*) *Lakshman D. Naik* v. *Ramchandra D Naik*, I. L. R. 1 Bom. 561. *See* below, Sec. 7.

(*c*) *Moti Mulji* v. *Jamnadas Mulji*, S. A No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123; *Ballal Krishna* v. *Govinda et al*, S. A. No. 25 of 1877; *ibid*, p. 124.

(*d*) *Thakur Durriao Singh* v. *Thakur Davi Singh*, L. R. 1 I. A. 1; *Moro Vishvanath* v. *Ganesh*, 10 Bom. H. C. R. 444. As to limitation, *see* above, p. 633, and below, Sec. 4 D.

(*e*) The right acquired by a decree may be abandoned by non-execution, *Prankissen Mitter* v. *Sreemutty Ramsoondry Dossee*, 1 Fult. 110. This might be regarded as a case of reunion as soon as limitation barred execution of the decree.

(*f*) The whole property of two co-sharers may be attached for the debt of one, though only the undivided moiety can be sold, *Goma Mahadev* v. *Gokaldas Khimji*, I. L. R. 3 Bom. 74. By proceedings in execution against a single parcener (even the father) alone, his interest only, not that of his sons, can be affected according to *Deendyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 I. A. 247. (*See* on this subject above, pp. 621 ss.) Separation may be enforced in order to give effect out of his own share to a sale made by a single member of a joint family, 2 Str. H. L. 349, or to a sale of such share in execution, *Bai Suraj* v. *Desai Harlochandas*, Bom. H. C. P. J. F. for 1881, p. 123, and *Gopal Narayan* v. *Atmaram Ganesh*, Bom.

dispose effectually of his own undivided share for value, though not by way of gift or devise, except for pious purposes. (*a*) It is improper to put a purchaser of land in execution of a decree against one member of an undivided family into possession of the property. (*b*) Where he has been actually placed in possession, the other co-sharers will be awarded joint possession and the parties will be left to work out their several rights should they desire it by a suit for partition. (*c*) The alienation is thus subject to claims

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H. C. P. J. F. for 1879, p. 489. Such a transaction, however, Ellis says, Str. H. L. *loc cit*, is presumably collusive on the part of the purchaser. *See* below, Sec. 4 F.; *Suraj Bunsi Koer* v. *Sheo Purshad Singh*, L. R. 6 I. A. at p. 109; 4 Comyn's Dig. 233.

A judgment debtor and his sons having joint possession of family property, the latter can sue for a declaration of their title to two-thirds of the property, whilst under attachment under decree of a creditor as against the former, without asking for consequential relief, *Narayan Damodar* v. *Balkrishna Mahadev*, I. L. R. 4 Bom. 529.

(*a*) *See* the elaborate judgment of Sir M. Westropp, C. J., in *Vâsudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Udárâm Sitâram* v. *Rânu Pánduji et al*, 11 *ibid* 76; *Mahábaláyá* v. *Timáyá*, 12 *ibid.* 138, &c., referred to below; *Tukaram* v. *Ramchandra*, 6 *ibid.* 247, A. C. J; *Suraj Bunsi Kooer* v. *Sheo Prashad Singh*, L. R. 6 I. A. 88, 101; *Anant Balaji* v. *Ganesh Janardhan*, I. L. R. 5 Bom 499, which discusses *Pandurung Anandrav* v. *Bhasker Sadashev*, 11 Bom. R. 72, 76; *Mahábaláyá* v. *Timáyá*, 12 Bom. R. 138; *Dugappu Sheti* v. *Venkatramnaya*, I. L. R. 5 Bom. 493, 496; *Kalappa* v. *Venktesh* I. L. R. 2 Bom. 676, citing *Nowla Ooma* v. *Bala Dhurmaji*, *ibid.* 95; *Gopal Narayan* v. *Atmaram Ganesh*, H. C. Bom. P. J. F. for 1879, p. 489; *see* above, pp. 605 ss.

The share of a widow arising on partition cannot be defeated either by execution proceedings or by a voluntary partition, *Bilass* v. *Dinanath*, I. L. R. 3 All. p. 88. Comp. *Parwati* v. *Kisansing*, I. L. R. 6 Bom. 567.

(*b*) *Deendyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 I. A. at pp. 251, 252, 255; *Anant Báláji* v. *Ganesh Janardhan*, I. L. R. 5 Bom. 499, which discusses the previous cases, and pp. 607, 621, *supra*.

(*c*) *Mahábaláyá* v. *Timáyá*, 12 Bom. H. C. R. 138; above, p. 633.

of the other sharers on the common property. (*a*) What is sold for the necessary discharge of a common liability is deducted from the common estate. (*b*)

§ 4 C. *Right to partition limited to demandant and his share.*

1. It must be considered a fundamental principle, that each coparcener has power only to effect his own separation from the family, and not to enforce a separation amongst the other coparceners against their will. In the Mitâksharâ Chap. I. Sec. 2, para. 1 (*c*) it is stated, that "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two, or more sons," and the comment on this by Bâḷambhaṭṭa, as translated in the note, is, that he may "make them distinct and several by giving to them shares of the inheritance." From this it would at first sight appear, that a father has a right not only to sever himself in interest from his sons, but also to effect a separation amongst the sons, independently of their desire or assent. (*d*) This however would not be a correct inference; the entire comment of Bâḷambhaṭṭa runs thus:—

'(If) he make them distinct by giving to them shares of the inheritance. As the limit of this (separation) is desired to be known, he (Vijñânesvara) adds: "From himself."'

'The purport is, that the (author) does not stop to consider, whether they (the sons) remain afterwards united or separate.'

This is evidently not conclusive either of separation or of union in such a case.

It is, no doubt, competent to a father to distribute, to a certain extent, his self-acquired property at his own pleasure

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(*a*) *Muccandas* v. *Ganpatrao*, Perry's O. Ca. 143.

(*b*) *Narayan Vinayak* v. *Balkrishna Narayan*, Mis. S. A. No. 21 of 1872, Bom. H. C. P. J. F. for 1872, No. 190.

(*c*) Stokes, H. L. B. 377.

(*d*) This would be the most natural inference from Nârada also. *See* Nârada, Pt. II. Chap. XIII. sl. 4.

amongst his sons.(*a*) But it does not follow, that by such a distribution, a separation amongst them individually and independently of their own desire will be effected. There appear to be no texts, which lay down such a rule, and Jagannâtha, in Colebrooke's Digest, Book V. Chap. VIII. Text 430, explicitly recognises the doctrine of a continuance of union in a family, notwithstanding the separation of individual members and the allocation to them of their shares in the estate.(*b*) He makes separation or non-separation depend on the free consent of the coparceners, resting, in the absence of explicit texts, on the reason of the law—a principle recognized in the Hindû, as well as in the English jurisprudence(*c*). So too the Privy Council (*d*) say, "It is however clear upon the evidence that the two other brothers continued joint after the separation of Shama Doss."(*e*)

This principle has been questioned in Madras, where the right to sever the sons *inter se* seems to have been regarded as a part of the *patria potestas* still recognized by the Hindû law, (*f*) and in *Lakshmíbâí* v. *Gaṇpat*

(*a*) Below, Sec. 7 A, 1 *a* (2), and Chap. I Sec. 1, Q 4, Rem ; Steele, L. C. 58, 216, 220.

(*b*) So Steele, L. C. p 211.

(*c*) Colebrooke, Dig Bk. II. Chap IV. Text 17. The defendants in a suit for partition in England need not submit to it *inter se*. The partition may be limited to the share of the plaintiff. *Hobson* v. *Sherwood*, 4 Bea 184, and a conveyance by a single joint tenant severs only his share, Co. Lit. 394.

(*d*) In *Musst. Cheetha* v. *Baboo Miheen Lall*, at 11 M. I. A. 380.

(*e*) *See* also *Rewan Persad* v. *Musst Rádhá Beeby*, 4 *ibid.* 137.

(*f*) *Kandasami* v. *Doraisami Ayyar*, I. L. R. 2 Mad. 317. The learned judgment sounds almost like an echo from an earlier world; one in which the equal rights of sons with the father had not yet been developed. (*See* Nárada, XIII, 15; Âpast II, VI, 14.) The power ascribed is special to the father, and would be exercised in vain against the will of sons who, being severed by the father's will, might forthwith reunite by their own. The cases of infants and absentees

Morobâ (*a*) it was laid down, that a grandfather could, by a will distributing a share of ancestral property received by him on a partition in equal portions among his grandsons, effect a separation amongst the latter. (*b*)

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are distinct. *See* below. In the Punjab the division made by a father may be revised at his death, *see* Panj Cust Law, II. p. 169, 180, 206, 257. A similar case in the Dekhan, Steele, L. C. p. 219.

(*a*) 5 Bom. H. C. R. O. C J. 128.

(*b*) As to Wills, *see* above, pp. 213 ss.

A daughter (childless) may dispose by will of property inherited from her father as against his heirs or her own, *Haribhai* v *Damodharbhat*, I. L. R. 3 Bom. 171, quoting *Narotum* v. *Narsandas*, the note at 5 Bom. R.136, O. C. J , and *Bhika* v *Bhava*, 9 Harr. R 449.

Mr. Ellis thought that a Hindû could not make a will at all, 2 Str. H. L. 419 It is obviously opposed to the Brâhmanical family system and to the interest of the ancestral manes in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the principle obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by will. See *Doe dem Munnoo Lall* v. *Gopee Dutt*, (A. D. 1786), Mort. R. 81; *M. V. Vardiah* v. *M. Lutchumia* (A. D. 1824), M. S D. A. Dec. 438. In Madras, wills of Hindûs have long been recognised by Statute if made in conformity with Hindû Law, Reg. III of 1802, Sec. 16, and Reg V. of 1829, Sec. 4, but this condition left the whole question of testamentary competence open, as may be seen by a reference to the Madras decisions.

In Bombay separate and self-acquired property may be thus dealt with, *Nana Narain Rao* v. *Haree Punt Bhao et al*, 9 M. I. A 96, 98; *Baboo Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I. A. at p. 38; *Adjoodhia Gir et al* v. *Kashi Gir et al*, 4 N W. P. H C. R. 31; *Bhagvan Dullabh* v. *Kalla Shankar*, I. L R. 1 Bom. 641. The extent of the testamentary power must be regulated by the Hindû Law, *Sonatun Bysack* v. *S. Juggutsoonderee Dossee*, 8 M. I. A. at p. 85 (which furnishes no analogy but that of gifts); Colebrooke at 2 Str. H. L. 428, 431, 435; *Jotindra Mohan Tagore* v *Ganendra Mohan Tagore*, S. I. A. 47 S. C, 9 Beng L. R. at p 398. But *see* also *S. Soorjeemoney Dossee* v. *Denobundoo Mullick et al*, 9 M. I. A. 123. Thus a will cannot be made of ancestral property in which sons have an interest, though effect may be given to it as a family arrangement, *Lakshmi-*

The reasoning of the learned Judge in that case

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bai v. *Gunpat Moroba et al,* 5 Bom. H. C. R. 135 O. C. J.; 2 Str. H. L. 436. The castes reject the wills of testators having issue, Borr. Coll. *passim.*

That a Hindû's will is to be construed according to Hindû Law, see *S. Soorjeemoney Dossee* v. *Denobundoo Mullick,* 6 M. I. A. at p. 550; *Musst. Kollaney Kooer* v. *Luchmee Pershad,* 24 C. W. R. 395; *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore,* S. I. A. 47: S. C., 9 Beng. L R. 395; *Mulvi Mahomed Shumsool Rooder et al* v. *Shewukram,* 14 Beng L. R. 227, 230, S. C, L. R 2 I. A. 7; *Musst. Bhagbutti Daee* v. *Chowdry Bh. anath Thakoor et al,* L R. 2 I. A. 256, 261; *Ramguttee Acharjee* v. *Kristo Soonduree Debia,* 20 C. W. R. 473, C. R. As to the form, a nuncupative will is effectual, *Bhagvan Dullabh* v. *Kala Shankar,* I. L R. 1 Bom. 641; and so is a parol revocation, *Maharaj Pertab Narain Sing* v. *Maharanee Soobha Kooer et al,* L R. 4 I. A. 228.

In East's cases No. 75 is a case of an adoption by a prostitute of a girl. It was said after adoption the son's share could not be devised, *see* Morl. Dig 133.

The following cases and observations on the law of wills may be added to the brief discussion of the subject in Bk I. Sec 9, and in the note above. An attempt to create a perpetuity will not be supported, *Muccondas* v. *Ganputrao* in Perry's Or. cases; above, pp 178, 195, 196. See *Abdul Gance Kásam* v. *Hasan Meya Rahimtulla,* 10 Bom. H. C. R. at p. 10.

A charge on property for worship will not give effect to an attempt to create a perpetuity in the surplus proceeds, *Ashutosh Dutt* v. *Doorga Churn Chatterjee,* L. R. 6 I A. 182; above, p. 178, 182, 184; *Promotho Dossee* v. *Radika Persaud Dutt,* 14 Beng L R 175.

A bequest for the erection of a bathing ghat and temples at the discretion of the executor, who renounced, was declared void for uncertainty, *Surbo Mungola Dabee* v. *Mohendronath,* I. L. R. 4 Calc. 508. It may perhaps be doubted whether effect should not have been given to this bequest according to the Hindû Law; *see* above, pp. 229, 230; Steele, L. C. 214, 404, 405.

Section 234 of the Indian Succession Act, X. of 1865, applies to Hindûs, and an application may be made under it to revoke the probate of a Hindu's will. In re *Pitamber Girdhar,* I. L. R. 5 Bom. 638.

By the Hindû Wills Act, XXI. of 1870, the forms prescribed by Sec. 50 of the Succession Act, X. of 1865, must be followed by Hindû testators where the Act is in force, *i. e.* Lower Bengal and the towns of Madras and Bombay. The Hindû Wills Act was not intended to introduce changes in the substantive Hindû law. The introduction

was not, however, concurred in by the Court on

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of Secs. 98, 99, 101 of the Succession Act is subject to all the provisos in Sec. 3 of the Hindû Wills Act, which was not intended to enlarge a testator's power, only to regulate its exercise, *Alangmanjari Dabee* v. *Sonamonee Dabee*, I. L R. 8 Calc. 637.

A person claiming under a will in the Mofussil is not generally obliged to obtain probate. See above, p. 226. Act V. of 1881 however, by Sec. 4, makes the executor or administrator of the deceased his legal representative, and vests the property in him. By Sec. 2 of the same Act, Chaps II to XIII. thereof apply in the case of "every Hindû, Buddhist and person exempted under Sec. 332 of the Indian Succession Act, 1865, dying before, on or after 1st April 1881." Again it is provided "that except in cases to which the Hindû Wills Act, XXI. of 1870, applies, no Court in any local area (in the Mofussil) . ...shall receive applications for probate or letters of administration until the local Government has, with the previous sanction of the Governor General in Council, by a notification in the Official Gazette authorized it so to do." The High Courts are, as to such areas, similarly restricted Now Act XXI. of 1870 in a sense applies to all wills made by Hindus, &c , in the towns of Bombay and Madras, but it does not apply to those made in the Mofussil, except so far as they relate to immoveable property within the presidency towns The result seems to be that until the issue of the requisite Notifications the law in the Mofussil remains what it was, while in the Presidency towns the new legislation applies to the estates of all classes of natives. When the Notification has been issued in Bengal the whole Act will operate generally there along with Act XXI. of 1870, but in Bombay and Madras the Act of 1870 is limited to the Presidency towns. In those towns therefore the provisions of the two Acts will operate together, while in the Provinces Act. V. of 1881 will operate alone from the 1st April 1881 conditionally on the notification required by Sec. 2 having been made. The provisions of Sec 52 of Act. V. of 1881 are repeated *verbatim* in Act VI. of 1881, Sec 2, as an addition (Sec 235 A) to Act X. of 1865, and other provisions are made with regard to "District Delegates." The tangle, here, of exemptions, exceptions, provisos and conditions is such as will afford a useful exercise to the perspicacity of students of the law. As to testators, the words of H. H. Wilson (Works, V. 58) may be quoted: "If the Hindûs are to be authorized to make wills, they should be instructed how to make them and not be suffered to......make the arrangements which they contemplate subject to improbable or impracticable conditions."

appeal, and the ultimate decision was based on different

As to the construction of Hindûs' wills, *see* above, pp. 184, 224, 229, 668. Such words as "putra paotrâdi krămo" and "naslan bád naslan," though primarily importing the male sex yet included females as heirs to either males or females, *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. 46.

The usual notions and wishes of Hindûs with regard to the devolution of property may properly be taken into consideration, *Moulvie Mahomed* v. *Shevukram*, L. R. 2 I. A. 7. Compare *Maniklál Atmarám* v. *Manchershi Dinsha*, I. L. R. 1 Bom. 269; *see* above pp. 183, 184, 205.

A bequest to a class not completely ascertained and existing at the testator's death fails as to those even who do exist, according to *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Calc. 262; *Kherodemoney Dossee* v. *Dhoorgamoney Dossee*, I. L. R. 4 Calc. 455. The provisions of Secs. 102 and 103 of the Indian Succession Act, X of 1865, do not apply to the Mofussil, but do apply to the town of Bombay under Act XXI. of 1870. The references to the Hindû law in the latter of the two cases just cited seem to show that those qualified at the testator's death might take, but the decisions point the other way. Comp. pp. 183 ss.

According to the English Statute, 3 and 4 Wm. IV. C. 106, an heir who is also a devisee takes in the latter character.

The present freedom of devise in England is of quite recent origin. Before the Conquest a man might dispose as he pleased of his own acquisitions, though his devise of book-land was usually precatory on account of the temporary character of his interest as strictly viewed. After the Conquest "till modern times a man could only dispose of one-third of his moveables from his wife and children, and in general no will was permitted of lands till the reign of Henry the Eighth, and then only for a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present," Kerr's Blackstone, II. p. 11. The Latin nations adopted the Roman Law system of testaments much more readily; the older German Law, as reported by Tacitus, was simply *Heredes successoresque sui cuique liberi et nullum testamentum.* The customary equal partition of lands under the law of gavelkind seems to have been limited to the undivided estate, and over this by the old Common Law a father had not a power of free devise, which indeed is manifestly opposed to rights of equal partition. *See* for the Saxon Law, Elton, Tenures of Kent, 74; and comp. *infra*, Bk. II. Chap. I. Sec. 2, Q. 4. The custom of the City of London down to 1725 allowed a freeman to deal by way of devise

grounds. (a) The views above stated are conformable to those set forth by Sir T. Strange, H. L. 193 and 204, the authority quoted by whom, however, is not applicable. In a Bengal case effect was refused to a father's deed of partition which had not been carried out by actual distribution in his life. (b) Conversely when a testator had bequeathed his business to his sons, but had directed that there should be no partition for 20 years, the latter direction was held repugnant, and the sons entitled to immediate partition. (c)

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with only the half or one-third equal to the half or one-third which it gave to his widow and to his children even of his personal property, Vin. Abt. Customs of London Thus the notions of the Hindus were substantially those of the English until a comparatively recent time.

(a) See *Lakshmibâi* v. *Ganpat Moroba*, 5 Bom. H C. R. 128 O. C. J.

(b) *Bhowanneychurn* v *Heirs of Ramkaunt*, 2 C. S. D. A. R. 202. This case may be referred to another principle, *see* below, Sec. 4 D, but it shows that the mere volition of the father was not held by itself to create the desired jural relations.

(c) *Mokoondo Lall* v. *Gonesh Chunder*, I. L. R. 1 Calc 104. His inculcation of joint enjoyment is no bar to a suit for partition, *Raja Sooranany Venkatapettyrao* v. *R. S Ramchandra*, 1 M. S. D. A. Dec. 495. So Macn., Cons. on H. L. 323; *see* above, pp. 178, 182, 195.

The Madras High Court allows a gift but not a bequest by an undivided coparcener, *Vitla Buttel* v. *Yamenamma*, 8 Mad. H. C. R. 6. The latter it thinks prevented by the survivorship. This principle was recognized by the Privy Council in *Suraj Bunsi Koer* v. *Shivparsad Singh*, L. R. 6 I. A. 88. In Bombay the gift of undivided property by a joint coparcener is illegal, *see* Privy Council in *Lakshman Dada Naik* v. *Ramchunder*, L. R 7 I. A. 181. A father in an undivided family cannot dispose by will of his undivided share without the consent of his co-sharers, *ib.* The alienation by gift where, as in Madras, that is admitted, is founded on a parcener's right to partition and dies with him, the title of the other co-sharers vesting by survivorship at the moment of his death. The Śâstris denied any power of disposal before partition in *Bajee Sudshet* v. *Pandoorung*, 2 Morr. 93. According to these cases the father's declaration of will would be inoperative, except after partition or to effect it in his own case.

A joint tenant under the English Law has not a devisable interest, Co. Lit. 185 *b*.

§ 4 c. 2. *Great-grandson.*—Devala says, "Partition among undivided parceners and among reunited parceners extends to the fourth in descent from a common ancestor." The case of a great-grandson is not otherwise expressly dealt with in the Hindû law books except in a rather obscure passage of Kâtyâyana quoted by the Vîramitrodaya, (*a*) but it rests on the same principle as that of the grandson, viz., on the doctrine of representation. (*b*)

§ 4 c. 3. *Minors.*—In the case of minor coparceners, it would certainly tend to convenience, if the doctrine, apparently upheld by the Madras and Bombay High Courts, (*c*) that a minor coparcener is to be represented in partition by his guardian, could be based on any explicit texts. All, how-

(*a*) Transl. p. 72.

(*b*) "The great-grandson's son is not entitled to any share." Víram. *loc. cit.*

(*c*) *Nallappa Reddi* v. *Balammál et al,* 2 Mad. H. C. R. 182, quoted in *Lakshmibai* v. *Gunpat Moroba et al,* 5 Bom. H C. R. O. C. J. p. 128. Every minor is to be guarded by the King, Colcb. Dig. Bk. V. T. 449; 2 Str. H. L. 72.

Minority now ceases at 18 years of age, Act. IX. of 1875.

A guardian may sell a portion of a minor's property to maintain a suit beneficial to the minor, *Ganga Prasad et al* v. *Phool Singh et al,* 10 C. W. R. 106. Compare the cases of *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh,* 10 M. I. A. 454, and *Dharmáji Vâman et al* v. *Gurrâv Shrinivás et al,* 10 Bom. H. C. R. 311; *Taikom Devji* v. *Aba,* Beng. H. C. P. J. 1878, p. 126. The minor is bound by a compromise made in good faith, *Baboo Lekraj* v. *Baboo Mahtab Chand,* 14 M. I. A. 393.

When an administrator has not been appointed under Act XX. of 1864 a guardian *ad litem* of a minor may be appointed under Section 443 of the Code of Civil Procedure, Act XIV. of 1882, *Jadow Mulji* v. *Chhagan Raichand,* I. L. R. 5 Bom 306. The office of administrator or of guardian *ad litem* cannot be imposed on a person unwilling to accept it, *Bábáji bin Kusáji* v. *Maruti,* 11 Bom. H. C. R. 182 S. C., I. L. R. 5 Bom. 310. An officer of the Court may be appointed guardian, and being appointed remains subject to the jurisdiction, *see* Act XV. of 1880, Sec. 3, cl. (b).

The Minors' Act for the Bombay Presidency is Act XX. of 1864. But this, it has been held, does not enable the Civil Court under

ever, that can be deduced from the original authorities appears to be that the interests of the minor shall be duly regarded, and shall, if necessary, be protected by the sovereign power. His position is, in fact, declared to be analogous to that of absentees, and the rules proceed on the assumption that his assent or that of a guardian for him is not essential. (*a*) The minor must not be injured by any unconscientious dealing. Mr. Colebrooke, in an opinion quoted at 2 Str. H. L. 360, says, that "the sovereign or his representative, as *guardian of the minor*, is competent to authorise a partition," and for this opinion he refers to a text of Kâtyâyana, Coleb. Dig., Bk. V. Chap. VIII., T. 453. But this text points to the necessity of protecting the minor's interest, if, contrary to the ethical obligation to remain undivided during the minority, (*b*) a partition should actually be made by the adult coparceners, rather than to any necessity for an assent expressed on behalf of the minor. (*c*) This text, indeed, and

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ordinary circumstances to take charge of an infant's share in undivided property, *Shivji Hasam et al* v. *Datu Marji*, 12 Bom. H. C. R. 281. So under Act XL. of 1858, *Sheo Nundun Singh* v. *Musst. Ghunsam Kooeree*, 21 C. W. R. 144. A different view however seems to have been taken by the Judicial Committee in *Doorga Persad* v. *Baboo Keshav Persad*, I. L. R. 8 Cal. 656. See below, p. 674, note (*e*).

The natural father is not the proper guardian of an adopted infant so long as either of his adoptive parents lives, *Lakshimbai* v. *Shridhar Vasudeo Takle*, I. L. R. 3 Bom. 1. The Bombay Minors' Act, XX. of 1864, is not superseded by the provisions of the Code of Civil Procedure, Act XIV. of 1882, *Murlidhar* v. *Supda*, I. L. R. 3 Bom. 149.

(*a*) Vîramitrodaya, quoted below, Bk. II. Chap. I. Sec. 1, Q. 7; 2 Str. H. L. 341, 348.

(*b*) But only during the minority, as generally "a partition is favourably viewed by the Hindû religion and law;" The Judicial Committee in *Juggut Mohinee Dossee* v. *Musst. Sokheemoney Dossee*, 14 M. I. A. at p. 303.

(*c*) To the guardianship the paternal male kindred have the preference, 2 Str. H. L. 74. Any one may come forward as a next friend for an infant, *ib.* 79. A relative is to be preferred, *ib.* 80.

the one preceding it, with their accompanying commentaries, imply a valid partition by the will of the adults alone. (*a*)

A partition, demanded on behalf of a minor by his guardian or friends, cannot usually be enforced against the will of the adult coparceners. But such a demand may be enforced, when it is necessary to prevent malversation or jeopardy to the minor's interests. (*b*) This opinion has been expressed by Mr. Colebrooke also in the passage quoted above; but it rests on the reason of the law, not on any express texts. In the case of *Govind Ramchandra* v. *Moro Raghunath,* (*b*) reference is made to *Sheo Nundun Singh* v. *Musst Ghunsam Kooer,* (*c*) and to *Shivji Hâsam et al* v. *Datu Mâvji Khojâ,* (*d*) and the rule is repeated that "when the joint property of an undivided family governed by the Mitâksharâ law is enjoyed in its entirety by the whole family, and not in shares by the members, some of whom are adults, one member has not such an interest therein as is capable of being taken charge of, and separately managed, under the provisions of the Minors' Act (XX. of 1864)." (*e*) In the same case the District Judge was directed to report whether

(*a*) *Kandasámi* v. *Doraisámi Ayyar,* I L. R 2 Mad. at p. 323, referring to 2 M. H C. R. and to *Apporier's* case, 11 M. I. A. 75.

(*b*) App. No. I. of 1875 (under Act XX. of 1864), Bom. H. C. P. J. F. for 1875, p. 261; *Sválmiyár Pillai* v. *Chokkalingam Pillai,* 1 Mad. H. C. R. 105; *Alimel Ammál* v. *Arunáchellam Pillai et al,* 3 *ibid.* 69; and *Kámákshi Ammál* v. *Chidambara Reddi et al,* 3 *ibid.* 94; 2 Str. H. L. 310, 362.

(*c*) 21 C. W. R. p 143 C. R.

(*d*) 12 Bom. H. C. R. p. 281 (S. A No. 316 of 1872).

(*e*) *See* also *Bhágirthibái* v. *Sadashiv,* Bom. H. C. P. J. F. 1881, p. 155, and *Samatsang* v. *Shivasangji and Ramasangji,* Bom. H. C. P. J. F. 1882, p. 404. But in *Doorga Parsad* v. *Baboo Keshav Parsad,* I. L. R. 8 Calc. 656, the Judicial Committee say : "It is clear that the manager of an estate, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond as Hur Nandan did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL. of

on inquiry it seemed probable that the minor would benefit by a suit for partition brought against his uncles, against whom no "special instance of malversation," it was said, had been alleged. In *Meghashâm Bhavânrâo* v. *Vithalrâo Bhavânrâo,* (a) it had been said, "No doubt, the claim for partition advanced on behalf of a minor is one that must in every case be closely scrutinized..............Its result must in each instance depend on the view that the Court below takes of the evidence as rendering a partition necessary or not for the protection of the minor's interests." (b) A minor who has been used unfairly in a partition may repudiate it on attaining his majority or within a reasonable

1858............shows that Sheo Nundan Persad, though he was a co-proprietor and manager of the estate, was not the guardian of the infants who, according to the Act, were subject to the jurisdiction of the Civil Courc . ...No certificate was obtained by Sheo Nundan Persad; and although it is stated that he was guardian to the infants he clearly was not the legal guardian, and had no right to defend that suit in their names." Hence it would seem a manager, to enable him to act for his infant co-sharers, must take out a certificate of guardianship, though the Court cannot on an application under the Minors' Act, XX of 1864, remove the adult managing member from the control of the estate and business in which he and all the members of the family are interested. See *Bâbâji Shriniwâs* v. *Sheshgir Bhimaji,* I. L R 6 Bom. 593 The view of the High Courts has been that jurisdiction expressly given to the Civil Courts did not necessarily affect the ordinary relations of a Hindû family, and that before a partition there is no distinct property of the minor of which the manager has charge All possess together, the manager administers. See *Appovier's* case, 11 M. I. A. 75; *Ramchundra Dutt* v. *Chundar Coomar Mundal,* 13 M. I. A. at p. 198. *Girdhari Lal's* case, L. R. 1 I. A. at p. 229 *ad. fin.* As to the representation of minors in suits *see* further Act XV. of 1880, Sec. 3, cl. (b); Act XIV. of 1882, Sec. 440 ss; *Jadow Mulji* v. *Chhagan Raichand,* I. L. R. 5 Bom. 306; *Babaji* v. *Maruti, ib* 310, S. C. 11 Bom. H. C. R. 182.

(a) S. A. No. 148 of 1871, decided on the 14th of September 1871 (Bom. H. C. P. J. F. for 1871).

(b) In England a sale under the Partition Act sought on behalf of an infant will not be allowed unless it is for his benefit, *Rimington* v. *Hartley,* L. R. 14 C. D. 630.

time afterwards. (*a*) Where partition would be detrimental to the shares, the Court, it has been held, can refuse to decree a division. (*b*) But a somewhat different view was taken in *Ram Pershad Narain* v. *The Court of Wards.* (*c*) *See* further upon this point in Bk. II. Chap. III., Sec. 1, Q. 1.

§ 4c. 4. *Absentees.*—The absence of one or more coparceners does not bar partition, (*d*) if it is desired by the coparceners present. (*e*) All that the law requires is that their equitable shares, like those of the minors, be set apart in the division. For the definition of what constitutes absence in a foreign country, enabling the coparceners present to dispense with any expression of assent on the part of the absentee, *see* 1 Str. H. L. 188; Coleb. Dig., Bk. II., Chap. III., T. 26 and 27. The great change of circumstances that has occurred in recent times would make it necessary, for practical purposes, to fall back, in this case as in others, on the reason of the law, the essential part of which here is evidently the supposed impossibility of communicating with the absent co-sharer. The remarks of Sir T. Strange, l. c., as to the periods of twelve and twenty years, appear to

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(*a*) *Kallee Sunkur Saunyal et al* v. *Denendro Nath Saunyal et al*, 23 C. W. R. 68 C. R; *Dharmâji et al* v. *Gurrav Shrinivas et al*, 10 Bom. H. C. R. 311.

(*b*) *Durbaree Sing et al* v. *Saligram et al*, 7 N. W. P. R. 271.

(*c*) 21 C. W. R. 152.

(*d*) Vîramitrodaya, quoted below, Bk. II. Chap. I. Sec. 1, Q. 7. The Smṛiti Chandrikâ, Chap. XIII p 21 ss, says that, when a parcener having absented himself, the other parceners have divided the property in ignorance of his existence, he on his return is entitled to only half a share. Bṛihaspati is cited to this effect, but the passage is really inconsistent with others which follow.

(*e*) As to the presumption of death in the case of a person not heard of, this arises in the case of one who went away at less than forty years old after 20 years, at less than sixty years after 15 years, at any greater age after 12 years. The authorities however vary, *see* 1 Str. H. L. 188, 2 *ib.* 237, 316; Steele, L. C. 34; *Musst. Anundee Koonwur* v. *Khedoo Lal,* 14 M. I. A. 412. For the present law *see* Act 1. of 1872, Sections 107, 108.

refer to the propriety or impropriety of a distribution of the property, without reserving the absentee's share. There is no text which enjoins the postponement of the division for the advantage of an absentee, and his interests are otherwise sufficiently protected. The descendants of an absentee may claim down to the seventh degree. (*a*)

§ 4C. 5. *Wives, Mothers, &c.*—Wives, mothers, grandmothers, sisters, &c., the female members of a united family, entitled to shares on partition, (*b*) are still not invested with any power to demand a partition of the estate. (*c*) This disability rests on the principle that males alone in a united family are regarded as heirs, with rights untransferable to females. The source of the right of females to a share on partition is

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(*a*) 2 Str. H. L. 329; *Moro Vishvanath et al* v. *Ganesh Vithal et al*, 10 Bom H. C. R. 444. As to Limitation, *see* above, p. 633 (*c*), and Sec. 4 D.

It was formerly a rule in most, if not in all parts of India, that a tenant of land paying assessment to the government as proprietor or quasi-proprietor might abandon the land for an indefinite time during which the Government could dispose of it for the benefit of the revenue, but subject always to a resumption of his former rights by the absentee on his return. See *Bhaskarappa* v. *The Collector of North Cánará*, I. L. R. 3 Bom. 525. *Appa* v. *Juggoo*, 1 Morr. 57; above, p 172; and below, Sec. 5 B. As to the disposal of a share of a village during the absence of a sharer by his co-sharers, see *Sirdar Sainey* v. *Piran Singh*, I. L R. 3 All. 458. The partition binds absentees who have been effectively represented, *Sakhárám Bhárgao* v. *Rámchandram Bháskar*, Bom. H. C. P. J. 1881, p. 280.

(*b*) This right arises on a partition whether voluntary or enforced by a creditor or purchaser in execution, *Bilaso* v. *Dinanath*, I. L. R. 3 All. 88.

(*c*) In Bengal a grandmother not a party to a partition suit was allowed to sue the parceners in order to secure her share along with the grandsons and grand-daughters, *Sibbosoondery Dabia* v. *Bussoomutty Dabia*, I. L. R. 7 Calc. 191. Her right to a share is again recognized, *Badri Roy* v. *Bhugwat Narain*, I. L. R. 8 Calc. 649. The position of sisters in the line of heirs is by Nanda Paṇḍita and Bâḷambhaṭṭa fixed as next after that of brothers for reasons (*see* Coleb. Mit. Chap. II. Sec. 4, pl. 1 note; Stokes, H. L. B. 443,) rejected by the Privy Council in *Thakoorain Sahiba* v *Mohun Lall*, 11 M. I. A.

the necessity to secure for them a certain provision, which otherwise might fail. In Bengal it has been ruled(*a*) that the widow of a member of a united family may claim a partition, the concession of which rests in the discretion of the Court. There, however, the widow of an undivided coparcener inherits his share, (*b*) on failure of sons, grandsons, and great-grandsons, though she has only the life enjoyment of the property, except under special circumstances. (*c*) Under the law of the Mitâksharâ she succeeds only to a separated coparcener.

at p. 402, but deriving some support from the use of the word *Santâna* = issue, in Sec 5, pl. 4 (Stokes, H L B 446), compared with Sec. 2, pl. 6, (*ibid.* 441) and Sec 11, pl. 9 (*ibid.* 460). The right of sisters to an equal share seems to be recognized in the passage of Manu IX. 212, quoted in the Mitâksharâ, Chap. II. Sec. 9, para. 12 (Stokes, H L. B 454). *See* also Nârada, Pt. II. Chap. XIII. sl. 13. But Manu IX. 118, is different. *See* above, pp 464, 468.

The mother of two out of four sons of one father is entitled on partition to maintenance from all four, *Musst. Muncha* v. *Brijbooken et al*, Bom. Sel. Ca. p 1. But according to Vijñâneśvara, 'It is a mere error to say that the wife takes nothing but a subsistence from the wealth of her husband (who died leaving no issue), and though she cannot demand a partition, she is, when a partition is made by the sons, entitled as their father's widow to a share equal to one of theirs, as his unmarried daughter to one-fourth of a share, Mit. Chap. I. Sec. 7 (Stokes, H. L. B. 397), Chap. II. Sec. 1, pl. 31 (Stokes, H. L B. 436). *See* below, RIGHTS AND DUTIES ARISING ON PARTITION; *Lalljeet Singh* v. *Raj Coomar Singh*, 12 B. L. R. 373, 383; *Jo loonath Dey Sircar et al* v. *Brojonath Dey Sircar et al*, *ibid.* 385; *Ramappa Naiken* v. *Sithamal*, I. L R. 2 Mad. 182, 186. In the last case it is pointed out that according to the Smṛiti Chandrikâ the share or portion allotted to a mother is not to be regarded strictly as dâya, seeing she had not an ownership in it before. *See* above, p. 238.

In England the Court in dealing with a suit for partition will regard the equitable rights of all persons interested in the estate, *Rowlands* v. *Evans*, 30 Bea. 302; *Davis* v. *Turvey*, 32 *ibid.* 554

(*a*) *Soudaminey Dossee* v. *Jogesh Chunder Dutt et al*, I. L. R. 2 Calc. 262.

(*b*) Dâya Bhâga, Chap. XI. Sec. 1, pl. 19, 44, 56; Stokes, H. L. B. 308, 315, 320.

(*c*) *Ibid.* pl. 62; Stokes, H. L. B. 321.

Even in Bengal (*a*) it seems to have been admitted that there were no reported decisions in favour of the widow's right, though it had apparently been recognised in numerous unreported cases. What is said in the same judgment as a reason for decreeing partition, "Otherwise she would be unable during her life to improve the heritage of her children," these children being daughters, implies the succession of the daughters, who also, according to the Mitâksharâ law, would be excluded in a united family. Their succession in Bengal would rest on their being, in the event of their survival, the next heirs, at the death of their mother, to her husband, their father.

§ 4c. 6. *Disqualifications for demanding a separation.*—Disqualifications to inherit operate equally to exclude from a share on partition, and consequently, from the right to demand a separation. The maintenance (*b*) of the excluded members must be provided for. (*c*)

According to Strange, Man. H. L. Sec. 319, a person who has fraudulently concealed a portion of the family property, loses, on discovery of such fraud, his right to a share. Sir T. Strange also, in H. L. Vol. 1, p. 232, seems to be of opinion, that the Mitâksharâ, Chap. I. Sec. 2, paras. 4, 5, and 12, (*d*) agrees with this rule, which is certainly laid down by Manu, IX. 213. But with regard to the Mitâksharâ, it would seem that the paras. 4—12 do not refer to the loss of the right to a share in case of fraud practised by a co-sharer, but to the criminality of the act only. The author first states the positive rules regarding the treatment of fraudulently concealed and recovered property in paras. 1—3, and then he goes on to combat the opinion held by some Hindû lawyers, that such a concealment of property

(*a*) *Pokhnarain et al* v. *Musst. Seesphool*, 3 C. S. D. A. R. 114.

(*b*) *See* Book I., Introduction, pp. 153, 248, and Bk. I. pp. 576, 578.

(*c*) *See* below, 'LIABILITIES.'

(*d*) Stokes, H. L. B. 377, 380.

by a coparcener is not criminal. He is forced to do this, because the text of Yâjñavalkya does not touch on the point, and, for the same reason, he is also forced to base his arguments on the verse of Manu (para. 5), though the doctrine contained in the latter is partly at variance with his own. The argument of the Mitâksharâ has been understood in this manner by Mitramiśra also, who, after repeating the substance of Mitâksharâ, l. c. paras. 1—12, adds :—(*a*)

"But the co-sharers ought not to inform the king, (if fraud has been committed by one of them). But even if an information has been laid, he (the king) ought to cause it to be restored by kind exhortations and the like. For Kâtyâyana gives a rule, the manifest object of which is to enjoin that kindness only ought to be used, saying:—'He (the king) shall never use force to cause the restoration of property taken away by a relation.'"

Hence it appears, that according to the authorities prevailing in the Bombay Presidency, a co-sharer, practising fraud, does not lose his right to a share. The same has been held also by the Mad. S. A. in *C. Lutchmeedavee* v. *Narasimmah,* (*b*) and is recognized as law by the Smṛiti Chandrikâ, Chap. XIV., para. 4 ss, and by Jagannâtha in Colebrooke, Dig. Bk. V., Commentary on T. 376, and on T. 378 *ad fin.* (*c*) Compensation may be taken in a partition for flagrant malversation. (*d*)

§ 4D. *Will to effect a separation.*—The will of the united coparceners to effect a separation may be

1. *Stated explicitly* ; 2. *Or implied.*

1. As to *express will,* it may be evidenced by documents, (*e*) or by declarations before witnesses. (*f*) In some of the older

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(*a*) Vîramitrodaya, f. 220, p. 2, l 4, Transl, p. 247.

(*b*) Reports for 1858, p. 118.

(*c*) The Sarasvati Vilâsa, Sec. 784, is to the same effect. *See* the corrections at the end of the translation of that work.

(*d*) *See* below, Sec. 7; Steele, L. C. 212.

(*e*) Borr. Col. Lith. 39, 83, 100; Steele, L. C. 220, 221.

(*f*) A partition deed, as it requires registration, is inadmissible in evidence unregistered. Unregistered partition may however be proved by other evidence, *Govindaya* v. *Kodsur Venkapa Hegde,* Bom.

cases, it was held that the execution of a deed by the coparceners and a distribution *in specie* were not merely evidence of a partition, but were essential to make it valid (*a*) But this doctrine has, for some time, been abandoned, and it is now recognised, that all which would be evidence of an assent or expression of will in other cases would be equally so in a case of partition, (*b*) and that the expression

H. C. P J. F for 1880, p. 210; *Kachubhai bin Gulabchand* v. *Krishnabai*, I. L. R. 2 Bom. 635. *See* Act III. of 1877. Secs, 17 and 50, and the cases *Burjorji* v *Muncherji*, I. L. R. 5 Bom. 143; *Rámásámi* v. *Rámásámi*, I L. R. 5 Mad 115.

A family arrangement with respect to the estate must be given effect to when proved, *Mantappa* v. *Buswuntrao*, 14 M. I. A 24.

(*a*) A farikhat or deed of mutual release has in several replies of the Śâstris, as those below, Bk II. Chap IV. been thought essential to the completeness of a partition. See *Oomedchund* v. *Gungadhar*, 3 Morr. 108. It was required by the custom of many castes, *see* Steele, L. C pp 213, 214 Similar answers were given in some instances to Borradaile's questions. Generally however it was deemed only one of the means of proof important on account of its formality, *see* Steele, L C 56, 211, and could be replaced by separate residence and enjoyment of shares, *ib.* 215. (Art LXII)

In Madras the mere execution of releases seems to have been thought insufficient without a corresponding severance of actual possession, see *Nagappa* v *Mudunde*, M. S. D. A Dec. for 1853, p. 125; *Kuppammaul* v. *Panchanadaiyane*, M S. D A. Dec. for 1859, p 263 But when the intention is clear neither the other cases cited nor the original texts exact a physical division for a severance of interests. A father's deed of partition was held inoperative as not having been acted on, but it may have been thought that without action a unilateral expression of will was incomplete, *Bhowanuychurn* v. *Heirs of Ramkanut Binshoojea*, 2 C S. D A. R 202. On the other hand a quiescent enjoyment of a particular portion of the once united estate for 19 years was held to imply assent to a partition assigning that portion to the holder of it, *Linga Mulloo Pitchama* v. *Linga Mulloo Gonappah*, M. S. D. A Dec. for 1859, p. 84; and generally a partition in fact is as binding as one by express agreement, *Doe dem Gocalchandar Mitter* v. *Tarrachurn Mitter*, 1 Fult. 132; *i. e.* it may be proved by oral testimony and the conduct of the parties implying separation.

(*b*) *Rungama* v. *Atchama et al*, 4 M. I. A. at p. 68; *Mantena Rayaparaj* v. *Chekuri Venkataraj*, 1 M. H. C. R. 100; *Appovier* v. *Rama Subha*

of will, whether immediate or implied, is the sole criterion of division. This has been carried so far, that, where a partition had been planned and agreed to by coparceners, but not actually effected, the widow of one of the coparceners, who died in the mean time, was allowed to recover the

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Aiyan et al, 11 M. I A 75 Partition, not by metes and bounds, may yet be effectual. So *R. S. Venkata Gopala Narasimha Row* v. *R. S. Lakshama Venkama Row*, 13 M. I A at p. 139. *See* also Mit. Chap. I. Sec. 9, para. 1 (Stokes, II L. B 404); May. Chap. IV. Sec. 3, para 2, quoted in a corrected translation under Bk. II Chap III. Sec. 3, Q. 5. In the case of *R S. Lakshma Venkama Row* v *R. S. Venkata Gopala Narasimha Row*, 3 M. H. C R 40, and in *Timama Kom Timapa* v. *Amchimani Parmaya*, S A. No 452 of 1874, Bom H C P. J. F for 1875, p. 257, an agreement to be separate was held to constitute a separation. Indeed "the question, in every particular case, must be one of intention, whether the intention of the parties, to be inferred from the instruments they have executed and the acts they have done, was to effect such a division"; *Doorga Pershad et al* v. *Musst. Kundun Koowar*, 21 W. R 214; S C. 13 B L. R 235. *Rewun Persad* v. *Musst. Radha Beeby*, 4 M I. A. 137, recognised a partition by mere agreement as good, though made during subsistence of a life-estate. In the case of *Roopchund* v. *Phoolchund et al*, at 2 Borr 670, the Zilla Judge found that there had been no writing executed, but "that the brothers perfectly understood that certain parts were the share of each." The law officer and the Sudder Court held this sufficient to constitute a partition. In *Musst. Bannoo* v. *Kasheeram*, I. L. R. 3 Cal. 315, the Judicial Committee drew an inference in favour of partition from a petition by a member of a family asking that his name might be entered as owner of a moiety of land purchased by his father and his uncle out of joint hereditary funds.

Where, though there has not been an actual distribution *in specie*, the shares have been ascertained and an agreement made to hold in severalty, the former co-sharer is of course unfettered as to the disposal of his own portion, *Hurdwar Singh et al* v. *Luchmun Singh et al*, 4 Agra H. C. R. 42.

But a mere definition of a parcener's interest, in terms of a fraction of the whole, does not, it has been said, itself constitute a legal separation, *Musst. Phooljhuree Kooer* v. *Ram Pershun Singh et al*, 17 W. R. 102, C. R. So also *Ambika Dat* v. *Sukhmani Kuar et al*, I. L. R. 1 All. 437, referred to below under Sec. 4 D 2 *d*. Comp. the cases below, p. 684.

share allotted to her deceased husband. (*a*) But there must be an actual severance of interests. An inchoate partition does not alter the rights of the co-sharers. (*b*) In *Kadapa et al* v. *Adrashapa,* (*c*) of two co-sharers suing a third for partition, one died; the remaining plaintiff insisted on his right to two-thirds as united with the deceased and virtually separated from the defendant by the institution of the suit, but the Court awarded him only a moiety of the joint estate. (*d*)

In a suit not in terms for a partition, but seeking a distinct share, a decree awarding a separate interest destroys the joint estate according to the doctrine of *Appoviêr* v.

In *Devapa Mahabala* v. *Ganapaya Annaya et al*, S. A. No. 125 of 1877, Bom. H. C. P. J. F. for 1877, p 194, an oral agreement for partition having been made, one of the dividing coparceners, who subsequently received no part of the rents for more than 12 years, was then held barred, notwithstanding Art. 127 of Sch II. of Act IX. of 1871, as the property from the time of the agreement ceased to be joint.

(*a*) *Ram Joshi* v *Lakshmibai,* 1 Bom H. C. R. 189 : *Appovier* v. *Rama Subba Aiyan et al,* 8 C. W. R. 1. P. C , S. C., 11 M I. A. 95. But *see* also *Sheo Dyal Tewaree* v. *Judoonath Teware et al,* 9 C. W. R. 62 C. R. as to (1) definition, (2) distinct enjoyment; and *Timma Reddy* v. *Achamma,* 2 Mad H. C. 325 ; *Bai Suraj* v *Desai Harlochandas,* B. H. C. P. J. 1881, p. 123. Tenants to three brothers, after a division amongst their landlords paid one of them his share of the rent, but on his death paid it to the surviving brother. The widow of the deceased recovered as heir to her husband in a suit for this share of the rent against the tenants, *Rakhmabai* v. *Bayaje,* S. A. 172 of 1874, Bom. H. C. P J. 1874, p 289.

(*b*) *Prawnkissen Mitter* v. *Shreemutty Ramsoondry Dossee,* 1 Fult. 110.

(*c*) R A. No 30 of 1874, Bom. H C. P. J. F. for 1875, p. 182.

(*d*) The same principle, as to an adjustment of shares in ancestral property, caused by the death of a coparcener before actual partition was adopted in *Duljeet Sing* v. *Sheomunook Sing,* 1 Beng. S. D. A. R. 59, wherein the eldest of three undivided brothers having died leaving behind him a son, and the second without issue, the son of the eldest brother and the surviving brother were awarded each half a share in the property. In *Gungoo Mull* v. *Bunseedhur,* 1 N. W. P. R. for 1869, p. 79, a coparcener was held entitled, during his father's lifetime, to bring a suit to assert his right in the share which the father inherited from his deceased brother. *See* also Sec. 5 A, 1 *a*, below.

Rama Subha Aiyan; (a) In *Babaji Pareshram* v. *Ramchandra Anunta*, (b) it was held that a decree declaring mortgagors divided, not carried out pending appeal by mortgagee, during which pendency one mortgagor died, had not effected a partition. This decision, resting on *Prankissen's* case, must be compared now with that of the Privy Council in *Chidambaram Chettiar* v. *Gouri Nachiar*. (c) There had in that case been an adjudication that the plaintiff was entitled to a moiety of the joint estate, but it did not appear that a decree had been drawn up. Still their Lordships held that the judgment was "equivalent to a declaratory decree declaring that there was to be a partition of the estate into moieties and making the brothers separate in estate from that date," so as to bring the case within the principle of *Apporier* v. *Rama Subha Aiyana*. (d) In the same case however, between the same parties, a decree for partition appealed against is suspended as to its definitive operation on the relative rights disposed of by it, and is subject to the decree in appeal, which has regard to the state of facts existing at its own date. (e)

An agreement to divide certain lands still to be recovered was held, in *Ramabai* v. *Jogan Soorybhan et al*, (f) not to constitute a severance of interest. Until recovered, the property would, it was ruled, continue joint estate. So property under mortgage may, when redeemed, be open to partition. (g)

(a) 11 M I. A 75; *Joy Narain Giri* v. *Girish Chandru Myti*, L. R. 5 I. A. 228; see *infra*, Bk. II. Chap. III. Sec. 3, Q. 7.

(b) P. J. 1879, p 535.

(c) L. R 6 I. A. 177

(d) Under the English Law it was held that a decree for sale and division of proceeds in a partition suit operated as a conversion of the estate even before the sale, *Arnold* v *Dixon*, L. R. 19 Eq. 113.

(e) *Sakhárám Mahádev Dange* v. *Hari Krishna Dange*, I. L. R. 6 Bom. 113, distinguishing *Joy Narain Giri* v. *Girish Chunder Myti*, I. L. R. 4 Calc. 434.

(f) S. A. No. 260 of 1871, Bom. H. C. P. J. F. for 1873, No. 35.

(g) *Balkrishna* v. *Harishankar*, 8 Bom. H. C. R. 64 A. C. J.

By some of the Hindû lawyers a separation such as to give one or more members their several shares is regarded as necessarily involving a general partition. (*a*) Those who have not separated are on this theory looked on as reunited, *see* Coleb., Dig. Bk. V. T. 433 *sub. fin.*, and the Mit. Chap. I. Sec. 6, paras. 1, 7, where it is assumed that in a partition under Mit. Chap. I. Sec. 2, para. 1, all the sons have become separated though some may have reunited with the father ; *see* also Manu, IX., 212. Jagannâtha does not adopt this view, and it involves perhaps a certain confusion of thought as pointed out in the case above quoted, (*b*) but it rests also, probably, to some extent on the general necessity, under the Hindû law, of seisin or possession to validate any change of title, (*c*) no

(*a*) *Sham Narain et al* v *The Court of Wards*, 20 C. W R 201 C. R Such a general partition might be supposed to be intended in *Gopal Anant* v. *Venkaji Narayan*, Bom. H. C. P. J. F. for 1878, p. 13, though the plaintiff was entitled to but one-fiftieth of the property. But the decree is, in its operative part, confined to the parties; and the ascertainment and declaration of all the shares which the High Court directed the Subordinate Judge to make, would not of itself constitute a partition where there was no mind amongst the parceners to divide. See *Gopal Anant Kamut* v. *Narayan Anant*, Bom. H. C. P. J. F for 1878, p. 13, 230, and same case, *ibid*. 1879, p. 370; *Samatsang* v. *Shivasangji*, Bom. H. C. P. J. 1882, p 404; *Chidambaram Chettiar* v. *Gouri Nachiar*, I. L. R. 2 Mad. 83 Above, p. 682.

(*b*) *Appovier* v. *Rama Subba Aiyan et al*, 11 M. I. A. 68.

(*c*) *Tarachand* v *Lakshman*, I. L. R. 1 Bom. at p. 93; *Lallubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299 But registration serving as notice may complete an ownership without physical possession, *ibid*. 332; *Icharam Dayaram* v. *Raiji Jaga*, 11 Bom. H. C. R. 41, and prevents rights subsequently arising which would be inconsistent with the one thus secured. *Hasha* v. *Ragho*, I. L R. 6 Bom. 165. In *Special Appeal* 668 *of* 1881, followed in a recent case, *Pemráj Bhaváni-ram* v. *Naráyam Shivram*, I L. R. 6 Bom. 215, it was ruled that in the case of a gift, even to a son, actual transfer of possession was requisite to complete the title of the donee. Registration it was held would not in such a case supply the want of possession. In the case at 2 Str. H. L. 7, Colebrooke says that " no doubt a gift may be made to an absent

ownership of any definite share being predicable of a particular coparcener while united. (*a*) The Vivâda Chintâmani, p. 79, says that a division of the property actually made into lots, but not completed by distribution, raises no separate interests.

When a parcener has been excluded from joint family property for twelve years a suit on his part to enforce his right to a share is barred by limitation. (*b*) His right is extinguished. His ground for a claim to partition is by this

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person," but there a delivery may have been contemplated to a person on account of the donee. Under Sec. 25 of the Indian Contract Act, IX. of 1872, a gift to a son duly registered would apparently bind the father and his representatives without delivery of possession. Sec. 123 of the Transfer of Property Act, IV. of 1882, provides for the completion of a gift either by registration of the instrument, or in the case of moveable property by delivery, but this Act is not yet (A. D 1883) in force in Bombay, *see* above, p. 179. In Madras possession is not necessary to complete a sale, *Vasudeva Bhattu* v *Narasamma*, I. L. R. 5 Mad. 6. The instrument was registered after the executant's death by his widow. In *Bai Amrit's* case, I. L. R. 2 Bom 29J, registration is pronounced generally equivalent to possession. *See* the Transfer of Property Act, IV. of 1882, Sec. 54

Possession obtained during the pendency of a suit gives the acquirer of it no *locus standi* to resist the successful plaintiffs when the new possessor has omitted to get himself made a defendant, *S. B. Shringarpure* v. *S. B. Pethe*, I. L. R 2 Bom 662 See *Radhabai kom Shrikrishna* v. *Shamrao Vinayak*, Bom. H. C. P. J. F. for 1881, p. 218.

A change of possession is not necessary to validate the transfer of a right not exercised by possession, such as the reversion of a landlord, or an equity of redemption in the case of a usufructuary mortgage. See *Kachu* v. *Kachoba* above, and *Lallubhai Surchand* v. *Bai Amrit*, I. L R. 2 Bom. at pp. 325, 326 ; *Shripati* v. *Balvant*, Bom. H. C. P. J. 1881, p. 221. But one who has gained possession before the suit is a necessary party.

(*a*) Compare also above, p. 603, 633, and *see* the case of *Puree Jan Katoom et al* v. *Bykunt Chunder et al*, 9 C. W. R. 483, C. R.

(*b*) Act XV. of 1877, Sch. II. Art 127, and Sec. 28. The same limitation applies to a claim to an hereditary office (Art. 124), a periodical benefit (Art. 131), and possession due on the death of a female (Art. 141).

withdrawn, a partition having been practically effected by the law in his favour as well as against him, since exclusion implies mutual exclusion (*a*).

§ 4 D. 2. As to *implied will*, the Hindû authors are prolix in their discussions of the circumstances, from which separation or union may be inferred. (*b*) According to them the 'signs' of separation are :—

a. The possession of separate shares.

b. Living and dining apart.

(*a*) *See* above, p. 633. The adverse possession by which those who enjoy it profit through limitation must be a possession incompatible with a recognition of the alleged concurrent right. Thus non-participation in the general profits of an estate is not an exclusion while the parcener holds certain lands in that character, *Pertabnarain* v. *Opindurnarain*, 1 C S. D A R. 225. Conversely an enjoyment in the form of commensality bars limitation, *Rajoneekant Mitter* v. *Premchand Bose*, Marsh. R. 241. Mere non-participation in the profits was held not to constitute a cause of action from which limitation could be counted in *Shebo Sundari Dasi* v. *Kali Churan Rav* C. W. R for 1864, p. 296. So *Bonud Naik* v *Doorga Churn Naik*, 1 C W. R 74. In *Chaghanlal* v. *Bapubhai*, Bom. H. C. P. J 1880, p. 123, it was held that where a decree for a share of a vatan had been made in favour of a plaintiff he was not barred by the lapse of more than 12 years from recovering arrears due on account of such share. This may possibly be open to question, as the bar of limitation shuts out any consideration of the validity of the title thus barred, and the possession previously adverse, and as such made a cause of action, did not become less adverse through a decree against the possessor. Where on the other hand possession has begun under a title or in the exercise of a right implying the existence of another superior to itself, or concurrent with itself, the mere continuance of such possession does not constitute an exclusion. There must be some act contradictory of the right known to the person affected to impose on him the necessity of taking any step for the assertion of the right. *See* Ind. Evidence Act, I. of 1872, Secs. 114, 110; Lim. Act, XV. of 1877, Sch. II. Art. 127; *Dadoba* v. *Krishna*, I. L. R. 7 Bom. 34; and comp. Burge, Com. Vol. III. p. 13, 14; Domat. Ci. L. Vol. I. 886; *Board* v. *Board*, L. R. 9 Q. B. 48; *Williams* v. *Pott*, L. R. 12 E. Ca. 149.

(*b*) Mit. Chap. II. Sec. 12; Stokes, H. L. B. 466-7; May. Chap. IV. Sec. 7, paras. 27—35; Stokes, H. L. B. 80—82.

c. Commission of acts incompatible with a state of union, such as trading with or lending money to each other, or separately to third parties, mutual gifts or suretyship. They add also giving evidence for each other, but from this in the present day no inference can be deduced. (*a*)

The burden lies on a member, asserting that his acquisition of property has been made subsequently to a partition, of proving that it was not acquired as part of the joint estate. (*b*). In other words if he sets up a partition at a particular time or prior to particular transactions he must prove as he has averred it.

(*a*) " A writing attested by them (kinsmen) is the best proof; on failure of that, one attested by other witnesses; failing that, mere oral testimony; and lastly, evidence of separate acts Such is the order of proof." Jagannâtha, in Coleb. Dig Bk. V. T. 381. Nârada, Pt. II. Chap XIII. para. 36, cited by Vyav. May. says, (1) evidence of kinsmen, (2) documentary proof, (3) separate transaction of affairs. Vyav. May Chap IV Sec 7, p. 27; Stokes, H. L. B. 80 Nîlakaṇṭha adds separate possession of house and field, and so Vijnânesvara, Mit. Chap. II Sec. 12, Stokes, H L B. 466-7.

Under the English law a severance of a joint tenancy is caused by a course of dealing which implies such severance amongst the parties to such dealing. See *Williams* v *Hensman*, 1 J. & H. 546, and a similar principle seems to be involved in *Ujamsi* v. *Bai Suraj*, Bom. H. C. P. J. 1881, p. 66 In *Ramchundur Dutt* v. *Chundar Coomar Mundul*, 13 M. I. A. at p. 198, it seems to have been thought that a mere alienation of a share to a stranger would bring the the relation of the parcener as a member of a joint family to an end, and make the alienee a co-owner with the other parceners. A sale by a joint tenant in England severs the joint-tenancy, but in India it is either ineffectual under the strict Hindû law or it gives to the purchaser a right only to have the transaction made good so far as is equitable by means of a partition. *See* above, pp. 602 ss.

(*b*) *Musst. Anundee Koonwur* v *Khedoo Lal*, 14 M. I. A 412; *see* also *Rewan Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137; *Moti Mulji* v. *Jamnadas Mulji et al*, S. A. No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123. As there may be separate property without a division of the united family, the question is perhaps still more frequent of whether particular property of an undivided co-parcener is to rank as joint or as separate property. For such cases *see* below, Sec. 5 A.

d. The separate performance of religious ceremonies, *i. e.* of the daily Vaiśvadeva, or food-oblation in the fire preceding the morning-meal; of the Naivedya, or food-oblation placed before the tutelary deity; of the two daily morning and evening burnt-offerings; of the Śrâddhas (*a*) or funeral oblations to the parents' manes, &c. (*b*)

None of these signs of separation can be regarded as by itself conclusive. Living and dining apart, on which the Śâstris appear to set great value, may justify an inference that separation has taken place, but it is not conclusive of the fact, since many coparceners live and dine apart, sometimes in the same village or house, for the sake of convenience. Other reasons too may necessitate the same arrangement, *e.g.* Government service taken by one or more of the coparceners. The Privy Council indeed have said that cesser of commensality is strong, but not conclusive, evidence of partition. (*c*)

The separate performance of the Vaiśvadeva sacrifice, of Śrâddhas and other religious rites is still less conclusive. In Book II. Chap. IV., Q. 4, *infra*, a passage of Bhaṭṭojídíkshita is quoted, according to which coparceners, living apart, may or may not perform the Vaiśvadeva each for himself, and, in the present condition of Hindû society, the performance of all religious rites has become so lax and irregular as to

(*a*) On the Śrâddhas *see* H. H. Wilson, Works, VIII. 113; Coleb. Essays, vol. II. p. 180 ff. At p. 196 reference is made to the enumeration in the Nirṇaya Sindhu. On the Vaiśvadeva, *ibid* p. 203, 207, and Journ. Bo B. R. A Soc. vol. XV. p. 253. Comp. Mommsen, Hist. of Rome, vol. I p. 173, 174, for the Roman domestic sacrifices. *See* also the Tagore Lectures for 1880, Lec. I.

(*b*) *See* Colebrooke and Ellis at 2 Str. H. L. 392.

(*c*) *Anundee Koonwar et al* v. *Khedoo Lal*, 18 C. W. R. 69 C. R., S. C. 14 M. I. A. 412; and as to separate residence, see *Vinayck Lakshman et al* v. *Chimnabai*, R. A. No. 44 of 1876, Bom. H. C. P. J. F. for 1877, p. 170; *Sheshapa* v. *Igapa bin Surapa*, R. A. No. 12 of 1873, *ibid* for 1875, p. 37.

afford no safe ground for inference. (a) Separate contracts, entered into by coparceners mutually or with third parties constitute, according to 1 Macn. H. L. 54 and 1 Str. H. L. p. 225—227, the most certain evidence of a partition. But even these raise no conclusive presumption *per se*, since it is consistent with a condition of union, that a coparcener should, concurrently, possess separate property (avibhâjya), which implies separate transactions. (b) As no one of the marks of partition above enumerated can be considered conclusive, so neither can it be said that any particular assemblage of these alone will prove partition. It is in every case a question of fact to be determined like other questions of fact, upon the whole of the evidence adduced, circumstantial evidence being sufficient, as distinctly admitted indeed by Bṛihaspati. (c) This principle has been followed by the Privy Council in *Rewan Prasad* v. *Radha Bibi* and in other cases, and, in effect, supersedes the artificial rules of the Hindû Law (d)—rules, as Jagannâtha points out (Coleb.

(a) "When brothers living apart separately perform the daily ceremonies of *Naivedya* and *Vaiśvadeva* and have separate house and other property, they may be considered separated." Q 685, Poona, 17th August 1849, MS. Although three brothers may have had undivided family property some *primâ facie* improbability of their continuing joint arises from their respectively carrying on the profession of pleaders in three different places, *Bhagirthibai* v. *Sadashivrav*, Bom. H. C. P. J. 1880, p. 126.

(b) Separate trading and separate acquisition are not proof of partition, *Vedavalli* v. *Narayana*, I. L. R 2 Mad. 19.

(c) *See* Dâyabhâga, Chap XIV. p. 8; Stokes, H. L. B. 362; *see* also Borr. Col. Lith. 264 ; Morley's Dig. Partition, pp. 484, 485; 2 Macn. H. L. 152; *Ravee Bhudr* v. *Roopshunker*, 2 Borr. 713 ; *Sheshapa et al* v. *Igapa bin Surapa*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1875, p. 37.

(d) In *Lalla Mohabeer Pershad et al* v. *Musst. Kundun Koowar*, 8 C. W. R., 116 C. R. there is a case of a coparcenary converted by agreement into a simple mercantile partnership, in a judgment, affirmed by the Privy Council, *Doorga Pershad et al* v. *Musst. Kundun Koowar*, 21 C. W. R. 214, S. C., L. R. 1 I. A. 55. *See* Dâyabhâga,

Dig., Bk. V., T. 389, Comm. *ad fin.*), drawn from texts "founded on reason, not revelation, leaving room for the admission of presumptive proof." (*a*)

Chap. XI. Sec. 1, p. 30; Stokes, H. L. B. 311; Str. H. L. 395. Separation for fifty years was pronounced proof of a partition. *See* below, page 692.

(*a*) In his essay "On the Deficiencies, &c.," the late Prof. Goldstücker objected to what he called "the summary rejection as legal proof of all and each of the signs of separation." If by "legal proof" the Professor meant evidence forming a fit ground for inference, he went much beyond the statement he was criticising. If by "legal proof" he meant "conclusive proof," then the criticism is unfair only in substituting "the rejection of all and each," for a denial that any particular group of signs can, apart from its logically evidential weight, be conclusive. Jagannâtha, in Coleb. Dig., after a discussion of the various signs of partition, which shows that they have severally a probative but not a conclusive force, winds up by saying "The texts are founded on reason, and the several arguments on each being equal, presumptive proof may be admitted on failure of written and oral evidence." Bk. V. Chap. VI. *ad fin.* In the same sense Mitramiśra says of the several indications enumerated by Nârada, "It is not to be supposed that the inference arises only when all these jointly subsist, the intention is that the inference arises from all or some of them, the text being based on reason," Vîram. 262. On the difference between actual proof and a mere "*Adyuharaṇa*" (*i. e. Ud-âharaṇa*) or indication, *see* the remark of Ellis, 2 Str. H. L. 392, who, at p. 398, says that the weight to be given to such tokens is "one of the many points reserved by the Hindû Law for equitable judgment." In *Ambika Dat* v. *Sukhmani Kuar et al*, I. L. R. 1 All. 437, a definition of shares, separate entries of the parceners' names as owners of those shares in the Government records, and the substitution on their deaths of their respective sons' names, were held insufficient, in the absence of evidence of separate enjoyment of profits, to prove partition. This is perhaps an extreme case, reference being made to *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. at p. 89, and to the separate contracts with the Government constituted by the separate entries of the parceners' names for several shares; but on the whole evidence the Court thought the intention to divide must have been abandoned. See *R. S. Venkata Gopala Narasimha* v. *R. S. Lakshmi Venkama Roy*, 3 Beng. L. R. 41 P. C.; *Baboo Doorga Pershad* v. *Musst. Kundun Koowar*, L. R. 1 I. A. at p. 70; *Pragdás* v. *Kishen*, I. L. R. 1 All. 503.

On the other hand, from the separate possession, by individual members of a family, of portions of the property once held in common, a presumption, though not an indisputable presumption, of partition arises.(*a*) This presumption is strengthened by length of time, and Nârada, Pt. II. Chap. XIII. sl. 41, (*b*) states, that a continuous separation for ten years is a proof of partition. This verse is quoted in the Smṛiti Chandrikâ, Chap. XVI. as from Kâtyâyana; and in the Sarasvati Vilâsa, Secs. 34, 811, as from the same source. In the latter work there is a long discussion of the means of proof of partition ending with a statement that where there is positive direct evidence, that is to be relied on; in its absence efficient causes, such as transactions which involve separateness of interests inconsistent with a continued union; and finally what are called memorial causes, as the separate performance of religious ceremonies, which, continued for a period of ten years, become effective in producing separation. This seems but another way of saying that a

(*a*) *See* above, p. 681, 690.

(*b*) A various reading of Nârada, Part II. Chap. XIII. sl. 36, gives "*bhoga lekhyena*"="by enjoyment or record," instead of "*bhága lekhyena*"="record of division." *See* Coleb. Mit Chap. II. Sec. 12, p. 3 note, Stokes H. L. B. 467, and the case of *Bharangowda* v. *Sivangowda et al*, S. A. No. 356 of 1873, Bom H C. P J F. for 1874, p. 184. Ten years is the period prescribed by Manu (Chap. VIII. 148) as that by which ownership is lost through adverse possession, but his rule does not give a prescriptive title to encroachments on land, or to public property, that of an infant, a pledge or a deposit (VIII. 149). Gautama also (Chap. XII. para. 37) gives ten years as the period of prescription except in favour of Śrotriyas, ascetics and Government officers; but he excludes land as well as females and animals from the rule. That the right to land was widely regarded as imprescriptible in the customary law has been shown above, p. 172 ; *see* too below, Sec. 5 B. Why female slaves should have been excepted from the general rule is less easy to explain, perhaps because of the more positive identification possible in their cases than in those of ordinary chattels. Yâjñavalkya, II. 24, assigns twenty years for land and ten years for moveables. See *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bom. at p. 307 ss.

presumption, weak at first, grows in strength with a repetition or continuance of the facts that give rise to it, until it becomes conclusive.

The fact that certain portions are admittedly held in severalty does not, it has been said, rebut the presumption of non-partition as to the rest of the family property, (a) and separate enjoyment merely as a matter of arrangement for the convenience of the family will not constitute partition.(b) This is the normal condition of a Khoti estate in Ratnagiri, and will not prove a partition as intended to be permanent, as held in *Bâbâshet* v. *Jirshet*. (c) This last decision must, so far as it extends, qualify the rulings in *Musst. Mohroo Kooeree* v. *Musst. Gunsoo Kooeree et al*, (d) *Shib Narain Bose* v. *Ram Nidhee Bose et al*, (e) and the old case of *Ruvee Bhudr* v. *Roopshunkur Shunkurjee et al*, (f) in which separate collections, and even a division of the income derived from a village, were held to be sufficient proofs of a partition. Even if, for common convenience, the parties took the profits of an estate in certain defined shares, still it would not be conclusive evidence of a separation. (g) Nor would false statements made by the parties for their common benefit. (h)

(a) *Sreeram Ghose et al* v. *Sreenath Dutt Chowdhry et al*, 7 C. W. R. 451 C. R.

(b) *Musst. Josoda Koonwur* v. *Gowrie Byjonath Sohaesing*, 6 C. W. R. 144 C. R.

(c) 5 Bom H. C. R. 71 A. C. J.

(d) 8 C. W. R. 385 C. R.

(e) 9 *ibid*. 88.

(f) 2 Borr. 713.

(g) *Hariparsad* v. *Bapuji Kirpashankar*, S. A. No. 150 of 1872, Bom. H. C. P. J. F. for 1872, No. 134; *Vinayek Lakshaman et al* v. *Chimnabai*, R. A. No. 44 of 1876, *ibid*. for 1877, p. 170; *Sakho Narayan* v. *Narayan Bhikhaji*, 6 Bom. H. C. R. 238 A. C. J.

(h) *Musst. Phooljhuree Kooer* v. *Ram Pershun Singh et al*, 17 W. R. 102 C. R.

In *Sonatun Bysack* v. *Sreemutty Jugatsoondree Dossee* (*a*) the Privy Council say, "their Lordships are very clearly of opinion that the mere division of income for the convenience probably of the different members of the family did not amount to a division of the family." So as to mortgaged property redeemed by one member and then held by him exclusively for 20 years. (*b*) In a recent case it was held that a decree, which had on an agreement between the co-owners awarded to the one two-fifths and to the other three-fifths of a village, was not to be deemed an adjudication of partition in a subsequent suit between the representatives of the parties. (*c*) If it effected a severance of the rights it would apparently constitute a partition, but not if it merely defined the proportions of the interests. (*d*)

Where there had been a really exclusive enjoyment of any portion of the patrimony, a suit would, it was said, ordinarily be barred by the Limitation Act, XIV. of 1859, Sec. I., para. 13, after the lapse of twelve years, (*e*) and as to the general principle, it would seem that the older Bombay decision was more strictly in accordance than the recent ones with the Hindû Law as viewed by native commentators. A division of the proceeds is a recognized mode of distribu-

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(*a*) 8 M. I. A. at p. 86.

(*b*) *Balu bin Bapurao* v. *Narayen Bhivrav*, P. J. 1874, p. 132.

(*c*) *Samatsang* v. *Shivasangji and Ramsangji*, Bom. H. C. P. J. 1882, p. 404.

(*d*) *Jay Narayan Giri* v. *Girishchundar Myti*, I. L. R. 4 Calc. 434. *See* the cases referred to above, and Sec. 7 A. 1 *b* below. It may be doubted whether this refinement would be admitted by a purely Hindû lawyer taking his stand on the principles stated in *Rama Subayanna's* case.

(*e*) *Umbika Churn Shet* v. *Bhuggobutty Churn Shet et al*, 3 C. W. R. 173 C. R.; *Vidyashankar et al* v. *Ganpatram*, S. A. No. 260 of 1873, Bom. H. C. P. J. F. for 1875, p. 351; *Shidojirav* v. *Naikojirav*, 10 Bom. H. C. R. 228, wherein it was held that the period during which the property was under attachment by Government, and during which neither party was in possession, is excluded from the operation of the Limitation Act (now Act XV. of 1877).

tion of the family property, *see* below, Sec. 7; and in the case of *Somangoudá* v. *Bharmangoudá*, (a) it was held that where a plaintiff admitted having had separate possession for sixteen years of a portion of the ancestral estate, it lay on him to prove that the family had remained undivided.(b) Exclusive

(a) 1 Bom. H. C. R. 43.

(b) The separate possession being *prima facie* an exclusive possession as owner (In. Ev. Act, I. of 1872, Sec. 110 ; *Keval* v. *Vishnu*, Bom. H. C. P. J. 1875, p. 368). It does not appear that the Hindû, like the Roman, lawyers elaborated any very clear theory of possession, distinct from proprietorship, as itself conferring rights. In the Vyavahâra Mayûkha, Chap II. Sec. 2 (Stokes, H. L. B. 31), possession is regarded merely as a means of proof, comparatively valueless without a title otherwise established. A law of prescription, however, is distinctly recognized, (Coleb. Dig Bk. I. T. 113; Bk. V. T. 395, 396,) defined for the Bombay Presidency by Reg. V. of 1827; and in the case of conflicting titles possession gives him who holds it the preference. Coleb. Dig. Bk. I. T. 128 sqq. In the case of *Rajah Pedda Vencatapa* v. *Aroovala Roodrapa Naidoo*, 2 M. I. A. 504, it is laid down that " the title of possession must prevail until a good title is shown to the contrary." This is an adoption of the English law, the doctrine of which on this point, as Sir T. Strange (1 H. L. 38) observes, is substantially the same as that of the Hindû Law. *See* to the same effect *Pemráj* v *Narayan*, I. L. R. 6 Bom. 215.

The Hindu law generally requires in the case of material property a transfer of possession to complete a change of ownership. Yâjñ. II. 27 ; Nârada, Pt. I Chap. IV. paras. 4, 5 : but a right of entry or redemption may as such be transferred by mere contract, see *Bái Suraj* v. *Dalpatram*, I. L R. 6 Bom. 380, referring to *Raja Saheb Prahlad Sen* v. *Baboo Budhusing*, 12 M. I. A. 275, 307 ; *Mathews et al* v. *Girdharlal Fatechand*, 7 Bom. H. C. R. 4 O. C. J. ; *Kachu* v. *Kachoba*, 10 Bom. H. C. R. 491 ; *Vásudev Hari* v. *Tátia Náráyan*, I. L. R. 6 Bom. 387 ; and the cases cited in *Lakshmandas* v. *Dasrat*, I. L. R. 6 Bom. 175. In the last case the effect of non-possession and of registration in many different cases is discussed by Sir M. Westropp, C. J. *See* also *Lalubhai* v. *Bai Amrit*, I. L. R. 2 Bom. 299, 331, 332. In *Sobhagchand* v. *Bhaichand*, I. L. R. 6 Bom. 193, the effect of purchase at a sale in execution of property already equitably charged is considered.

Under the older English law transfer of possession was as necessary as under the Hindû law for a change of the right *in re*; *see* Bl. Com. Bk. II. Chaps. X. XX. Butler's note to Co. Lit. 330 *b*.

possession for 30 years affords conclusive proof of partition

Possession giving a preference to the mortgagee having it over one without it is sufficiently acquired by a *bond fide* attornment of the mortgagor as tenant to the mortgagee, *Anunt Bapu* v. *Arjun Gondu*, P. J. 1880, p. 293. The possession requisite to perfect a title may be acquired notwithstanding an irregularity in taking it, *Lillu* v. *Annaji*, I. L. R. 5 Bom. 387. The mortgagee's possession continued after payment of the mortgage debt does not necessarily become adverse, *Babla* v. *Vishnu Ballal Thakur*, Bom. H. C. P. J. F. of 1880, p. 294 ; Comp. Steele, L C. 72; and on Pledges, pp 251 ss.

As to possessory actions there have been very conflicting decisions. Compare *Khajah Enaetoollah* v. *Kishen Soondur et al*, 8 C. W. R 386 C. R , with *Musst. Tukroonissa Begum et al* v *Musst. Mogul Jan Bebee*, 8 *ibid.* p. 370 ; *Kalee Chunder Sein et al* v. *Adoo Shaikh et al*, 9 C. W. R. 602 C R., and *Kunbi Komapen Kurupu* v. *Changarachan Kandil*, 2 M. H. C. R. 313 ; and *see* also *Rádha Bullub Gossain et al* v. *Kishen Govind Gossain*, 9 C. W. R , 71 C. R ; and *George Clarke* v. *Bindavun Chunder Sircar et al*, C. W. R. Special Number, p. 20. The Specific Relief Act, I. of 1877, Sec. 9, gives a summary remedy to one dispossesed illegally, see *Sayáji* v. *Rámji*, I. L R 5 Bom. 446. A jurisdiction in such cases is given to Mamlatdars by Bombay Act III. of 1876. The present Limitation Act is Act XV of 1877.

The relations of different parties concerned in a dispossession are discussed in *Virjivandas* v. *Mahomed Ali Khan*, I. L. R. 5 Bom. 208. A possession acquired permissively or by tenancy does not become adverse by mere non-payment of rent for more than 12 years. It must have become distinctly adverse and remained so for 12 years, in order that a claim for recovery may be barred. *See* the Limitation Act, XV. of 1877, Sched. II. Arts. 139, 144; *Radha Govind* v. *Inglis*, decided by the Privy Council on 6th July 1880; *Ramchandra Govind* v. *Vámanji*, Bom. H. C. P J. 1881, p 198

In many cases of so-called tenancy in India it may be remarked the possession of the land is not really intended to be given to the cultivator. He is, especially where the produce is divided, rather in the position of a *colonus* or of a farmer, as in the earlier English law, (*see* Bracton, 27 *b* 220, Butler's note to Co. Li. 330 *b* ; Bl. Com. Bk. III. Ch. IX. and Ch. XI.) with a license to enter and use the land but no interest in the land itself, only a personal right against the owner should the latter eject him. See *Venkatáchalam Chetti* v. *Andiappan Ambalam*, I. L. R. 2 Mad. 232. On the other hand payments are sometimes made by "tenants" who do not hold by a derivative title from their over-lord, and where there is not really a "reversion,"

and bars an action for further partition. (*a*) In *Anandrâo Padaji* v. *Shidooji Anandrâo* (*b*) one member of a Vatandâr family had exclusively held the Vatan lands and another the personal emoluments for 30 years. (*c*) It was held that this raised a presumption of partition, and in *Sitârâm Vâsudev* v. *Khanderâo* (*d*) it was ruled, that where there had been a separation of residence and non-participation by the plaintiff for more than 30 years before Act IX. of 1871 came into operation, an exclusive prescriptive title had been acquired by the defendant, under Reg. V. of 1827. The learned Judges in this last case must have supposed that there had been an exclusive possession held, in good faith, as sole proprietor for 30 years, as otherwise the possession by one joint tenant would have been the possession of all. (*e*)

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there never having been a lease. The possession is that of owners subject only to a rate or quit-rent. See *Bháskáráppá* v. *The Collector of North Canara*, I. L. R. 3 Bom. at pp. 545, 564; *Bábáji* v. *Náráyán*, *ib*. 340, and the cases there referred to.

(*a*) *Girdhur Purshotum et al* v. *Govind et al*, 7 Harr. 371; *Bhana Govind Guravi* v. *Vithoji Ladoji Guravi*, 3 Bom. H. C. R. 170 A. C. J.; *C. D. Rane et al* v. *G. R. Rane*, 3 *ibid*. 173 A. C J.; *Svamirayacharya* v. *the Heirs of Moodgalacharya et al*, S. A. No. 94 of 1872, Bom. H. C. P. J. F. for 1875, p. 89, and the File for 1876, p. 132. Acquiescence in a distribution for 19 years was held conclusive in *Linga Mulloo Pitchanna* v. *L. M. Goruppa*, M. S. D. A. Dec. for 1859, p. 84. Under Act. XV. of 1877, Sec. 25, the title by possession held continuonsly will generally be completed by limitation concurrently with the extinction of the right to sue.

(*b*) S. A. No. 453 of 1871, Bom. H. C. P. J. F. for 1872.

(*c*) *Bharangowda* v. *Sivangowda et al*, supra, p. 692.

(*d*) I. L. R. 1 Bom. 286.

(*e*) *See* above, p. 633; 16 Vin. Abridgt. 456; Cr. Dig. Tit. XXXI. Ch. II.; 2 Sm. L. C. 606 ss.; 2. Ev. Pothier, 127; *Denys* v. *Shuckburgh*, 5 Jur. N. S. 21; *Murray* v. *Hall*, 18 L. J. C. P. 161; *Luchman Singh* v. *Shumshere Singh*, L. R. 2 I. A. 58; *Runjeet Singh et al* v. *Kooer Gujraj Singh*, L. R. 1 I. A. 9.

As to absolutely exclusive possession being necessary to constitute a bar against coparceners, *see* above, p. 633; *Shidoji* v. *Naikoji*, 10 B. H. C. R. 228, quoting *K. Subbaiya* v. *K. Rajesvara*, 4 M. H. C. R. 357;

Under Act XV. of 1877, Sch. II., Art. 127, time is counted for limitation against a claimant of a share only from his knowing of his exclusion. (*a*)

§ 4 E. The separation may be general or partial, *i. e.* it may extend to a partition of the whole of the property, or only to a portion of it. (*b*) In the latter case the mutual rights

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Atmaram Baji v. *Madhavrao Bapuji*, Bom. H. C. P. J. 1880, p. 311; *Kazi Ahmed* v. *Moro Keshav*, Bom. H. C. P J. 1878, p. 120. In *Ramchandra* v. *Venkatrao*, I. L. R. 6 Bom. at p. 600, it was stated as a ground for inferring non-partition between the parties " that each is in enjoyment of some portion of the family property."

The Hindû Law of prescription is considered in the case of *Moro Vishvanâth et al* v. *Ganesh Vithal et al*, 10 Bom. H. C. R. 444. The law of prescription under the Regulation is further discussed in the case of *Rambhat* v. *The Collector of Poona*, at I. L. R. 1 Bom. 592; and *see* above, Book I. Introduction, pages 73, 172 ; also *Thakur Durryao Singh* v. *Thakur Davi Singh*, 13 B. L. R. 165, S. C., L. R. 1 I. A. 1.

Under the older Roman Law there was no usucapion of provincial land ; but it might be acquired by a *longi temporis prescriptio* of 10 years during the presence of the former proprietor and of 20 years during his absence. (Comp. Yâjñ. II 24 ; Manu VIII. 147; Nárada, Pt I. Ch. IV. paras. 6, 7) This was, by Justinian, made the universal law. He added a general prescription of 30 years free from the condition of an initial title provided the possession had begun in good faith, Cod. L. 7; 39, 8. *See* Poste's Gaius, pp. 159, 160. This is the original source of the term prescribed in Bom. Reg. V. of 1827, Sec. 1. See West's Bombay Code *ad loc*, and Savigny's Syst. Vol. III. 380.

(*a*) *Hari* v. *Maruti*, I. L. R. 6 Bom. 741.

(*b*) *Rewun Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137 ; *Appovier* v. *Rama Subba Aiyan et al*, 11 *ibid* 75; 2 Str. H. L. 377, 380, 387. A partition carried out partly in foreign territory was completed in British territory, *Kasi Yesaji* v. *Ramchandra Bhimaji Nabur*, Bom. H. C. P. J. for 1878, p. 151. In *Manjanátha* v. *Náráyan*, I. L. R. 5 Mad. 362, the case is dealt with of a claim to partition by a representative of one branch against the representative of another after partial partitions. These having been obtained by younger members during their fathers' lives and membership with others of a joint family could not properly have been enforced, *see* pp. 657, 661, and comp. p. 701. It is only when no progenitor in his own branch intervenes that a junior has an unqualified right to a severance of his share. The share due

and duties of the former coparceners in relation to the undivided residue of the estate remain generally as before partition. (*a*) If there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family the undivided family becomes a divided family with reference to the property that is the subject of that agreement. (*b*) A partial division, however, cannot be enforced: the coparcener must claim the whole of his share. (*c*) *See* below 'LIABILITIES ON INHERITANCE.'

to each branch and sub-branch was held to be what it would have been had there been no partition, since the right centred in a single ancestor, minus so much as had in the partial partitions been previously given to members of such branch or sub-branch. According to the theory of those who regard a partial partition as involving a general partition and partial reunion, each branch and sub-branch in the case just discussed would be regarded as having rejoined with a share diminished by the sub-share of the severed member. There would then be room for an application of the principle stated in the Vyav. May. quoted above, p. 143 ; and equally so in the case of a reunion of one of two or more brothers who as a group had previously left the family and also separated *inter se* One such bringing back but a third of what his branch had taken out could not be allowed to claim a repartition and the full share of his branch in the reunited estate, already diminished by two-thirds of that share. By treating the relative claims as subject to deduction as in the case quoted, a result is brought out identical with that contended for in the Mayûkha, if ancestral estate only is in question. It is in this sense that the reunited parcener " is remitted to his former status "

(*a*) *Ramabai* v. *Jogan Soorybhan et al*, S A. No. 260 of 1871, Bom. H C. P. J. F. for 1873, No 35. In *Átmárâm Báji* v. *Madhavrav Bapuji*, Bom. H C. P. J. F. for 1880, p. 31, it was held that a family house reserved from partition was open to a supplemental partition, and that a family arrangement, if not shown to have been abandoned, was enforcible, though not acted on.

(*b*) Lord Westbury in *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75. *See* also *Timmi Reddy* v. *Achamma*, 2 M. H. C. R 325.

(*c*) *Dadjee Deorav* v. *Vitul Deorav*, Bom. Sel. Ca. 172; *Ragrindrapa* v. *Soobapa*, S. A. No. 3948, 27th September 1858; *Nándbhái* v. *Náthábhái*, 7 Bom. H. C. R. 46 A. C. J; *Jaitaram Bechur* v. *Bai Gunga*, 8 *ibid*.

It sometimes happens that litigation occurs as to a particular part of a joint estate without the existence of the remainder being disclosed. (*a*) In such cases the property in suit is naturally treated as the whole estate. Sometimes the whole of the interests of the members of a joint family in a defined property, as for instance in a "hakk," have been sold to several persons who become litigants. In such a case (*b*) it seems to have been tacitly assumed that the purchasers and mortgagees, by dealing with the parceners for their several interests in the fragment of the whole family property as distinct from the remainder, recognized their capacity to enter into such transactions without a general partition, and the continuance of mutual rights and obligations arising out of the union of the family with respect to the residue of the common estate. The case was disposed of by reference to the respective aliquot shares to which the grantors were *primâ facie* entitled, compared with each other and with those of the other members of the family. The latter members might however have claims which would diminish the *primâ facie* shares of the grantors; and the determination of the rights *inter se* of grantees from one member or branch, or between such grantees and their grantors, members of a joint family, must always be subordinate to the relative rights of such grantors and their coparceners in the joint estate. (*c*)

Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules

228 A. C. J; *Trimbak Dikshit* v *Narayan Dikshit*, 11 *ibid.* 69; *Murariapa* v. *Krishnapa et al*, S. A. No. 372 of 1872, Bom. H. C. P J. F. for 1873, No. 15; *Mahadew et al* v. *Trimbuk Gopal*, S. A. 90 of 1872, *ibid* No. 127; *Bajyram Vithal* v. *Atmaram Vithal*, Bom. H. C P. J. 1881, p. 302. Comp. *Parbati Churn Deb* v. *Ainud Deen*, I. L. R. 7 Calc. 577.

(*a*) *Vainder Bhat* v. *Venktesh*, 10 Bom. H. C. R. at pp. 158, 159, 162.

(*b*) *Galla Motiram* v. *Naro Balkrishna*, Bom. H. C. P. J. F. for 1878, p. 69.

(*c*) See *Rakhmaji* v. *Tatia*, Bom. H. C. P. J. F. for 1880, p. 188.

on the subject. (*a*) But that it is not a mere modern innovation may be inferred from the passages relating to 'Naturally Indivisible Property' in the older Smṛitis. (*b*) In the absence of definite authorities, it is necessary to fall back here, as in other cases, on general principles and on actual decisions. Lands assigned for the subsistence of a widow or disqualified member are commonly reserved for future partition. Property left undivided, because mortgaged, was redeemed by the widow of one of the parties to the partition. She died and her daughter succeeded, but was compelled to give up the property redeemed to the son of one of her father's coparceners on a recoupment of the expenses of redemption. (*c*) So also where there had been a former suit for partition excluding a portion mortgaged. (*d*) So as to a part advisedly reserved for common enjoyment. (*e*) Limitation does not operate in such a case until, by exclusive possession as sole owner, one branch becomes entitled by prescription. (*f*)

(*a*) Partial partition cannot, it was said, be decreed except by consent, *Radha Churn Dass* v. *Kripa Sindhu Dass*, I. L. R. 5 Cal. 474.

(*b*) "A remainder of an estate being undivided is not deemed disproof of a partition, for it frequently happens that disunited co-heirs have (retain) some joint property," Jag. in Coleb. Dig. Bk. V. T. 387, Comm , *ad fin* Though partition may by accident have been incomplete, the parties are then in status divided, Smṛiti Chandrikâ, Chap. XIV. para. 10. *See* above, pp. 681, 684, 692.

(*c*) *Khondaji Bhavani* v. *Salu Shivram*, S. A. No. 199 of 1874, Bom. H. C. P. J F. for 1875, p. 50, following *Balkrishna Vithal et al* v. *Hari Shunker*, 8 Bom. H C. R. 64 A. C. J.

(*d*) *Nârâyan Bâbâji* v *Pândurang Râmchandra et al*, 12 Bom. H. C. R 148.

(*e*) *Gopâlâchârya* v. *Keshav Daji*, S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

(*f*) *Swâmirâyâchâri* v. *The Heirs of Moodgalachâryi et al*, S. A. No. 94 of 1872, Bom. H. C P. J. F. for 1875, p 89, and the File for 1876, p. 132; *Salu et al* v. *Yemaji*, S. A. No. 291 of 1873, *ibid*. for 1873, p. 89; *Devapa* v. *Ganpaya et al*, S. A. No. 125 of 1877, *ibid*. for 1877, p. 194.

One of the most important questions arising in connexion with this subject is that of whether the law regulating the succession to an undivided or that applicable to a divided male's estate regulates the devolution of an undivided residue. Mr. Colebrooke (*a*) states that opinions have differed on this subject, but that the former view seems preferable. Most of the Sâstris (*b*) hold the same opinion, in favour of which the following considerations also may be urged. The law, which bases partition on the will of the coparceners, extends the partition no further than such will. If this extends only to a portion of the estate, their mutual rights and duties with respect to the remainder are unaltered. To the same effect is 1 Macn. H. L. 53. (*c*) It was said however that when an actual partition of part of a family estate had been proved it lay on those who asserted non-partition of the remainder (a banking business) to prove it. (*d*)

§ 4 F. *Partition final.*—A partition once agreed to is final, (*e*) except in the case of a mistake or fraud, which has materially affected the distribution. In both cases a

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(*a*) 2 Str. H L 387 *See* p. 701, note (*e*).

(*b*) *See* Bk. I Chap I Sec 2, Q. 9, 11, 14, 22; *supra*, pp 345, 347, 349, 352

(*c*) Coleb Dig. Bk V Chap. VIII T. 431 Comm.; *Rewana Prasad* v. *Radha Bibi*, 4 M. I A 137; *Katama Natchiar* v *The Rajah of Shivagunga*, 9 M. I. A. 539; *Timmi Reddy* v. *Achama*, 2 M H C. R. 325; *Maccandas* v *Ganpatrao*, Perry's Or. Ca. 143.

(*d*) *Umiashankar* v *Bai Ratan*, Bom. H C. P J. F. for 1878, p. 217, referring to *Narayan Babaji v. Nana Manohar*, 7 Bom. R. 153 A. C. J. Comp. p. 633 *supra*, and next note.

(*e*) Manu IX 47; *Maharajah Hetnarain* v. *Baboo Modnarain Sing*, 7 M I A 311; *Rango Mairal* v. *Chinto Ganesh et al*, S A. No 297 of 1874, Bom H C P J. F for 1876, p. 74 A distribution acquiesced in will not be set aside, *Kunnyah Pande et al* v. *Ram Dhun Pande*, 9 S. D. A. R. N. W. P. for 1854, p. 383.

But in the case of fraud or ignorance or of a part left undivided by arrangement, the Court will entertain a suit for partition of that

redistribution may be claimed by any parties injured, which, however, extends only to the portion overlooked or fraudulently abstracted. (a) It is subject to a proportional deduction from each coparcener's share on the birth of a posthumous son. (b) Misconduct in dealing with the common property to the injury of the co-sharers is a usual charge both in suits seeking to have a partition reopened and in those claiming a partition and an account. A partition is sometimes frandulently resorted to, or the incapacity of the debtor is set up, or sham debts are admitted, and sham securities executed, in order to cheat the creditors of one or more co-sharers. On the other hand creditors come forward with or without collusion on the part of particular coparceners, especially ex-managers, to claim a partition or a revised partition for the satisfaction of unjust claims. Many decisious have had for their aim to defeat such schemes

residue, *Nárâyan Babaji et al* v. *Nana Manohar et al*, 7 Bom H. C. R. at p. 178 A. C. J.; *Lakshuman* v. *Krishnaji Ramajee et al*, S. A. No. 289 of 1869, Bom. H. C. P. J. F. for 1870.

Where shares of co-sharers are defined so as to consist solely of particular parts of the family property, but it is not actually divided in specie, the brothers are severally entitled to the shares as so defined notwithstanding subsequent changes in value, *Amrit Rav Vinâyak* v. *Abâji Haibat*, Bom. H. C. P. J. for 1878, p. 293.

(a) Mit. Chap. I. Sec. 9, paras. 1 and 2; Stokes, H. L. B. 404; May. Chap. IV. Sec. 7, paras. 24 and 26; Stokes, H. L. B. 79. So, in the Roman law, a partition, really incomplete, though supposed to be complete, does not prevent the coparceners from afterwards claiming their further shares, because the provisional partition, without an abandonment of rights, is not juridically binding on them; Sav. Syst. III. 411. Compare the Smṛiti Chandrikâ, Chap. XIV. paras. 7, 11 ff. When a previous partition has taken place, the burden of proving, in a subsequent suit, that the property, of which a division is sought, remained undivided, rests on the plaintiff, *Nárâyan Bâbâji et al* v. *Nánâ Manohar et al*, 7 Bom. H. C. R. 153 A. C. J.; *Maruti et al* v. *Vishwanâth*, S. A. No. 233 of 1877, Bom. H. C. P. J. F. for 1877, p. 347.

(b) *See* below, § 7, "DUTIES AND RIGHTS ARISING ON PARTITION."

on the one side or the other, consistently with the recognized principles of the Hindu law. (*a*)

In Hindû as in English law, fraud vitiates every transaction. (*b*) It affords a ground for setting aside or rectifying

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(*a*) As to limitation *see* above, p. 633, 697. Under the older law of limitation a plaintiff had to show his own possession within 12 years. Under Act. IX. of 1871 he could sue within 12 years of the possession challenged by him having become adverse, by the denial of a claim actually made by him. Possession by the Collector to protect the land revenue was not deemed adverse to the real proprietor, *Rao Kasan Singh* v. *Raja Bakar Ali Khan*, L. R. 9 I. A. 99. The law is the same under the Limitation Act, XV. of 1877, Sch. II. Art 127, the time being counted from *knowledge of exclusion*. As to the coalescence of rights arising from sequence of possession by legal succession or privity but not without it, *see* Domat, C. L. vol. I. pp. 874, 875, and the cases referred to in *Asher* v. *Whitlock*, L. R. 1 Q. B. 1. The prescriptive title arising under section 28 of the Limitation Act is not created for the last of a series of mere possessors not connected by a legal derivation of right from the first to the last. It is only the original right that is extinguished by discontinuance of possession under Schedule II. Art. 142. If mere accidental instances of possession might be combined, each in turn would properly be connected with the original rightful possession, and being derived out of it would not avail for a greater interest than could be based on an accompanying title, which in such a case would not exist. That mere non-enjoyment is not equivalent to exclusion giving an adverse character to another parcener's possession, is shown by the case of *Vishnu Vishvanath* v. *Ramchandra Narhar*, Bo. H. C. P. J. 1883, p. 53. There a sole enjoyment of immoveable property by one brother for about 30 years, was followed by a partial partition, and that by a suit 7 or 8 years afterwards, which was not pronounced unsustainable. In *Hanaji Chhiba* v. *Valabh Chhiba*, Bo. H. C. P. J. 1883, p. 57, the common case is referred to of a son's going away for several years to gain his livelihood, leaving his father and brothers in sole enjoyment but on a joint right. This it was thought would not cause even Act XIV. of 1859 to bar a subsequent claim. *See* above, pp. 675, 685, 687, 695.

(*b*) Manu VIII. 165; Coleb. Dig. Bk. IV. T. 184; Vyav. May. Chap. IX. para. 10; *Vaman Ramchandra* v. *Dhondiba Krishnaji*, I. L. R. 4 Bom. 126, 153; *Bayabai* v. *Bálá*, 7 Bom. H. C. R. 1, 22, 23, App.; *Bálárám Nemchand* v. *Appa*, 9 Bom. H. C. R. 121, 146, 147; *Khushálbhai Narsidás* v. *Kabhai Jorábhai*, Bom. H. C. P. J. 1881, p. 231.

a partition, equally with any other transaction by which one parcener may endeavour, with or without assistance, to gain an unfair advantage at the cost of the others. But neither is the coparcenership allowed to be made a means of cheating outsiders who have engaged in transactions with particular members of the family. In *Khushálbhai* v. *Kabhai,* (*a*) a partition was set aside on the ground that a parcener had been unfairly used by his brothers. But in Bengal a nephew was allowed to profit by his suppression of a will which prevented his uncle's widow from adopting. (*b*) In some instances individual coparceners have affected, contrary to the law of the Mitâksharâ (Chap. I. Sec. 1, pl. 30, Stokes, H L. B. 376) to sell or mortgage the common property or particular parts of it. The Privy Council have as to brethren adhered to the Mitâksharâ :—" Between undivided coparceners, there can be no alienation by one without the consent of the other," (*c*) at the same time that effect is given to the principle laid down by James, L. J., in *Syud Tuffuzzool* v. *Rughoonath Pershad,* (*d*) that the undivided share is property that a creditor can make available for payment of his claim. (*e*) A purchaser of an undivided share, though not entitled to any particular portion of the estate, can sue for a partition on the same terms as his vendor, and in the partition effect is to be given, so far as justice allows, to the particular transaction with the vendee or the mortgagee. (*f*) Neither therefore is a partition

(*a*) *Supra,* p. 704, note (*b*).

(*b*) *See* above, p. 368.

(*c*) *Musst. Cheetha* v. *B Miheen Lall,* 11 M. I. A 369. In England a covenant by a joint tenant to sell severs the joint tenancy in equity as regards his share, *Brown* v. *Randle,* 3 Ves. 257 ; see *supra,* Bk. II. Introd. Sec. 4 C.

(*d*) 14 M. I. A at p. 40.

(*e*) As to gift and devise see *Gangubai et al* v. *Ramanna,* 3 Bom. H. C. R. 66 A. C. J. ; *see* p. 632, note (*d*). This agrees with the English law as to a joint tenancy, Co Lit. 185 *b.*

(*f*) *Udárám Sitárám* v. *Ránu Pánduji et al,* 11 Bom. H. C. R. 76 ; *Vithal Pándurang et al* v. *Purshottam Ramchandra et al,* S. A. No. 3 of

actually made allowed to defraud him. (*a*) But to prevent a converse fraud the purchaser from a single member must, in his suit, join all the members as defendants. (*b*) If the undivided coparcener is in sole possession, which he transfers to a vendee, the vendee may retain such possession as tenant in common with the other coparceners. (*c*) A contrary rule would tend to frauds on innocent purchasers. Until their several rights are ascertained the whole undivided property may be attached by a judgment creditor of one coparcener, (*d*) and if a coparcener's share be sold in execution, the purchaser acquires a right to demand a partition from the other coparceners, (*e*) though not more, even when the managing member has been sued only in his individual capacity. (*f*) Though in particular circumstances the manager may be held to have represented the whole family, (*g*) yet a suit for partition is generally necessary; since the sale of his interest *as such* as answerable for the

1876, Bom. H. C. P. J. F. for 1876, p 77; *Devapa et al* v. *Hemsheti Shivapa*, S. A. No. 384 of 1874, *ibid*, p. 93; *Bai Tulsa* v. *Bhaiji Adam Abraham*, Bom, H. C. P. J. F. for 1878, p 263.

(*a*) *See* above, p. 664.

(*b*) *Sitárâm Chandrashekhar* v. *Sitâram Abâji*, S. A. No. 379 of 1874, Bom. H. C. P. J F. for 1875, p. 140.

(*c*) *Kariapa Irapa* v. *Irapa Solbapa et al*, S. A. No. 231 of 1875, Bom. H. C. P. J. F. for 1876, p. 9; *Govind Narayan et al* v. *Vasudev Vinayak*, I. L. R. 1 Bom. 95; compare *Babaji* v. *Ramaji*, 2 Borr. R. 698.

(*d*) *Goma Mahad Patil* v. *Gokaldás Khimji*, I. L. R 3 Bom. at p. 84.

(*e*) *Pandurung* v. *Bhaskar*, 11 Borr R. 72; *Keshav Sakharam Dadhe* v. *Lakshman Sakharam*, Bom. H. C. P. J. F. for 1878, p. 123; *Udaram Sitaram* v. *Rânu Panduji et al.* 11 Bom. H C. R. 76.

(*f*) See *Mahábaláyá* v. *Timáyá*, 12 Bom. H. C. R. 138; *Venkataramayyan* v. *Venkatasubramania*, I. L. R. 1 Mad. 358; *Pandurung Kamti* v. *Venktesh Pai*, Bom. H. C. P. J. F. for 1879, p. 513.

(*g*) See *Narayan Gop* v. *Pandurung Ganu*, I. L. R. 5 Bom. 685; *Mayaram Sevaram* v. *Jayvantrav Pandurung*, Bom. H. C. P. J. F.

decree transfers no more than his share. (*a*) The purchaser has acquired the rights of one co-sharer. In that character he obtains the legal position of a tenant in common, (*b*) and if put in possession, he may retain it in that character (*c*); but unless this has occurred the Court will not give him joint possession. He is put to his suit for a partition. So in a case of a mortgage improperly made and a suit thereon against the manager alone. (*d*) But a decree and execution,

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for 1874, p. 41; *Gopal Anant Kamat* v. *Venkaji Narayan Kamat*, Bom. H. C. P. J. F. for 1879, p. 370; *Ram Sevak Das* v. *Raghabar*, I. L. R. 3 All. 72; *Gaya Din* v. *Bunsi Kuar*, *ibid.* p. 191; *Jogendro Deb Roy Kut* v. *Funendro Deb Roy Kut*, 14 Moo. I. A. at p. 376; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 236.

(*a*) *Harsahaimal* v. *Maharaj Singh*, I. L. R. 2 All. 294; *Deen Dayal* v. *Jugdeep Narayan*, L. R. 4 I. A. 247; *Nanhak Joti* v. *Jaimangal Chaubey*, I. L. R. 3 All. 294.

(*b*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R at p. 81

(*c*) *Mahábaláyá Parmaya et al* v. *Timáyá Appaya et al*, 12 *ibid.* 138; *Bábáji Lakshman et al* v. *Vasudev Vinayek*, I. L. R. 1 Bom. 95. As to separate possession by a united parcener *see* below. A purchaser at a Court sale can only seek for partition by suit; he is not entitled to joint possession, *Balaji Anant* v. *Ganesh Janardhan*, I. L. R. 5 Bom. at 500; *Dugappa Sheti* v. *Venkat Ramnaya*, *ib.* 493; *Pandurung Anandro* v. *Bhaskar Sadashiv*, 11 Bo. H. C. R 72; *Krishnaji* v. *Sitaram*, I. L. R. 5 Bom. 496; contra *Indrasa* v. *Sadu*, *ib.* 505. *See* above, p. 607.

When one of two coparceners aliens to a stranger his share in a piece of family property, the other may either exercise his right of interdiction, or affirm the act and claim by partition to recover from the stranger that share to which the alienation cannot extend, and which has now become his separate property, *Sripatti Chinna Sanyási Razu* v. *Sripatti S. Razu*, I. L. R. 5 Mad. 196. The right of interdiction does not seem to exist. By the strict Hindû Law a concurrence of all the coparceners is necessary to give effect to an alienation. By the decisions one coparcener may dispose of his interest against the will of the others, but an interest to be ascertained by a general partition; see *Pandurang* v. *Bhaskar*, supra.

(*d*) *Baji Shamraj Joshi* v. *Dev bin Babaji Jadkav*, Bom. H. C. P. J. F. for 1879, p. 238.

against a father as representative of a family were held binding on his sons (*a*). See *Bâbu Deen Dayâl Lâl* v. *Bâbu Jugdeep Nârâin Singh,* (*b*) where, referring to *Sadabart Prasâd Sahu* v. *Fool Bash Koer et al,* (*c*) and *Mahabeer Pershad* v. *Ramyad Singh et al,* (*d*) it was said that though the mortgage of an undivided share be invalid, yet execution may be had against it by a suit for partition by the purchaser in execution of the undivided share. This judgment established the seizable character of an undivided share (*e*) and a charge created by such attachment. In all such cases as these effect may be given to transactions approved by the law, and those disapproved may be defeated not only by means of a compulsory partition, but by the revision of one actually or fictitiously made.

III.—Distribution of the Common Property.

§ 5A. In a (suit for) partition the whole property of each member is presumed to belong to the common stock. (*f*) Every Hindû family is presumably joint in food, worship, and estate. (*g*) The common property may be distributable or undistributable. In both classes it may be:—

(*a*) *Ram Narayan Lall* v. *Bhowani Prasad,* I. L R. 3 All. 443. As to the case in which a father defendant may be held not to represent his infant sons, see *Gurusámi* v *Chinna Mannar,* I. L. R. 5 Mad. 37, 42.

(*b*) L. R 4 I. A. 247.

(*c*) 3 B. L R. 31 F. B.

(*d*) 12 B. L. R. 90.

(*e*) *Suraj Bunsee Koer* v. *Sheo Prasad,* L. R 6 I. A. 88, 109; *Vasudev Bhat* v. *Venkatesh Sanbhav,* 10 Bom. H. C. R 139; *Balaji* v. *Ganesh,* I. L. R. 5 Bom. 499. Several of the decisions quoted in this paragraph have more or less distinctly been referred to different priniciples, but the purpose of the reference has generally been the prevention of fraud by moulding the Law of Partition to the exigencies of modern life.

(*f*) *Luximom Raw Sadasew* v. *Mullárow Baji,* 2 Knapp P. C. Ca. 60; *Bapu Purshotam* v. *Shivlal Ramachandra,* Bom. H. C. P. J. 1879, p. 571. As to debts due by or to the family, *see* below, § 7 B. 1.

(*g*) *Neelkishto Deb Burmono* v. *Beer Chunder Thákoor,* 12 M. I. A. 540; *Narayan Deshpande* v. *Anáji Deshpande,* I. L. R. 5 Bom. 130.

1. A grant to united parceners without distinction of shares. (*a*)
2. *Ancestral,* which may again be :—

   a. Inherited, *b.* Or recovered.
3. *Self-acquired.*

2. *a.—Ancestral inherited property.*—Ancestral property, as amongst descendants, comprises property, transmitted in the direct male line from a common ancestor, and accretions to such property, made with the aid of the inherited ancestral estate. (*b*) In the absence of proof to the contrary it is assumed that a purchase by a member of a joint family is made on the joint account. (*c*) In *Rájmohun Gossain* v. *Gourmohun Gossain,* (*d*) the Privy Council say of the term ancestral in an agreement amongst brothers :—" Ancestral is here employed...........in the sense of paternal, *i. e.* as mean-

(*a*) *Rádhábái* v *Nánáráv,* I. L R 3 Bom. 151.

(*b*) *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh,* L. R. 6 I. A. 233. In a family descended as follows :—

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                A
        ________|________
        |               |
        B               B¹
        |          _____|_____
        |          |         |
        C          C¹        C¹
                   ₁         ₂
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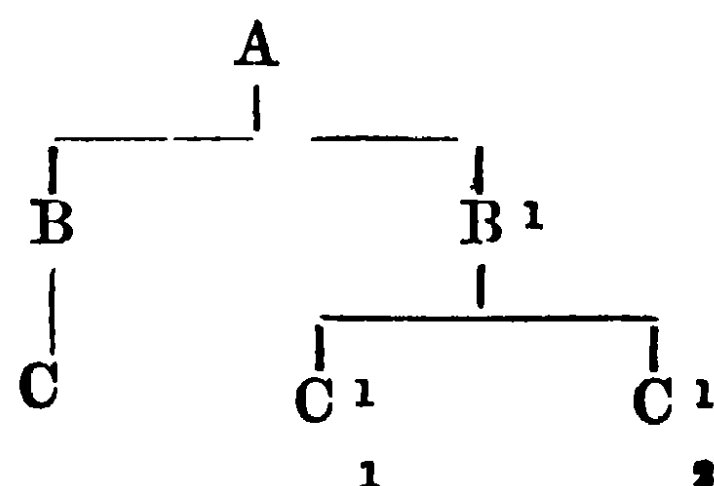
C^1_1 having purchased property out of the profits of the family estate, it was held that C was entitled as against C^1_2 to a moiety, *Keshoo Tewaree* v. *Ishree Tewaree et al,* N. W. P. R. for 1861, p. 565. Immoveable property purchased with the capital or profits of ancestral moveable property ranks as immoveable ancestral property, not as moveable. It cannot be disposed of by a father without the assent of his sons, and the latter may insist on partition, *Shib Dayee* v. *Doorga Pershad,* 4 N. W. P. 71.

(*c*) *Gopeekrist Gosani* v. *Gungapersaud,* 6 M. I. A. 53; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh,* L. R. 6 I. A. at p. 236. So *Nathu* v. *Mahadu,* Bom. H. C. P. J. 1879, p. 569. *See* below, 'SELF-ACQUIRED PROPERTY.'

(*d*) 8 M. I. A. at p. 96.

ing the property of the father in whatsoever manner or by whatsoever title the father had acquired it." To him it might be self-acquired, but to the sons it was ancestral estate. Thus, in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. Ancestral property, mortgaged by the father and sold in execution, is subject to the claim to partition of the sons. (*a*) In *Gungoo Mull* v. *Bunseedhur,* (*b*) three sons having inherited on the death of the father, and one of them having afterwards died, the sons of a surviving brother were held to have an interest in the addition thus caused to their father's share, enabling one of them to sue a purchaser in execution for the allotment to him of his proper portion. The Court say :—" The father has no more absolute and exclusive right in ancestral property, which devolves on him by his brother's death than he has in the like property, which he inherits from his father." The case seems to have been imperfectly brought before the Court. The family being joint, it does not appear how one of the three brothers could, on the death of another, succeed to the whole instead of a moiety of his share, or how one of his three sons could sue alone, or sue his father's judgment-creditor or execution-purchaser alone for his one-third share in his father's estate, without claiming a general partition of the family property.

On the other hand, property inherited by a father from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. (*c*) Ancestral property, in fact,

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(*a*) *Lochun Singh et al* v. *Nemdharee Singh et al,* 20 C. W. R. 170.

(*b*) 1 N. W. P. R. 79.

(*c*) *Baboo Nund Coomar Lall et al* v. *Moulvie Razee-ood-deen Hoosein,* 10 Beng. L. R. 183 S. C., 18 C. W. R. 477; *Gooroochurn Doss et al* v. *Goolukmoney Dossee,* 1 Fult. 165; *R. Nallatambi Chetti* v. *R Makunda Chetti,* 3 M. H. C. R. 455, 457. In *Muttayan Chetti* v. *Sivagiri Zamindar,* I. L. R. 3 Mad. at p. 375, it is said that property inherited from

may be said to be co-extensive with the objects of the *apratibandhadáya*, or 'unobstructed inheritance:' the contrast drawn in the Sanskrit authorities is between *pitrârjit*

a mother, (which according to the now prevailing doctrine would generally be looked on as inherited from her father, or some other male relative,) is not to be ranked in the same class with self-acquired. This, which may perhaps be regarded as extra-judicial, is opposed to the judgment of Sir A. Bittlestone and the other authorities referred to in this note. The chief ground for the doctrine seems to be a passage in the Mit. Chap. I. Sec. IV. para. 2, in which Vijñâneśvara extends the condition of a separate acquisition's having been made without detriment to the paternal estate by analogy to the maternal estate, which in some cases brothers inherit equally (Mit. Chap. II. Sec. XI. para. 20). There is no inborn right of a son to a maternally as to a paternally descended estate. In the case of patrimony the right is one of co-ownership, and it is this right only that qualifies the father's ownership and power of disposition. It is on this that Vijñâneśvara grounds the son's right to an interdiction: in its absence the father might dispose of the ancestral as well as of the other property, and a mother's estate is not ancestral within the meaning of the Sanskrit term, though for some purposes the analogy of the patrimony has been extended to it. These particular extensions imply a general difference in kind, and a usual incident of ownership is not to be extinguished without a clear rule to that end. The Mayûkha in dealing with the Sanskrit text of Yâjñavalkya, on which Vijñâneśvara's discussion is founded (*see* Vyav. May. Chap. IV. Sec. VII. para. 2 ff; Yâjn. II. 118) does not, any more than the text itself, mention a maternal heritage. In Sec. II. of the same Chapter, though it quotes a passage limiting "dâya" to the "wealth of a father," it says that father stands for "relations in general," but again in Sec. X, para. 26, it does not place the son's inheritance to the mother's property on an immediate participation by birth as in the case of the patrimony. On the theory of the woman's estate being merely interpolated, the maternal grandson's right may be called "dâya," but not patrimonial. On the whole Jagannâtha's reasoning seems to be the best. Complete ownership in him who takes an estate is the general principle of the Hindû law, modified only by the texts which dedicate ancestral and in part self-acquired lands to the nurture of the agnatic line of manes and descendants. Had Vijñâneśvara recognized in the sons a joint ownership along with their mother in her separate estate it is unlikely that he should not have said so in the

"acquired by fathers," and *svârjit* "acquired by one's self."(a) The view, here stated, agrees with that arrived at by Jagannâtha, (b) after a discussion of the contrary doctrines held by other lawyers. (c) This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy. Those, who hold that all property descending to the father from relations ranks as ancestral property, interpret the text of Yâjñavalkya, (d) which relates to the grandfather's property, as an example of the principle that all property, taken by right of affinity, (e) is to be regarded as ancestral. Those, on the other hand, who maintain that property regularly transmitted from ancestors in the male line, and that alone, is ancestral property, understand the text to imply affinity only of that closest kind which its terms necessarily import, namely that existing between an

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discussion by which he establishes their joint ownership with the father over ancestral property. The text of Yâjñavalkya, which declares the equal ownership of father and son, does not include a mother. (*See* Mit. Chap. I. Sec. V. para. 13 ff). The inheritance to her is rather by succession than by survivorship, (*see* Vyav. May. Chap. IV. Sec. II. paras. 1, 2) and the estate which the son has not himself gained through joint ownership need not in his hands be subject to a joint ownership and the other incidents of an ancestral heritage. Amongst some of the tribes in the Panjâb, property inherited through the mother is excluded from the aggregate for partition. Amongst others all property of every kind is included. Panj. Cust. Law, Vol. II. 170.

(a) Bk. I. Introd. p 65, 77, ss. A similar distinction is made by the Customary Law: *see* Steele, L. C. p 53.

(b) Coleb. Dig. Bk. V. Chap. II. T. 103. "What is received from the maternal grandfather must not be considered as having descended from ancestors, but as acquired by the man himself." Coleb. Dig. Bk. II. Ch. IV. T. 28, Comm.

(c) This view was approved and adopted in the case of ***B. Nund Comar Lall et al* v. *Moulvee Razee-ood-deen Hoosein et al*,** 18 C. W. R. 477.

(d) Mit. Chap. I. Sec. 5, para. 3.

(e) *See* also Colebrooke, Dig. *loc. cit.*

ancestor and his first three descendants. (*a*) On considering the former of these conflicting views, it presents this difficulty, that it assigns, in many cases, to a son equal power with his father over property which, but for his father's taking it could never come to him, while, in the example given in the text, the intervention of the father is immaterial. The property held by a grandfather must come to his grandson, and that of a great-grandfather to his great-grandson, in the male line, whether the intervening descendants survive or not, whereas the property of a great-grandfather descends to his great-grandson, through his daughter, only if first inherited by his daughter's son. (*b*) It may further be objected that the equal right of the grandson with his father in the property of the grandfather is a supersession of the more ancient rule, supported by numerous texts, of the father's independence and supremacy over his family and estate. (*c*) It would appear

(*a*) *See* also Colebrooke, Dig. *loc. cit. sub fin* In Kangra, "by ancestral lands is generally understood land once held by the common ancestor, not all land whatsoever inherited by the donor" (to a daughter and her children), Panj. Cust. Law, Vol. II. p. 185.

(*b*) As the passage of Yâjñavalkya, Mit. Chap. II. Sec I. para. 2, specifying the daughter is extended, *ib* Sec. II. para. 6, by the aid of Vishṇu XV. 47, to a daughter's son, but no further

(*c*) *See* Nârada, Pt. I. Chap. III. paras. 36. 40; Pt. II. Chap. IV. para 4; Pt. II. Chap. V. para. 39; Manu IX. 104; Vyav. May. Chap. IV. Sec. 1, pl 4, 5; Stokes, H L. B. 43; Mit. Chap. I. Sec. 1, para. 24; Stokes, H. L. B. 375 The father appears in the earliest form of the law to have had unqualified administrative power and to have had complete dominion over the family (*see* above, pp. 69, 281, 646). The rights of the manes at the same time made an alienation of the ancestral estate unlawful, and the interest felt in a son as a continuator of the family sacra to be celebrated with indispensable offerings out of the patrimony (*see* Vishṇu, Transl. 189) raised him first in religion and then in law to a joint-ownership with his father. It became recognized far earlier than at Rome that the "*patria potestas in benignitate non in atrocitate consistit,*" as the highly affectionate character of the Hindûs readily admitted sons to a position of secure equality in title, though not till afterwards in administra-

dangerous to extend the supersession in the absence of explicit texts, on the strength of an interpretation.

An objection, commonly urged against the second view, is that, by classing property inherited by the father from relations with self-acquired property, an undue extension is given to the latter term, since acquisition (arjana) implies an individual effort. Jagannâtha, *l. c.*, felicitously meets this objection by showing that such an extension must be allowed in other cases, such as those of a priest inheriting from his Yajamâna, *i. e.* the person for whom he sacrifices, and of an Âchârya or religious teacher inheriting from his pupil. (*a*) It is impossible to class such inheritances as ancestral property, since the text, by instancing a grandfather, whose relationship is one of blood, cannot imply the spiritual relationship existing between a teacher and his pupil, or between a priest and his Yajamâna. Though inherited therefore, such estates still rank in contradistinction to the "pitrârjit," as "svârjit" or self-acquired, which thus becomes equivalent to "in any way acquired except by succession through descent and participation of rights."

In a recent case (*b*) the Privy Council have said that a zamindari inherited through a mother was not self-acquired property, but they expressed no opinion whether it was subject to the same restrictions on alienation or hypothecation as if it had descended to the zamindar from his father or grandfather. It may be concluded therefore that the

tion. Then followed the right of interdiction to guard against impious waste, and lastly the right to partition as a logical consequence of co-ownership. The archaic law has in part been revived by recent cases. As to sale of ancestral property by a father or by the Court, *see* above, pp. 631, 687 ss; *Narayanacharya* v. *Narso Krishna et al*, I. L. R. 1 Bom. 262; *Kastur Bhavani* v. *Appa and Sitaram*, S. A. No. 124 of 1876, Bom. H. C. P. J. F. for 1876, p. 162.

(*a*) As to a Vṛitti regarded as a heritable estate, *see* 2 Str. H. L. 12.

(*b*) *Muttayan Chettiar* v. *Sangili Vira Pandia*, L. R. 9 I. A. 128, reversing I. L. R. 3 Mad. 370.

more extensive construction of "pitrârjit" or "ancestral" is that which in the future is to prevail, though probably without the consequence of giving to the son equal power with the father over such ancestral property which is not in the stricter sense "patrimonial" by agnatic descent. (*a*) In the Madras decision it is said that property may at the same time be not "ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to partition under the Mitâksharâ Law at the instance of the son," and yet "not self-acquired property on that ground for purposes other than those of partition." This notion of the property being of one class for one purpose and of another for another is a subtilty which the authorities do not apparently warrant, and which would lead to contradictory consequences. The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired, or according to the special rules applicable on account of the character of the property as sacred or secular, or as affected or not with the support of public duties. (*b*)

The nature of ancestral property, as between a father and his sons, is not affected by the circumstance of a partition having taken place between the father and his coparceners. The general principle is laid down by Yâjñavalkya(*c*):—"The ownership of father and son is the same in the land which was acquired by the grandfather, or in a corrody or in chattels, which belonged to him." Vijñâneśvara, in his remarks introducing the text quoted, explicitly states, that it is given to meet the case of a doubt that might otherwise be felt, in the case of a separation having taken place between a father and a grandfather. The doctrine has been correctly appre-

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(*a*) *See* Mit. Chap. I. Sec. I. para. 27; Sec. II. para. 6; Chap. VI. Sec. 7, paras. 9, 10, and the judgments referred to in p. 710, note (*c*).

(*b*) Above, p. 179.

(*c*) Mit. Chap. I. Sec. 5, para. 3; Stokes, H. L. B. 391.

hended by the Calcutta High Court, in *Muddun Gopal Thakoor et al* v. *Ram Baksh Panday et al,* (a) where the authorities are discussed at length. It has been said indeed that "the divided share of a Hindû in property, which had previously belonged to the united family, is separate estate, and, like any other estate held in severalty (such, for instance, as self-acquired property), is assets, while yet in the hands of the heir, for payment of the debts of the deceased proprietor." (b) In *Girdharilal's* case, (c) and some others, (d) this last rule has been practically absorbed in a wider one, but at the date of the earlier decision separateness of estate was thought essential to the liability. In the case of *Kattama Natchiar* v. *The Râjâ of Sivagangâ* too, (e) the Privy Council laid down the rule, "When property belonging in common to a united Hindû family has been divided, the divided shares go in the general course of descent of separate property." But from this it must not be understood that the nature of the property, as ancestral estate, is changed. Such a view, originally held in the case of

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(a) 6 C. W. R 73 C. R.

(b) *Udârâm Sitârâm* v. *Ranu Panduji et al,* 11 Bom. H. C R. at p. 83.

(c) 22 W. R. 56 C. R. S. C, L. R. 1 I. A. 321.

(d) *Haza Hira* v. *Bhaiji Modan,* S. A. No. 444 of 1874, Bom. H. C. P. J. F. for 1875, p. 97.

(e) 9 M. I. A. 609. The judgment of their Lordships was subjected to some hypercriticism by the late Prof. Goldstücker (On the Deficiencies, &c., p. 14 ss) who seems to have overlooked (p. 16) that the religious benefits for which ancestral property is inherited (*see* Dâyabhâga, Chap. XI. Sec. 1, para. 32; Stokes, H. L. B. 312; Sec. 6, paras. 30, 31; Stokes, H. L. B. 351) are not a cause for the disposal of property not acquired by descent from a former owner, assumed to be still, in the spirit world, interested in the purposes to which it is applied. That undivided members may make separate acquisitions, *see* Coleb. Dig. Bk. V. T. 38 Comm., and above Bk. I. Chap. II. Sec. 6A, Q. 9, p. 399. Several cases occur in 2 Str. H. L. at page 439, the Smṛiti Chandrikâ being quoted as assuming such acquisitions to be possible. So at p. 441 the Mâdhavya.

Lakshmibâi v. *Ganpat Morobâ et al,* (*a*) was dissented from on appeal.(*b*) The share taken on a partition is indeed separate estate as regards the other branches of the family (*c*); but in the branch to which it belongs, it is ancestral estate, subject in the hands of sons to the father's debts, with the exception of those immorally incurred, on account of the special obligation arising from filial duty, (*d*) but not on account of its ranking as self-acquired property of the father. Jagannâtha says that ancestral property, remaining in the hands of a father on a partition with his sons, retains that character for the purposes of a partition with subsequently born sons; (*e*) while free from obligations to those

(*a*) 4 Bom. H. C. R. 150 O. C. J.

(*b*) *See* 5 Bom. H. C. R. 135 O. C. J.

(*c*) *See* the case of *Gavuri Devama Garu* v. *Raman Dora Garu,* 6 M. H C. R. at p. 93, quoted under Bk. I. Chap. II. Sec. 11, Q. 5; above p. 456; *Periasami* v. *Periasami,* L. R 5 I. A. 61. In that case a family estate made over by the eldest to the younger brothers was said by the Privy Council to have passed " with of course all its incidents of impartibility and peculiar course of descent," (*ib.* at p. 75). A property renounced by an elder brother in favour of the younger ones becomes their estate as in a partition, though there be no general partition. See *Gauri Devama's* case. The " incidents" in these cases would depend on the family law or the political conditions of the estate; *see* above, pp. 158, 172, 179, 237.

(*d*) Above, pp. 156, 642.

(*e*) Coleb. Dig. Bk. V. T. 392. Similarly under the English law, " If parceners make a partition of their land, they are still in of their respective shares by inheritance, though these shares are no longer held in coparcenary, but in severalty." 1 Steph. Comm. 443. So *Doe Dem Crosthwaite* v. *Dixon,* 5 A. & E. 835. And thus in *Baijun Doobey* v. *Brij Bookun Lall Awasti,* L. R. 2 I. A. 278, the Privy Council call a share obtained or ascertained and severed in a partition " separate estate," but at the same time, " ancestral estate derived from the father." Tenants of the united family retain their rights as against the individual member to whom the land held by them has been assigned in a partition of the estate, *Nárâyan Bhivráv* v. *Káshi,* I. L. R. 6 Bom. 67. *See* below, Bk. II. Chap. I. Sec. 1, Q. 5, Remark.

who have separated. Nor can special restrictions be imposed on the dealing of a co-sharer with his divided share by an agreement made amongst the sharers at the time of partition inconsistent with the nature of the estate taken by the co-sharer. (*a*)

§ 5A. 2. *b.—Ancestral property, Recovered.*—As regards *property recovered,* the cases must be distinguished of

(1) Recovery by a father, head of the family, and of

(2) Recovery by another coparcener,

(*a*) With or without the aid of the patrimony.

(*b*) Of moveables or of immoveables.

(1) Ancestral property recovered by a father, head of a family, ranks as self-acquired. (*b*) This rule, however, is in the Mayûkha qualified by a text (*c*) cited from Bṛihaspati, which imposes the condition that such a recovery must have been made without the aid of the ancestral property.

(2) Ancestral property recovered by another coparcener with the aid of the patrimony becomes an accretion to the common estate. Immoveables, recovered by such a coparcener without the aid of the patrimony, but with the acquiescence of the other co-sharers, rank likewise as an accretion to the common property, subject to a deduction of one-fourth for the acquirer. (*d*) This rule has been recognised by the Bombay High Court in *Mulhari* v.

(*a*) *Venkatramana* v. *Brammana,* 4 M. H. C. R. 345.

(*b*) Mit. Chap. I. Sec. 5, para 11; Stokes, H. L. B. 393.

(*c*) May. Chap. IV. Sec. 4, para. 5; Stokes, H. L. B. 48. So Vîram. Tr. p. 74. Compare also Dâyabhâga, Chap. VI. Sec. 2, paras. 31—35; Stokes, H. L. B. 285, 286; Jagannâtha's Commentary, Colebrooke, Dig. Bk. V. T. 25; and Smṛiti Chandrikâ, Chap. VIII. para. 28.

(*d*) Mit. Chap. I. Sec. 4, para. 3; Stokes, H. L. B. 385; May. Chap. IV. Sec. 7, para. 3; Stokes, H. L. B. 74. *See* Smṛiti Chandrikâ, Chap. VII. paras. 32–33; *Naraganti Achammagáru* v. *Venkatachalapati,* I. L. R. 4 Mad. 259, 260.

Shekoji. (*a*) It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words "hṛita" (*i. e.* that which has been taken or seized), (*b*) and "nashṭa" (*i. e.* that which has been lost), and "uddharet" (*i. e.* if he rescue or win back). (*c*) Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy et al* v. *Debee Pershad Tewaree,* (*d*) and a case at 2 Str. H. L. 377, with the comments of Messrs. Colebrooke and Ellis, shows that "recovered property" is of the nature of that which should have been, but could not be, divided, owing to its detention by strangers. The views here expressed are substantially repeated in the case of *Visalatchi Ammal* v. *Annasamy Sastry.* (*e*) The introduction of the condition of acquiescence on the part of co-sharers is due

(*a*) S. A No. 534 of 1864, decided 20th September 1864.

(*b*) Roer and Montriou translate "purloined." Yâjñ. II 119.

(*c*) In answer to Q 585 MSS. the Śâstri said that when a Vatan had been granted to one brother, resumed in part on his death, but recovered by the other brother, it did not become the property of the undivided family to which he belonged.—*Dharwar, 24th February* 1848. This agrees with the view taken by the P. C. in the *Shivagunga* case. Comp the cases above, p. 158, notes (*g*) and (*h*).

(*d*) 6 C. W. R. 58 C. R.

(*e*) 5 M. H. C. R. 150, *see* also *Muttu Vaduganadha Tévar* v. *Dora Singha Tévar,* I. L. R. 3 Mad. at p. 300, and *Naraganti Achammagaru* v. *Venatachalapati,* I L. R. 4 Mad. at p. 259.

probably to the necessity of guarding them against any underhand proceeding by one of their number. (a) Recovered property, it has been held, does not include what is regained from one claiming as a member of the family; but only property held adversely by strangers; and one, who, in a suit brought by him against a stranger, purposely ignores his co-heir, is not entitled to any extra share. (b) Ancestral moveables, recovered by a coparcener, without the use of the patrimony, but with the consent of the co-sharers, become his separate property.

The author of the Mitâksharâ has quoted Manu IX. 209 in support of his view of the father's independent power over ancestral property recovered by him. His explanation of the passage, though differing in terms, agrees in substance with that of Manu's Commentator Kullûkabhaṭṭa. The translation of Sir W. Jones does not correctly render the sense of Manu's words, inasmuch as he has translated the word putraiḥ, "with his sons," by "with his brethren." While the family is undivided, however, the acquisitions of its several members are usually made by the aid of the common property and unite with it. Hence a presumption arises of all the possessions of the several members being joint estate subject to distribution like ancestral property. In *Dhurm Das Pandey* v. *Musst. Shâma Soondri Dibiah*, (c) the Judicial Committee say:—"It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property." That this applies when the transac-

(a) 1 Str. H. L. 217.

(b) *Bissessur Chuckerbutty et al* v. *Seetul Chunder Chuckerbutty*, 9 C. W. R. 69 C. R.

(c) 3 M. I. A. at p. 240.

tions of a father are in question is shown by *Suraj Bunsee Kooer's* case (*a*) and many others. The case is consequently almost unknown in practice of a father's uncontrolled power being asserted on the ground of recovery referrible solely to his own exertions or fortune.

§ 5A. 3.—*Self-acquired property.*—*Acquired,* as distinguished from *inherited* or *recovered,* property, has a two-fold character as being the acquisition

a. Of a father, head of a family, and
b. Of any other coparcener.

§ 5A. 3. *a.* Self-acquired property, as between a father and his sons, includes all separate acquisitions by the father, such as a grant of a village as an inam, (*b*) as well as

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(*a*) Above, p. 609.

(*b*) *Bahirji Tannaji* v. *Odatsing,* R. A No. 47 of 1871, Bom. H. C. P. J. F. for 1872, No. 33.

The following cases connected with grants of land may be useful as showing when the grantee has, and when he has not, a full power of disposal.

A grant to a man, his children and grandchildren, confers an absolute estate, *Tagore* case, 4 B. L. R. 182 O. C., and if to a gift are added "words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected [as a] qualification which the law does not recognize." *Tagore* case, 9 B. L. R. 395, quoted by the Judicial Committee in *Bhooban Mohini Debya* v. *Hurish Chunder Chowdrey,* L. R. 5 I. A. at p 147. (Comp. Laboulaye, Prop. Fonce. en. Oc. 368.) As to the extent of the property conferred by a grant in Bombay, see *Waman J. Joshi* v. *The Collector of Thana,* 6 Bom. R. 191 A. C. J., and *Nagardas* v. *The Conservator of Forests,* I. L. R. 4 Bom. 264; *Bayaji* v. *The Conservator of Forests,* P. J. 1880, p. 342. In *Jamna Sani* v. *Lakshmanrao,* Bom. H. C. P. J. 1881, p. 6, it was said that ordinarily the holder of a jaghir or saranjâm can make a valid grant only for his own life; and the Government having defined an estate previously granted as a saranjâm, and untransferable from the family meant to be benefited, a subsequent alienation to a stranger was pronounced invalid as against the grantor's heirs. In *Nagardas'* case (*supra*) it was held that an Izafatdar's title does not necessarily involve any proprie-

ancestral property recovered and property taken by inheritance, but not in the direct male line of descent. (*a*) The acquisition or recovery must have been made without the aid of the family estate; otherwise the property will rank as ancestral. (*b*) In the Mitâksharâ this qualification is not distinctly drawn out. The general rule only is laid down, that sons become by birth participators in both the property inherited by their father and the property by him

tary right, and that even though a Khot may be a proprietor yet this is not implied in his "Khoti" office or grant, so as to make him owner of timber growing on the village lands subject to his authority.

When a grant has once been made by the Government, or a sanad has been granted settling the land tax under Bombay Act VII. of 1863, the executive cannot reform or annul it, *Dholsang Bhavsang* v. *The Collector of Kaira*, I. L R. 4 Bom 367. If the settlement has been made with a person not the rightful owner, the owner is bound by it, but he may recover the property subject to the settlement from the possessor holding the sanad as from a trustee. On the other hand the grantee, (an inamdar,) is strictly bound by the terms of his grant from the sovereign power, *see* above p 173, 441. Unless expressly empowered by his grant he has not a right to enclose land used immemorially as pasture ground by the inhabitants of a village, *Vishwanáth* v. *Máhádáji*, I. L R. 3 Bom. 147.

In *Collector of Surat* v. *Ghelabhoy Nárandas*, 9 Harr. 603, the State taking by escheat an estate granted free of service was held bound by a mortgage effected by the last deceased inamdar. Comp. *Rája Salig Ram* v. *Secretary of State*, L R. Supp. I. A. 119, 129. As to a grant by a Zamindar, see *Raja Nursingh Deb* v. *Roy Koylasnath*, 9 M. I. A. 55. *See* Steele, L C. pp. 207, 237, 269.

(*a*) *See* above, p. 710 ss

(*b*) In the common case of a purchase by the father out of funds separately acquired by himself of property in the name of his son, the presumption is not as under the English law of an intended advancement of the son, but of a purchase, benami (*i.e* without his name or in another name) for the father himself, see *Naginbhai Dayabhai* v. *Abdula bin Nasar*, I. L. R. 6 Bom. 717. The auspicious fortune of the son is thus sought to be attached to the acquisition and a unity of interest is generally recognized in feeling even when not acknowledged as a legal obligation. "By the Mitâksharâ

acquired, (*a*) and that the right of sons and grandsons in the grandfather's estate is equal, without any express provision for accumulations or increments of the estate. The section (4 of Chapter I.) which treats of property not subject to partition, since it lays down no explicit rules regarding acquisitions made by a father, might be taken as relating only to independent or equal coparceners, such as brothers or collaterals. But in the Mayûkha, Chap. IV. Sec. 4, para. 5, (*b*) the text of Manu, which excludes property recovered by a father from ancestral property, is modified by a text of Bṛihaspati, which declares that such recovery must take place through the father's own ability [and without the use of the patrimony]. The effect would seem to extend to the case of separate acquisitions made by the father with the aid of the ancestral estate. In *Sudanund Mohapattur* v. *Bonomallee et al,* (*c*) quoted in *Sudanund Mohapattur* v. *Soorjamonee Debee,* (*d*) it was said that ancestral property did not include that purchased out of the income; but this has been overruled. (*e*)

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law... . the son has a vested right of inheritance in the ancestral immoveable property.........the ancestral property is only that which is actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it,"—the judgment, overruled at 8 C. W. R. 456 (*Sudanund Mohapattur* v. *Soorjomonee Debee*), was subsequently held to be *res judicata* between the parties and decisive of Chakardhur's right to dispose of acquisitions out of profits, *Soorjomanee Dayee* v *Saddanund Mohapatter,* P. C. 20 C. W. R. 377 S. C., L. R. S. I. A. 212, though the correct doctrine is upheld in *Umrithnath Chowdry* v. *Goureenath Chowdry et al,* 13 M. I. A. 542.

(*a*) Mit. Chap. I. Sec. 1, pl. 27; Stokes, H. L. B. 375; Sec 5, p. 10; *ibid.* 393.

(*b*) Stokes, H. L. B 48.

(*c*) 1 Marshall, 317.

(*d*) 8 C. W. R. 456 C R.

(*e*) C. W. R l. c., and *Sudanund Mohapattur* v. *Bonomallee Doss,* 6 *ibid,* 256 C. R.

§ 5A. 3. *b*. Self-acquired property, as between coparceners generally, includes gifts of friends, or at marriage, gains of science, valour, and chance, obtained by one or some of the coparceners apart from the others (*a*) without the use of the family property. (*b*) If in the acquisition of property directly gained by science, valour, &c., the result is in a considera-

(*a*) See *Radhabai* v. *Nanarao*, I. L. R. 3 Bom. 151 An inam resumed by the Government and afterwards bestowed on a single member of the family was held to be self-acquired by him, *Kristniah* v. *R. Panakaloo*, M. S. D A. Dec. for 1849, p 107. This agrees with the *Shivaganga* case, 9 M. I A. 609. In Bombay the resumption of an inam in the sense of reimposing the land-tax on the death of the inamdar was held not to create a new estate. The encumbrances created by the inamdar were held still to subsist as against his representatives, *Vishnu Trimbak* v. *Tátiá*, 1 Bom. H C. R. 22. Comp. p. 158, *supra*.

(*b*) Mit. Chap. I. Sec. 4, paras. 1-15, Stokes, H. L B. 384-7 ; May. Chap. IV. Sec. 7, paras 1-14, *ibid*. 73-77 ; *Nahak Chand* v. *Ram Narayan*, I. L. R 2 All. 181. Property acquired by use of inherited funds is joint, *Musst. Mooniah et al* v. *Musst. Teeknoo*, 7 C. W. R. 440, and from union a presumption arises of all property being joint, *Taruck Chunder Poddar et al* v *Jodeshur Chunder Koondoo*, 11 B L. R. 193 ; *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M. I. A. 53 ; *Neelkisto Deb* v. *Beerchunder Thakoor*, 12 M. I. A. 540. When two brothers lived together without paternal estate and acquired land chiefly through capital supplied by the elder and improved it by their joint exertions, the younger suing for a moiety was awarded one-third, *Koshal Chukurwutty* v. *Radhanath Chukurwutty*, 1 Calc. S. D. A. Rep. 335. But conveyances in a single name and prolonged separate enjoyment raise a presumption of separate acquisition, *Gurácharya* v. *Bhimácharya*, S. A. No. 223 of 1876, Bom. H. C. P. J. F. for 1876, p. 241.

In the Dera Ghazi Khan District it is noted that gifts from a father-in-law or maternal grandfather are excluded from partition, Panj. Cust. Law, Vol. II. p. 261.

With the gain by valour may be compared the Roman law on that subject. Gaius says—"Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt," Lib II. Sec. 69. He links this with the doctrine of title by first occupation. The right to the peculium castrense was specially constituted as against the patria potestas, *see* Juv. Sat. XVI. 51.

ble proportion evidently due to the use of the family estate, an equitable distribution of such acquisition between the family and the separate estates, should, it appears, be made. (*a*) Such seems to be the effect, when interpreted according to the reason of the law, of the text of Vaśishṭha, cited Mit., l. c., para. 29, on which *see* Mr. Ellis's remarks quoted at 2 Str. H. L. 383. (*b*) The difficulty as to the relation of Mit., Chap. I. Sec. 4, para. 29 to para. 31, (*c*) may be solved with Mr. Colebrooke and Sir T. Strange by regarding the former paragraph as referred to a *wholly separate acquisition*, obtained by the aid of the family property, whereas the latter refers to augmentations, blending

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(*a*) The distribution of property acquired by different parceners is to be in fair proportion to their contributions of labour and capital, *Krippa Sindhu Patjoshe* v. *Kanhaya Acharya*, 5 M. S. D. A. R 335.

(*b*) Gains of science, through learning acquired while the gainer was supported by a stranger, are separate and self-acquired property. So is a reward for any extraordinary achievement. But all other acquisitions of an undivided coparcener are family property. Q. 594, Poona, 17th August 1849, and Q. 685 MSS; *see* also 2 Str. H. L 374. But Jagannâtha says, Coleb. Dig. Bk. V. T. 346 Comm.:— "The meaning is that wealth gained by superior attainment in any art or science belongs exclusively to him who acquired it." Sir William Jones, at 2 Str. H. L. 250, translates Manu apparently as recognizing separate property held by an undivided coparcener, and to be inherited by his widow, as distinguished from the doctrine of the Dâyabhâga, which makes her heir even in an undivided brotherhood, though with a right limited to mere enjoyment. At 2 Str. H. L. 346 is a case of a member living apart and acquiring separate property, but without any division; whom the Śâstri pronounced answerable for his brother's debt only if he had received assets. A *Śrotriyam* grant for learned service was pronounced descendible to the grantee's sons only, to the exclusion of his brothers, *ibid.* 365. A village obtained without the use of the patrimony was pronounced separate property, *ibid.* 377.

The custom of London, which prescribed a particular distribution of a freeman's property, did not extend to his gains by the profession of chemistry or of medicine. 1 Vern. 61, Bac. Abrt. Customs. (C)

(*c*) Stokes, H. L B. 390.

as they accrue with the original estate. (*a*) In Colebrooke, Dig., Bk. V., T. 354, 355, Jagannâtha seems to lay down that what is acquired without any aid at all from the patrimony is separate property; that what is acquired with such aid, whether previous or concurrent, is partible with the learned brothers; and that if the aid has been both previous and concurrent, the acquisitions are partible with all the brothers. In commenting on the text of Vaśishṭha, Jagannâtha (T. 356) says that aid from the patrimony includes supplies previously received out of it, and under T. 359 he assumes that the double share is in an acquisition made without using the patrimony concurrently or as capital. (*b*) In *Chala Condu Alasâni* v. *C. Ratnâchalam et al*, (*c*) the subject of the gains of science is discussed at great length, the conclusion being that such acquisitions, made by one supported and instructed at the expense of the family, form part of the joint estate. (*d*) In *Ramasheshaiya Panday*

(*a*) When the self-acquired property is so held that the profits blend with those of the ancestral, the whole is to be deemed a common stock, *Gooroo Churn Doss et al* v *Goluck Money Dossee*, 1 Fulton, 165, which is cited and followed in *Lakshman* v *Jamnabai*, I. L. R. 6 Bom. 225. Where a distinction is possible a double share belongs to the acquirer, but this does not apply to a manager, who is bound to devote his abilities to the interest of the family, *see* above, p. 635.

(*b*) The case at 2 Str. H. L. 371 distinguished the three cases of (1) an augmentation of the common stock, (2) separate gains by the aid of the patrimony, in which the acquirer takes a double share, and (3) gains independently acquired and forming wholly separate property. " The common stock, however improved or augmented, is to be equally divided; but if separate acquisitions have been made to which the patrimony was instrumental the acquirer is rewarded with a double share. Separate gains of specified sorts to effect which the patrimony was not used would belong exclusively to the acquirer." Colebrooke in 2 Str. H. L. 371. As to the last class, see *ibid* 374.

(*c*) 2 M. H. C. R. 56. To the same effect see *Durvasula Gangadhurudu* v. *Durvasula Narasammah*, 7 M. H. C. R. 47.

(*d*) This case is referred to in *Bai Mancha* v. *Narotamdas*, 6 Bom. H. C. R. 1 A. C. J., in which there was clearly a joint capital as the basis of acquisition by a single coparcener.

v. *Bhagavat Panday*,(*a*) it is said that any property acquired by a Hindû while drawing an income from the family is joint property. (*b*) In the case of *Lukhun Chunder Dallal*

(*a*) 4 M. H. C. R 5.

(*b*) At 2 Str H. L. 376, Sutherland questions Ellis's dictum that an education at the cost of the father makes subsequent gains divisible as family property. *See* also per Mitter, J , in *Dhunoopdaree Lall* v. *Gunpat Lall*, 10 C W. R 122. In *Pauliem Valoo* v. *Pauliem Sooryah*, L. R. 4 I A , at p. 117 (S. C., I. L. R. 1 Mad. at p. 261), the Privy Council say that the doctrine, favored in Madras and followed in Bombay (in *Bâi Manchhâ* v. *Narotamdâs*, 6 Bom. H. C. R. 1 A C. J., involves "the somewhat startling proposition," that "if a member of a joint Hindû family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property." The member might acquire full capacity by a separation, but even without a separation his acquisitions should not, it appears, become, without distinction, joint property. Their distribution between the joint and the separate estates should, it would seem, be governed by the principles above set forth, as deducible on a just construction from the Smṛiti. *See* Manu IX. 208, as quoted in Mit. Chap. I. Sec. 4, pl. 10, Stokes, H. L. B. 387; Coleb Dig Bk. V. T. 347, 348 In the same case, it was held that the education of *B* out of the estate of his father *A*, that estate ranking as self-acquired property, was not an instruction at the cost of the joint estate, so as to make *B*'s property subsequently acquired joint as between him and his sons, *C*, *C*[1], *C*[2], &c , and thus raise a question as to the testamentary power with respect to it, exercised by *B* in favor of *C*[1], *C*[2], &c. to the exclusion of *C*. According to the Mitâksharâ and the Mayûkha, as construed above, Sec. 5A. 2 *a*. pp. 721, &c., the instruction of *B* at *A's* expense would entitle brothers, if he had any, to share with him in gains directly attributable to the instruction, but it would make no difference as between *B* and *C*, *C*[1], *C*[2], &c., whether *A's* property was ancestral or self-acquired, *see* Mit. Chap. I Sec. 5, pl. 3; Stokes, H. L. B. 391 The question would be whether the acquisition of property by *B* was or was not substantially founded on what he took from *A*, or held jointly with *A*, so as to make *C*, *C*[1], *C*[2], &c. joint owners on *A's* death. *See* Nârada, Pt. II. Chap. XIII. paras. 6, 11; Mit. Chap. I. Sec. V. para. 3; Vîram. Tr. p. 68; the Dâyabhâga, Chap. VI. Sec. 1, para. 16 note, Stokes, H. L. B. 269; Coleb. Dig. Bk. V. T. 354 Comm. *ad fin*, and T. 379 Comm.; *supra*, Bk. II. Introd. Sec. 5 A, 1A.

v. *Modhoo Mockhee Dossee,* (a) it was ruled that an allegation of separate acquisition by the use of a gift must be proved, and in *Dhurm Dos Pande* v. *Musst Shama Soondri Debia,* (b) that when property has been acquired by a coparcener in his own name, the criterion for determining its character is the source of the funds employed. (c).

In *Lakshman* v. *Jamnabai* (d) it was said after a review of the previous decision: " We think that we shall be doing no violence to the Hindû texts but shall only be adapting them to the condition of modern Hindû society, if we hold that when they speak of the gains of science which has been imparted at the family expense they intend the special branch of science which is the immediate source of the gains and not the elementary education which is the necessary stepping-stone to the acquisition of all science. Adopting this principle and applying it to the present case we find, as we have said, that there is no reason to suppose that Dayárám acquired at Dharwar and Belgaum anything more than a rudimentary education. We see no reason to doubt that the knowledge of law and judicial practice which qualified him for the post of a Judge was acquired by him in a lawyer's office in Bombay and in the Sadar Adawlat. Assuming that the burden of proving that this knowledge was acquired without any aid from the family estate lies upon the respondent (though the observations of the Privy Council in *Luximon Row Sudasew* v. *Mullar Row Bajee,* 2 Knapp 60, tend to the opposite conclusion), we find sufficient in the evidence, and especially in the earlier letters written by Dayárám from Bombay, to show that Dayárám was not receiving pecuniary aid from his father, but on the contrary was supplying his

(a) 5 C. W. R. 278 C. R.

(b) 3 M. I. A. 229.

(c) " Unequal gains.........using for the purpose the family property make no difference upon partition. It must still be equal." This dictum of the Śâstri is approved by Colebrooke, 2 Str. H. L. 313, who quotes Mit. Chap. I. Sec. 4, p. 31 (Stokes, H. L. B. 390).

(d) I L. R. 6 Bom. 225, 243.

father with such money as he could spare." The Court accordingly confirmed the decision of the Subordinate Judge that Dayárám's estate was to be regarded for purposes of inheritance as separate and self-acquired. The decision rests generally on the principles above set forth, and shows that acquired property does not rank as joint where there is not really an obligation of the acquirer to the family going beyond mere ordinary sustenance and rudimentary education. Whether there had been some aid from the family such as to limit Dayárám's right to a share double that of his brother however was a question not raised, it would seem, in the case. (*a*)

(*a*) For the presumptions which arise when amongst parceners separate acquisition is asserted by some and denied by others, *see* the cases of *Laxmanrav Sadasev* v *Mulharrav*, 2 Kn 60; *Dhuramdas Pandey* v. *Musst Shama Soondri*, 3 M I A. at p 240; *Gopeekrist Gosain* v. *Gangapersad Gosain*, 6 M I. A. 53; *Neelkisto Deb Burmano* v. *Beerchundur Thakoor*, 12 M. I. A. 540; *Bodhsing Doodhomia* v. *Ganesh Chundur Sen* (Pr. Co.) 12 Beng. L. R. 117; *Amritnáth Chowdry* v. *Gowreenath Chowdry*, 13 M. I. A 542; *Tamek Chunder Poddar* v. *Jodeshur Chundur Koondoo*, 11 Beng. L R 193; *Bholanath Mahta* v. *Ajoodha Persad Sookul*, 12 B. L. R. 336; *Dinonath Shaw* v. *Hurrynarain Shaw*, 12 B. L. R. 349; *Gobind Chundur Mookerjee* v. *Doorgapersad Baboo*, 22 C. W. R. 248; *Vishnu Vishwanath* v. *Ramchandra*, Bom. H. C. P. J. 1883, p. 53. The principal cases are discussed by Scott, J, in *Mooljee Lilla* v. *Goculdas Valla*. The learned judge is brought back as the result to the texts of Manu IX. 268, and the Mitaksharâ, Chap. I. Sec. IV. para. 10, already referred to.

Parceners claiming a share in property acquired by others must prove that the latter received aid from the paternal estate, according to *Cahotty Pillai* v. *Yella Pillai*, 1 M. S. D. A Dec. 148, and the burden has been similarly laid in several of the more recent cases above referred to. But the presumption in a united family is of continued unity of estate. *See Musst. Cheetha* v. *Miheen Lall*, 11 M. I. A. 369, though the presumption is one easily displaced by facts indicating a separate and substantially independent acquisition. In *Musst. Bannoo* v. *Kasheeram*, I. L. R. 3 Calc. 315, the Judicial Committee would not allow it to prevail, though in some property there had been an hereditary joint estate. The circumstances of the family it was said rebutted the ordinary presumption. *See* now

§ 5 B. *Property naturally indivisible.*—Naturally indivisible property is that which cannot be distributed retaining its essential characteristics. (*a*) In the Hindû law there are enumerated common roads or ways, tanks, wells, pasture-ground, (*b*) hereditary offices (vṛitti, vatan), religious and charitable dedications (yoga-kshema), as endowments and reservoirs for travellers, (*c*) clothes in use, books, tools, ornaments, vehicles, and furniture. (*d*) To these may

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Ind. Ev. Act, Secs. 4, 114, and the observations of Phear, J., at 12 Beng. L. R. 342 ss.

(*a*) *See* Ellis in 2 Str. H. L. 329.

(*b*) Steele, L. C. 223. Amongst the ancient Irish, the forests, bogs, and wastes remained undivided after a general partition. So in the German Markgenossenschaft, the mass of the land was held jointly, while his house and enclosure were held by the individual owner.

(*c*) Vîram. Tr. p. 249. The Dharwar Śâstri (30th June 1818) says that a Bhaṭ's vṛitti and a Zamindâr's vatan are alike divisible according to Bṛihaspati, Q. 643 MSS. *See* Steele, 218, 228; Vîram. Tr. p. 3, and above, p. 411. The books of genealogies of the periodical pilgrims to places like Nasik are on a division of the family distributed amongst the members of the priestly families, who thenceforward have an exclusive interest in the families allotted to them. Steele, L. C. 85.

(*d*) 2 Str. H. L. 370; Coleb. Dig. Bk. V. T. 362, 474 Comm.; Mit. Chap. I. Sec. 4, para. 19; May. Chap. IV. Sec. 7, para. 15, Stokes, H. L. B. 77; Mit. Chap. I. Sec. 4, paras. 17—20; *ibid.* 388. In para. 20, "If they cannot be divided, the number being unequal, they belong to the eldest brother," means that the indivisible remainder goes to him. This is the interpretation of the Subodhinî, and is supported by the text of Manu, quoted by Vijnâneśvara. Goldstücker (On the Deficiencies, &c.) thinks that Jones and Colebrooke were wrong in their translation, and that in the case of an unequal number of cattle, no partition at all could be made, but their construction is as grammatical as that of their learned critic, and more reasonable and convenient. Mit. Chap. I. Sec. 4, para. 19.

According to the borough-English custom the family dwelling (called astre or hearth) was reserved to the youngest son. *See* Elt. Tenure of Kent, 173. Under the ordinary law to the eldest, Glanv. VII. 3.

be added indivisible rights arising from obligations contracted towards the common ancestor, or towards the family, whilst in a state of union. (*a*) Vyâsa includes the dwelling in indivisible property. (*b*) The Vyav. May. (*c*) explains this away in a very confused manner. The passages seem to point to the sacredness under the antique law of the house and its curtilage. (*d*)

(*a*) *See* Colebrooke on Oblig. Art. 433; Pothier, Obl. Art. 294; *Musst. Ameeroo Nissa Bibee* v. *B. Otool Chunder et al*, 7 C. W. R 314 C. R.; *Dewakur Josee et al* v. *Naroo Keshoo Goreh*, Bom. Sel. Ca 215.

(*b*) Coleb. Dig. Bk. V. T. 354; so also Śankha and Likhita, T. 362.

(*c*) Chap. VI. Sec. 7, p. 21; Stokes, H. L. B. 78.

(*d*) The family estate, once regarded as inalienable, a quality extending even to acquisitions by acceptance of religious gifts, (*see* Vîram. Tr. p. 99, above p. 138,) next became disposable by the joint will of all interested. In *Lallubhai* v. *Bai Amrit*, I. L R. 2 Bom. at p. 328, the progress from this stage through the allowance of religious gifts to freedom of sale is traced by reference to the Hindû authorities. When the separate performance of the family sacrifices by brothers residing apart once became recognized as a right, and then as a duty, the close connexion between the sacra and the estate made a law of partition almost inevitable. Still the ancient habits and traditions made this a slow growth. Union under the eldest (Manu IX. 106) must long have remained the sacred type of the family, until the progress and increase of the other castes invited the Brahmans, the sole legislators of the codes, to dispersion, and to the encouragement of dispersion amongst their clients for the multiplication of religious functions. It seems from such Smṛitis as the one quoted, Mit. Chap. I. Sec. 1, para. 30, that the partition of the immoveable patrimony was regarded, when first allowed, rather as a distribution for use than a division of interests. To this may be ascribed some apparent contradictions of precept. Thus, notwithstanding a partition, the concurrence of all the co-sharers, though separated, was required for the gift or sale of any part of the ancestral lands, Steele, L. C. 239. To this may probably be traced the right of pre-emption amongst members of the same stock recognized by some local usages of the Hindûs. The right recognized amongst Hindûs in Gujarâth has been referred to a Mahomedan origin, *Gordhandás* v. *Prankor*, 6 Bom. H. C. R. 263 A. C. J., and in Bengal, B. L. R. F. B. R. 143, but a Gujarâth Śâstri referred it to the prohibition against

In the case of *Mangala Debi et al* v. *Dinanath*

alienation of the family estate, MS. Q 746. *See* Steele, L. C. p. 211; and comp. Tupper, Panj. Cust Law, Vol. III. p. 147.

The Mitâksharâ, written after the sacred and perpetual unity of the patrimony had passed away, says that the concurrence of one separated kinsman in the sale of his land by another is required only to prevent future dispute, but this utilitarian reason for the continuance of the rule was obviously not the source of it. The Smṛitis regard the patrimonial lands generally as indivisible. Thus Uśânas, (in Mit. Chap. I. Sec. 4, pl 26, Stokes, H. L. B. 390, Smṛiti Chandrikâ, Chap. VII. para. 44), says that land and sacrificial gains are wholly impartible. Prajâpati (para. 46) is to the same effect. (*See* also Smṛiti Chandrikâ, Chap. XII. para. 21) He says that the assent of every coparcener is requisite to the validity of any act, touching the immoveable property Unanimity amongst the sharers was perhaps meant by Prajâpati to warrant partition and even alienation, as Yâjñavalkya also (para. 49) says, "No one can make a partition of the inheritance It must be enjoyed merely, not aliened by gift or sale," and yet he lays down rules for partitions. (Yâjñ. II. 114, &c.) The text of Bṛihaspati quoted in Mit. Chap I. Sec. 1, para 30 (Stokes, H L B 376, and Smṛiti Chandrikâ, Chap. XV. para. 3), "A single person (even separated) never has power over immoveables," though differently explained by the modern commentators, points back to the same primitive notion The differences of custom which have spring from this may be seen in Steele, L. C. 238.

The ancient rule of the Hindû Law which forbade sale but allowed mortgage of the inheritance, Mit. Chap I. Sec. 1, para 32, was the basis of the law of Kânarâ, whereby a mortgagee who had entered on default was compelled, after any lapse of time, to restore the property on payment of the debt with interest and compensation for improvements. *See* 5th Rep. 130. So too the occupier of vacant land deserted by its owner had to restore it on his return with or without compensation for his expenditure, see *Bháskaráppá* v. *The Collector of North Kánará*, I. L. R. 3 Bom 525 ss. A similar law, resting on the same ideas, is still operative in the Panjáb, though there, as elsewhere, restrictions are creeping in, *see* Tupper, Panj. Cust. Law, Vol. III. p. 145-150; and the same, Vol I. p. 93, 94; Vol. II. p. 214, for the right asserted by village communities over the common land, and Vol. II. p. 8 ss for the tribal origin of property in land and the derivative constitution of the family and individual ownership, contrary to Sir H. Maine, Early Hist. of Inst. pp. 77-82.

Bose, (*a*) Sir B. Peacock, C. J., refers to Kâtyâyana, as

Amongst the Garos all land is held in common by a Mahari or clan.........It can be aliened only by common consent. Damant in Ind. Antq. Vol. VIII. p. 205. In the Delhi territories, according to native custom, "a sharer cannot dispose of his landed property by sale or gift nor introduce a stranger without the general acquiescence of the pane or thola or other division to which he belongs," his co-members of the community having also a right of pre-emption. Mr. Fortescue's Rept. of 28th April 1820, III. R. and J. Sel. 404. In Lahore sales of land are not recognized, while usufructuary mortgages are common, Panj. Cust. Law, Vol. II. p. 187. The consent of townsmen and neighbours (*see* Coleb. Dig. Bk II. Chap. IV. Sec. 2, T. 183), referred to in Mit. Chap. I. Sec. 1, p. 31 (Stokes, H. L. B. 376), may have been required on account of the joint enjoyment of the common pasture land appendant to the holding, and of the close connection and community of interest of the several members of the ancient village They were dependent on each other for many services and subject to taxation in common. It was natural then that the relatives first and then co-villagers should have a preferential right to vacant lands. *See* Proc. Beng. Soc. Sc. Assn. Vol. I. p. 31. The consent of the Mirâsdârs is said by Ellis (Madras Mirasi papers, pp. 206, 207) to be necessary for the admission of an outsider to ownership either of a share in the integral property in the village, or of a particular portion of the land. The form of such assent is retained in many modern grants, such as that under Tippoo's Government, set forth at Vol. I. p. 73, of the Evidence in the Kânarâ Land Case, which, it is said, is made "with the consent of the Desâis, Gâvkaris, Bhâvas, and Poṭbhâvas of the village" Sales were formerly attested in many cases by the whole village community, *see* Wilks, South of India, Vol. I. p. 132. *See* further Laveleye's Primitive Property, p. 60; Stubbs, Const. Hist. Vol I. pp. 95, 96; 5th Rep. on E. I. Affairs (1812), Vol II. p. 136, 826; and Mountst. Elphinstone's Hist. of Ind. Vol. I. p. 126; Maine, Anc. Law, Chap. VIII. p. 263.

The endeavour to preserve the land to the family to which it was originally allotted formed part of the polity of many of the Grecian States. The famous Agrarian law of the Jews had the same object in view, *see* Milman, Hist. of the Jews, Bk. V. Vol. I. p. 231. The Teutonic laws generally prohibited alike female succession, which might deprive the community of a defender, and the alienation of the patrimony without the consent of all the sons, or as in Sweden of all

(*a*) 4 B. L. R. 72 O. C. J.

quoted in Coleb., Dig. Bk. II. Chap. IV., T. 19, to show that an adopted son cannot, by selling the family house, deprive his adoptive mother of her right to a residence in it. This was followed in *Gauri* v. *Chandramani*, (*a*) where the purchaser at an execution sale of the rights of a nephew was successfully resisted, as to one-half of the family dwelling, by the widow of the judgment-debtor's uncle. And recently it has been held that the widow of an undivided Hindû has a right to residence in the family dwelling-house and can assert it against the purchaser of the house at a sale in execution of a decree against another member of the family. (*b*)

As regards clothes, furniture, vehicles, ornaments, books, and tools, it must be understood that an equitable distribution (*c*) of them or of the proceeds of their sale is sanctioned, when they are numerous and of value, or form the sole property of the family. As to ornaments it is said that those commonly worn by a woman during her husband's life are not subject to partition, after his death, by his coparce-

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members of the family except in case of extreme necessity. Captivity was such a case, and at a later time overwhelming debt. A right of retraction subsisted for a year. *See* Maine, Anc. Law, Chap VI. p. 198; Lex. Salica, Ti. 62, Sec. 6; Baring Gould, Germany, Past and Present, Vol. I. p. 74. In Sweden, as in India, the right of occupation of waste was at one time unrestricted except by the liability to taxation, but this latter was in both countries expanded into a right or claim to superior ownership; *see* Geiger, Hist of Sweden, Chap. IV; *Bhaskaráppá* v. *The Collector of North Kánará*, I. L. R. 3 Bom. 540, 544 ss. In Norway an indefeasible right of redemption was always recognized; Elt. Orig. p. 209.

(*a*) I. L. R. 1 All. p. 262.

(*b*) *See* Bk. I. Chap. I. Sec. 2, Q 9; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353; *Parvati* v. *Kisansing*, Bom. H. C P J. 1882, p. 183. *See* above, p. 252. According to the custom of London and other places under the English law, "while the house went to the youngest heir, the chief room was reserved as the widow's chamber." *See* Elt. Tenure of Kent, 42.

(*c*) May. l. c., paras. 22 and 23; Stokes, H. L. B. 78-9; Mit. Chap. I. Sec. 4, paras. 17-19; *ibid.* 388. Otherwise they are retained by the possessors, allowance being made for their value; Steele, L. C. 60, 223.

ners,(a) they and are expressly excluded from partition in the husband's life by Vishṇu, XVII., p. 21, unless given in fraud of the coparceners.(b) Property subject to partition, but the existence of which was not known and which could not therefore be included in a general partition, is, on its discovery, to be distributed, and in the same proportion as that actually divided. (c)

§ 5c. *Property legally impartible.*—Property, not naturally indivisible, may be impartible on account of the political condition of the owners or of a local or family law governing its devolution. (d) The succession to a principality is by the Hindû Law usually confined to a single line of chieftains. (e)

(a) Vîram. Transl. 250 ; *Infra*, Bk. II. Introd. Sec. 7 A. 2. A widow's ornaments are not partible amongst her husband's coparceners, Steele, L. C. 35. *See* above, p. 310.

(b) *See* above, pp. 186, 208, 310. (c) Steele, L. C. 60, 223.

(d) *See* Coleb. Dig. Bk. II. Chap. IV. T. 15 Comm. ; Maine, Anc. L. 233. Under the Maroomakatayam law a partition requires the assent of all members of the family, M. S. D. A R. for 1857, p. 120. Under the English Common Law cases arose of coparceners inheriting property, such as a fortress, a corody uncertain, or common appendant which could not be divided. In such cases the eldest took the impartible property and made an equivalent contribution in money to the others. So too when the youngest coparcener took the whole of the impartible property under the law of borough-English. *See* Bract. II. 76 ; Co. Litt. 165 *a* ; Elt. Tenure of Kent, 172.

(e) Steele, L. C. 60, 62, 229; 1 Macn. H. L. 7; 2 Str. H. L. 328. The custom arose, or maintained itself amidst a general change, partly from the sacred character ascribed to the eponymous founder of a line of chieftains and his descendants retaining power or nearly connected with those who held it; partly, too, under the pressure of necessities such as those which gave rise to a similar rule in the Feudal system. Before this had become developed we find the sons of Clovis dividing the empire (Coulanges, Hist. Inst. p. 427) under the Salic law (Hessels and Kern, 379 ss.) like a private estate. In England, before the Norman conquest, the succession to the throne, though confined to a single family, was determined, as to the individual, by election, a method which, unless the electors as well as the person chosen belong to the princely family, is not consonant to Hindû ideas of chieftainship. Feudal tenure required a defined and single successor to the fief. But in Germany, where allodial

The preference of individual members of the reigning family may be governed by a simple rule of primogeniture (*a*) and exclusion of females; it may admit of collateral representatives coming in under particular circumstances; or a power of selection of the heir apparent from a larger or a smaller class may be exercised by the chief in possession or after his death by a group of chiefs. (*b*) Such rules recognized as controlling the succession in a State are hardly to be classed with those of the ordinary municipal law. They can but seldom come under the cognizance of the ordinary Civil

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patrimony was often held along with the fief, the former was distributable as under the Hindû law, though the latter was impartible, at least from the 14th century downwards. The rule of primogeniture established as to their fiefs amongst the electors by the Golden Bull of Charles IV. was imitated generally by the princely houses as a family law, while partition was still the general law. *See* Freeman, Hist. of Norman Conquest, Vol. I. 107; Maine, Early Hist. of Inst. 199 ss; Baring Gould, Germany, Vol. I 78, 79; *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh*, 5 M. I. A. 169; *Chowdhry Chintamon Singh* v. *Musst Nowlukho Koonwari*, L. R. 2 I. A. 263.

(*a*) Notwithstanding the almost universal acceptance of the law of equal divisible ownership of the patrimony by several sons and their descendants, the traces of the older system of a theoretical permanence of union under a single head are still perceptible. *See* Steele, L. C. 62, 205, 215, 228, 229, 230, 375, 409, 417. The "vadilki" or eldership of a family of vatandars (hereditary functionaries) is still often contested with great acrimony, and that too when the rights or privileges annexed to the position are, according to an English estimate, of but the most trivial value, or of no value at all. The question between the grandson by a deceased elder son and a surviving younger son, and between the representatives of the eldest branch and of the branch nearest to the last holder gave rise in England and in Germany to contests like those which have arisen in India, *see* above p. 69, note (*b*), and Comp. Reeves, Hist. of Eng. Law, Chap. III. The Wars of the Roses sprang from an analogous dispute. In Germany the determination of the competing rights of the elder and the younger branch passed the skill of the lawyers and was committed to a single combat of champions. *See* Glanv. by Beames, p. 158; Meyer, Inst. Judiciaires, Vol. I. p. 344; Laboul. *op. cit.* 420.

(*b*) As to the tribal limitations and the customs of succession in Râjputânâ, *see* Sir A. C. Lyall's Asiatic Studies, p. 200 ss.

Courts, (*a*) the sanction requisite to enforce the decision as to a disputed succession, an appanage, or a maintenance, being in general an act of State. The analogy only of the ordinary law is usually followed, because this, forming a part of the popular consciousness, has moulded the natural expectations and the standard of propriety existing in the princely family and those connected with it. The custom of the family has equal or even greater influence, and its enforcement by the paramount power (*b*) rests ultimately on the same considerations as those which give weight to the ordinary Hindû law, the desire to satisfy the general sense of right. (*c*) The usage does not affect newly-purchased zamindaries. (*d*)

The primogeniture of the ancient Hindûs was much more a headship than an ownership excluding the other members or branches of the family. (*e*) The head was an administrator for all, and a master of all, because the refinements of more

(*a*) See *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya et al*, 25 C. W. R. 404, 12 M. I. A 523 (the Tipperah case).

(*b*) *Mootoor Engadachellasamy Manigar* v. *Toombayasamy Manigar*, M. S. A. Dec. 1849, p. 27; Steele, L C. 229. The character of the grant determined the rights as to inheritance and partition of an inam or jaghir. *See* Steele, L. C. 207; above pp. 157, 173.

(*c*) See *Neelkisto Deb* v. *Beer Chunder Thakoor et al*, 12 M. I. A. 523; *Maharaj Kuwar Busdev Singh* v. *M. Roodur Singh*, 7 C. S. D. A. R. 228; Coleb. Dig. Bk. II. Chap. IV. Sec. 1, T. 15 Comm. In Germany the property of the nobility "of the nature of a râj" is subject to various special rules of descent, having for their object the preservation of each estate as a support for the title. Besides primogeniture there are the rules of Majority, of Seniority, and of Secundo- and Tertio-geniture. For an explanation of these terms, the last of which implies the enjoyment of an appanage for life by a junior member of a family, according to a rule common in India, *see* Baring Gould, Germany, I. 81. Rules analogous to those of Majority and Seniority are to be found in operation in many States and Chieftainships.

(*d*) *Jagunnadharow* v. *Kondarow*, Mad. S. D. A. Dec. for 1849, p. 112; 3 Morl. Dig. 188.

(*e*) Above, pp. 69 ss.; Steele, L. C. 178, 228.

recent times had not been invented. At this stage of social development the idea of purely individual proprietorship was but growing up through the separate possession of moveables. (*a*) When the breaking up of families had been received into the legal system the former supremacy of the senior was recognized by the allowance to him of a greater portion or of some special parts of the estate, perhaps as an inducement to consent to a partition, (*b*) but probably also on account of the duty specially devolving on him of maintaining the sacra. (*c*) Precedence in public religious ceremonies, though sometimes burdensome, is still much prized by Hindû gentlemen, and has kept the minds of the people familiar with the idea of supremacy in families and individuals (*d*) notwithstanding the difficulty of reconciling the latter with the doctrine of equal rights acquired by birth. For ordinary public functions and the emoluments attending them, the generally received principle is that of a rotation of enjoyment amongst those entitled, (*e*) and this affords a means of transition, through cases where there must be some precedence, to an hereditary and singular succession to more exalted stations. (*f*) Both sets of ideas are at work in regulating the customary inheritance of the so-called "râj-es" of the present day, while the younger members of the territorial families claim appanages as of right in virtue of kinship. (*g*) But in each sub-branch a general secular precedence is conceded to the senior representative according with his pre-eminence in nearness to the ancestor and in ceremonial observances. (*h*)

With such cases as we are considering may be classed for some purposes the one relating to the confiscated estates of

(*a*) *See* St. L. C. 53, 179 Comp. Morgan, Anc. Soc. pp. 6, 528, 535.

(*b*) *See* Sir H. Maine, Early Hist. of Inst. p. 191 ss.

(*c*) *See* Steele, L. C loc: cit. 208, 218, 225.

(*d*) *See* Steele, L. C. 417.

(*e*) Steele, L. C. 205, 218, 229.

(*f*) *See* Coleb. Dig. *loc. cit.*; Steele, L. C. pp. 60, 63.

(*g*) Coleb. Dig. *loc. cit. ad fin.*; above, p. 264.

(*h*) *See* Steele, L. C. 217, 218, 221, 229, 413, 417.

the late King of Delhi, of *Raja Salig Ram and others* v. *The Secretary of State for India* (a) where it was said: "The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their position. If he had died, or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all), *durante regno,* and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself." In the same case a letter of the Government of India is quoted with seeming approval: "The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees. The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that 'the interests of justice' require the protection of creditors from the effects of a political catastrophe which they could not have foreseen." (b)

The rule and the exception above stated imply however that there may be what is called a *Râj*, or an estate held after the manner of a *Râj*, when there is no special political status at all. (c) In such cases the inheritance to the zamindâri or other estate resembles in general the succession to a true principality. The question is then usually one of "family custom and usage;" (d) and the rules of primogeniture and

(a) L. R. Suppl. I. A. 119, 128 The raj, in that case, was not of course subject to the Hindû law, but the principles relied on are equally applicable to the estate of a Hindû râjâ.

(b) *Ib.* 129, and *infra*, Bk. II. Chap III. Sec 4, Q 3 *a*. Steele, L. C. 227, 237, 269.

(c) 2 Str. H. L. 329; Coleb Dig. Bk II Chap. IV. T. 15 Comm. *See per* Judicial Committee in *Chowdhry Chintaman Singh* v. *Nowlukho Koonwar*, 24 C. W. R. at p. 256, S. C., L. R 2 I. A. 269.

(d) Introd. to Bk. I. above, p. 156; *Soorendronath Roy* v. *Musst. Heeramonee Burmoneah*, 12 M I A. at p. 91; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, *ib.* 523; *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*, L. R. 8 I. A. 248; *Bhau Nanaji* v. *Sundrabai*, 11 B. H. C. R. 249.

of exclusion of females in favor of male collaterals may prevail under a "Kulâchâr" or family custom, as to an estate that is not a "râj" even in the popular sense. (*a*) The impartibility of the estate in such a case is not enough to make the succession to it similar to that of a separate estate. (*b*) Property may be joint though impartible. (*c*) "Though property be impartible, yet the nearest male member of the joint family inherits in preference to the daughters of the last holder, as admitted in the *Shivagunga* case, (*d*) though without effect there, as the estate was a separate acquisition." (*e*) The family estate may comprise partible as well as impartible property, each following its own line of descent, (*f*) and in such a case a partition may be made with reference to the latter, so that it becomes, as regards the other parceners, a separate estate in the hands of the senior co-sharer to whom it is allotted. (*g*) This decision may be referred either to a resignation by the other members of their rights for a consideration in the form of their several shares, or to an abandonment by mutual agree-

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(*a*) *Baboo Gunesh Dutt* v. *M Moheshur Singh et al*, 6 M. I. A. 164; *Bhâu Nânâji Utpât* v. *Sundrâbâi*, 11 Bom. H. C R 249, 269; *B. Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I. A. 1; *Chowdry Chintaman Singh* v. *Musst. Nowlukho Konwari*, L. R. 2 I. A. 263; *The Court of Wards* v *R. Coomar Deo Nundun Singh et al*, 16 C W. R. 142 C. R.

(*b*) *S. R. Y. Venkayamah* v *S. R. Y. Boochia Venkondora*, 13 M. I. A. at p. 339.

(*c*) As said by the Privy Council in *Tekact Doorga Pershad Singh* v. *Tekaetnee Doorga Kooere*, L. R. 5 I. A. at p. 152, 159. See *Periasami* v. *Periasami*, *ib.* p. 61.

(*d*) *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 M. I. A. 539.

(*e*) *Sheo Soondary* v. *Pirthee Singh*, L. R. 4 I. A. 147.

(*f*) *Rawut Urjunsing et al* v. *Rawut Ghunsiam Singh*, 5 M. I. A. 169.

(*g*) *Tekaet Doorga Pershad Singh* v. *Takaetnee Doorga Kooere et al*, 20 C. W. R. 155, S. C.; L. R. 5 I. A. at p. 152.

ment of the special custom of descent, (*a*) and to a partition accompanying it, which thenceforward makes the rights of the sharers *inter se* those of owners of separate property. (*b*) The intention however must be distinctly expressed in order to free the impartible estate from the established custom (*c*).

In *Bodhrav Hanmant* v. *Narsinga Rav,* (*d*) the Privy Council held that an important inam was subject to the ordinary rules of partition. Where indeed the grant was

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(*a*) "The custom is capable of attaching and of being destroyed" Privy Council in *Soorendronath Roy* v. *Musst. Heeramonee,* 12 M. I. A. 91. *See* also *Gopal Das* v. *Nurotam Singh,* 7 C S. D. A R 195; *Rajkishen* v. *Ramjoy,* I. L. R. 1 Calc. 186; above, p 156-7

(*b*) In *Raja Bishnath Singh* v. *Ramchurn Mujmoadar,* B. S. D A. R. for 1850, p 20, it was held that an eldest brother could give his younger brothers equal rights as against himself by an acknowledgment, but that this did not exclude a question as to the validity of an adoption by one of the juniors according to the family law.

(*c*) *See* the case of *Chintâmun* v. *Nowlukho,* cited below, I. L. R. 1 Calc. at pp 161, 162.

(*d*) 6 M. I. A. 426. In *Girdharee Singh* v. *Koolahul Singh,* 2 M. I. A. at p. 35, a claim to a râj as impartible was held refuted by evidence of "a course of possession and enjoyment" opposed to its impartibility. An impartible râj is not necessarily inalienable, *see* above, p. 159, but this cannot of course be meant to imply that generally such an estate is alienable Its alienable quality would be made use of to effect partition contrary to the law, or still more completely to destroy the interests meant to be guarded by impartibility. *See* above p. 173, and Bk. I. Chap II. Sec. 13, Q. 10, p. 462. A vṛitti or income receivable for religious services is partible property, and may be even mortgaged and sold in execution of a decree. It was held that the mortgagor's right having been decreed to be sold the question of its liability to this process could not be raised in execution, *Sadashiv Lakshman Lalit* v. *Jayantibai,* Bom. H. C. P. J. F. 1883, p 27, referring to *Bechardas* v. *Gokha,* Bom. H. C. P. J. 1882, p. 379, and *Prannath Paurey* v. *Sri Mangula Debia,* 5 C. W. R. 176 C. R. Comp. *Ukoor Doss's* case, *supra,* p. 185, note (*b*). For the mode of distribution, *see* Steele, p. 85. That religious grants are generally inalienable, *see* Steele, L. C. 206, 207, 237, 441, and above, p. 201. A devasthân never reverts to the Government, *ib.* 235.

originally made to support an office, (*a*) Mr. Ellis said that it is not to be so distributed as to defeat that purpose. "Does not the law," he says, "that regards the grant of a corrody apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention?...... I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible, nor ought they to descend by primogeniture. The most capable ......should be selected......[and] enjoy the whole perquisites." (*b*) This principle is recognized by the Privy Council in *Ardreshappa bin Gadgiappa* v. *Guneshidappa* (*c*) so far as the emoluments may be annexed by any law to the office.(*d*) A saranjam is usually impartible. It is attended with an obligation to maintain the younger members of the family. A pension substituted for it has the same legal character. (*e*)

In many cases, temple allowances are hereditary and divisible, (*f*) though sometimes subject to special rules of descent, (*g*) or divisible in enjoyment subject to the charge for management which is indivisible. (*h*) Ancestral property made subject to a trust for an idol was pronounced partible subject to the trust. (*i*) On the other hand, a vatan property, found to be impartible according to the family custom, was held not to have become partible by the cessation of the official functions with which it had formerly

(*a*) *See* above, Introd. to Bk. I. p 180, 184.

(*b*) 2 Str. H. L. 364.

(*c*) L. R. 7 I. A. 162

(*d*) *Ib*. 167.

(*e*) *Ramchandar* v. *Sakharam*, I L. R. 2 Bom. 346; above, pp. 180, 264.

(*f*) 2 Str. H. L. 368.

(*g*) *Bháu Nándji* v. *Sundrábái*, 11 Bom. H. C R. 249.

(*h*) 1 Str. H. L. 210.

(*i*) *Ram Coomar Pál* v. *Jogendranath Pál*, I. L. R. 4 Calc. 56.

been connected. (*a*) What determines the rights in partition as by descent in each case is the family custom, where, according to that custom as clearly proved, a divergence from the ordinary law has become established. (*b*) Such a family custom allotting certain portions of a Zamindari to the junior members does not render savings and accumulations made by those members joint property. (*c*)

A family cannot make a custom for itself in opposition to the general law of the country, according to *Baswantrav* v. *Mantappa*. (*d*) But where the family is found to have been governed as to its property by a custom which has been submitted to as compulsory, that custom is itself law, (*e*) though it is extremely difficult to establish such a custom.(*f*) It is more readily admitted where the custom is found to extend to a considerable class of the community. Thus in *Shidoji Rav* v. *Naikoji Rav*, (*g*) the Court says, "we find a general usage amongst a large and important class of the community of dispensing with actual partition and providing for the maintenance of the family by special arrangements varying in different families, the general character of which,

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(*a*) *Savitriava et al* v *Anandrav*, R. A No. 24 of 1874, Bom. H. C. P J. F. for 1875, p 132. See *Timangavda* v. *Rangangavda*, Bom. H. C. P. J. 1878, p 240.

(*b*) A document containing a statement of a family custom was construed extensively so as to include the whole class indicated by specification of particular instances of the nearest male collaterals as heirs to a Zamindar who should die childless, *Chowdry Chintamun Singh* v. *Musst Nowlukho Konwari*, L R. 2 I. A. 263.

(*c*) *C. Hurreehur Pershad Doss* v. *Gocoolanund Doss*, 17 C. W. R. 129.

(*d*) 1 Bom. H. C. R. Appx. xlii.

(*e*) *Sorendronath Roy* v. *Musst. Heeramonee*, 12 M. I. A. 91. Comp. *Abraham* v. *Abraham*, 9 M. I. A. 195, and *Timangavda* v. *Rangangavda*, Bom. H. C. P. J. 1878, p. 240; *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. at pp. 562, 573.

(*f*) *Icharam* v. *Ganpatram*, S. A. No. 294 of 1871, Bom. H. C. P. J. F. for 1873, p. 169.

(*g*) 10 Bom. H. C. R. 228.

however, is the vesting of the family property principally in the representative of the elder branch, subject to the support of the other members," (a) and as to such a custom, that it "is one which, if clearly proved, should be allowed to displace the plaintiff's right to partition under the general law." The District Judge finding the custom proved for the particular family was to determine what provision by way of maintenance was to be made for the plaintiff, who had sued for a partition. (b)

(a) *See* Bk. I. Introd. above, pp. 263, 264.

(b) Comp Laboulaye, *op. cit.* 368. In cases of the kind here considered the law of descent is determined by the personal status of those concerned. The special rule does not adhere to the land itself independently of the hands in which it is held Under the English law a special quality as to descent is deemed inherent in some lands, or, rather the proprietary relation to them. Thus a manor given first in frankalmoigne and afterwards by knight service was held to be still gavelkind. *See* Elt. Tenure of Kent, 263, 377 But this notion, though sometimes referred to in the Courts, is strange to the Hindû Law. (See *Periasámi* v. *Periasámi*, L R. 5 I. A. at p. 75, and the instances at Nort. L. C. 278, and comp. Coleb. Dig. Bk. II. Chap. IV. Sec. I, T 15, Comm.) A Zamindari or Vatan once effectively aliened or even divided is freed from any special rule of descent. It is not *impartibilis ratione terrae*, as gavelkind established by custom before the Conquest made land in Kent, *partibilis ratione terrae*. *See* Bract. 374 a. In such instances as the *Hunsapore* case (12 M. I. A. 1) and the *Shivagunga* case, the fact that an estate was assigned to a branch of a family not entitled in the regular course of law was said not to change its previous impartible character (*Mutta Vadugunadha Tevar* v. *Dorasingha Tevar*, L R. 8 I. A. at p. 116), but in both cases the new grantees from Government were of the proprietary family and subject to its custom as to any estate to which that custom extended. Such cases as these are to be distinguished from those like *Raja Nilmoney Singh* v. *Bukram Singh* (L. R. 9 I. A. 104), in which lands are held as a remuneration for service for the maintenance of which they have been conferred, or a grant has been taken at a reduced land-tax in consideration of service to be rendered. These may be impartible on account of their attendant condition of service, either wholly, or without the approval of the Government. They may be inalienable either absolutely, or in a qualified way allowing an aliena-

As regards hereditary offices and their emoluments in the Bombay Presidency,(*a*) these are now regulated by positive enactments of the Legislature. *See* Bombay Act III. of 1874, by which a prohibition is imposed on Vatan property's leaving the family of the office-holders, and provisions are made for placing it under the control of the Collector. Subject to this, however, the right of the eldest member of a Patil family to officiate, as it is the usage of a large number of families, is regarded as "usage of the country," which by Sec. 26 of Reg. 4 of 1827 our Courts are bound to recognize and enforce. (*b*) In the case of Bhagdâri and Narvadâri holdings in Gujarâth the Legislature has provided against subdivision or separation of the house from the holding, (*c*) but without any rule as to inheritance or partition. These are left to the Hindû law and custom.(*d*)

tion of part or for a life, or subject to particular fiscal conditions, or as to the persons of the alienees. These conditions and qualifications may be found in the case of vatans in Bombay. A jaghir or saranjam is usually impartible, and the succession is according to primogeniture; *Râmchandra Mantri* v. *Venkatrav Mantri*, I. L. R. 6 Bom. 598; above, pp. 173, 179.

(*a*) *See* above, Bk. I. Introd. p. 173.

(*b*) *Sanganbusapa* v. *Sangapa*, Bom. H. C P. J. 1879, p. 257. Comp. *infra*, Bk. II. Chap. III. Sec. 4, Q. 3; and Bk. II. Chap. II. Sec. 1, Q. 5.

(*c*) *See* Bom. Act V. of 1862.

(*d*) See *Bhai Shanker* v. *The Collector of Kaira*, I. L. R 5 Bom 77; *Prânjivan Dayârâm* v. *Bâi Revâ*, *ib*. 482.

The customary law of the castes preserves many restrictions on the disposal of the patrimonial lands. *See* Steele, L. C. pp. 429, 432. Even after a partition in many castes the interest of the relatives is thought to prevent an alienation or incumbrance without their assent signified by attestation, *ib*. In many the succession of a daughter is not admitted in competition with separated brothers and uncles, *ib*. 424 ss.; as some of the Madras customs exclude even the widow, 2 Str. H. L. 163.

IV.—LIABILITIES ON INHERITANCE.

§ 6. The liabilities or charges on the common property, distributable on division, include the following:—

A. Debts, (a) for which the coparceners at large are liable, must, in general, have been incurred before partition, by a father or other managing member of the family, for the common benefit. (b)

(a) Compound interest may be stipulated for and recovered under the Hindû law, *Ramchandra and others* v. *Lalsha,* Bom. H. C. P. J. 1883, p. 45; Coleb. Dig. Bk. I. T. 49 Comm.; Steele, L. C. 72. The rules of the Hindû law on this subject are much more reasonable than those of the Roman law, which in some measure still prevail in the English law. The maximum of interest recoverable on an ordinary loan is a sum equal to the principal; on loans of grain and other articles different limits are prescribed. *See* Steele, L. C. pp. 266 ss. When interest has accumulated to the amount of the principal, it is to be turned into principal by a new account, or by a fresh transaction, but to this there is no objection; Steele, L. C. 265; Vyav. May. Chap. V. Sec. I.; Coleb. Dig. Bk. I. T. 59, 255 ss. As to the assignment of obligations, *ib.* T. 49, and Bk. II. Chap. IV. T. 27. As to dealing with mortgaged property, Bk. I. T. 117; Bk. II. Chap. IV. T 28; Vivâda Chint. Trans. pp. 73, 76, 316. *See* now the Indian Contr. Act, IX. of 1872.

(b) May. Chap. IV. Sec. 6, paras. 1, 2; Stokes H. L. B. 72; Chap. V. Sec. 4, para. 20; *ibid.* 124. The debt of a father is a charge generally, as far as his sons are concerned, though not incurred for the common benefit. Nârada, Pt. I. Chap. III. paras. 5, 6. See *Suraj Bunsee Koer* v. *Sheo Prasad Sing,* L. R. 6 I. A. 88; and *Laljee Sahoy* v. *Fakeerchand,* I. L. R. 6 Calc. 135; *Narayanrav* v. *Balkrishna,* Bom. H. C. P. J. 1881, p. 293; *Muttayan Chetti* v. *Sivagiri Zamindar,* I. L. R. 3 Mad. at p. 381; Steele, L. C. 266; and above, pp. 164 ss. 637 ss. But the estate is not so hypothecated, without a special lien, for the father's debt, as to prevent the son or other heir disposing of it and giving a good title for valuable consideration, *Jamiyatrâm* v. *Parbhudâs,* 9 Bom. H. C. R. p. 116; *Sheshigiri Shanbhog* v. *Gungoli Abboo Saiba,* S. A. No. 88 of 1873, Bom. H. C. P. J. F. for 1873, p. 31. In *Bheknarain Singh et al* v. *Januk Singh,* I. L. R. 2 Calc. 438, 443, White, J., says:—"The liability of a son for the debts of his deceased father under Hindû Law appears to me to be a distinct question from the right of a father in his life-time to charge the interest of the infant sons in the joint ancestral immoveable estate

B. Provision must be made for relations of the coparcenentitled to a portion or maintenance.

A. *Debts.* (*a*)—The Hindû Law lays down broadly that sons and grandsons shall discharge the obligations of their ancestors, (*b*) except where they have been contracted for immoral

with the payment of a debt.........There seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate." See *Narayan Acharya* v. *Narso Krishna et al*, I. L. R. 1 Bom. 262, and the cases there referred to; the texts referred to above, p. 644, and pp. 80, 161. The funeral expenses of a deceased Hindû are a charge on the family property, *Sadashiv Bhasker* v. *Dhakubai*, I. L. R. 5 Bom. 451. A widow's subsistence is sometimes deemed by the Śâstris a charge preferable to any other debt, as in the case at 2 Str. H. L. 280, but this opinion is not followed; *see* above, pp. 99, 102, 259. The widow's dower is preferred to the claim of the usurer by the 11th Art. of Magna Charta, *see* Stubbs, Docts. &c. p. 290.

(*a*) A father's promises are looked on as binding unless the performance of them would prevent the fulfilment of some still more sacred duty. His dying directions as to charities within reasonable limits must be obeyed. These rank as testamentary dispositions. *See* Steele, L. C. pp. 404, 429. But the Courts will not enforce either of these obligations except subject to the conditions of the Statute law where that is in force. *See* above, pp. 206, 207, 224; Steele, L. C. 178, 233, 238.

(*b*) Vishṇu, Tr. p. 45; May. Chap. V. Sec. 4, para. 12; Stokes, H. L. B. 122; *Umrootram Byragee* v. *Narayandas Ruseekdas*, 2 Borr. 222; *Ram Narain Lal* v. *Bhawani Prasad*, I. L. R. 3 All. 444, 445; *Laljee Sahoy* v. *Fakeerchand*, I. L. R. 6 Calc. 135; (*Mitâksharâ Law*), 1 Str. H. L. 167; 2 *ibid.* 274, 277, 477; Coleb. on Obligations, Chap. II. 51; Smṛiti Chandrikâ, Chap. II. Sec. 2, paras. 20, 24; Coleb. Dig. Bk. I. T. 167; Steele, L. C. 265, 266, 409.

It is assumed here that the father's " kriyâ " or funeral ceremonies have been performed or provided for. For these all the sons are liable, though their rights are not conditional, Steele, L. C. pp. 226, 414 ss; and they should act together, *see* above, pp. 603, 604; Steele, L. C. 404, 413. The obligation of providing for the father's debts is limited by the qualification " at least for those incurred in necessary

purposes, (*a*) and this duty is not altered by a partition amongst the sons. In the case of *Unnoda Soonduree Dassee* v. *Oodhubnath Roy*, (*b*) three brothers had separated while a decree against their father remained unsatisfied. In execution the shares of two of the brothers were sold. It was held that the excess, beyond two-thirds of the amount of the decree, could be recovered by the two brothers from the share of the third, even though this had passed to a stranger, by a sale made before the execution was levied. (*c*) It may be doubted perhaps whether this decision and that referred to in note (*d*) at p. 628 are reconcilable in principle. (*d*) In the Bombay Presidency, the liability has been limited by Bombay Act VII. of 1866, under which an heir is respon-

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expenses of the family," Steele, L. C. p. 57, 217; but this has been enlarged by the Courts. *See* above, pp. 80, 160, 207, 208, 625, 631, 639.

If valid incumbrances have been created by the father as the manager, these will of course form a deduction from the estate to be distributed. *See* above pp. 609, 635, 637 ss. In the case of mortgages, which are usually accompanied by possession, the mortgaged portion is frequently preserved for future partition. Otherwise it is allotted at a valuation of the equity of redemption to the share of one of the parceners. *See* above, Sec. 4 E; comp. Steele, L. C. p. 218. The right of the managing member to mortgage and even to sell the estate of the family to relieve its difficulties is widely admitted by the customary law. *See* Steele, L. C. p. 398. Hence the presumption in favour of his transactions. In. Ev. Act, I. of 1872, Secs. 114, 115.

(*a*) May. l. c. para. 15; Stokes, H. L B. 122. "The pious obligation of a son to pay his father's debts is confined to debts contracted for moral purposes." *Jettyapa* v. *Laximaya*, Bom. H. C. P. J. 1883, p. 87. *See* above, pp. 634, 635, 641, 643.

(*b*) 11 C. W. R. 125 C. R.

(*c*) *See* Coleb. Dig. Bk. I. T. 182.

(*d*) The law as to a single coparcener's alienation, and a creditor's sale in execution, are discussed above, pp. 631 ss. See *Deendyal Lall* v. *Jugdeep Narain Singh*, L. R. 4 I. A. 247; *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 101; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. 181, 195; *Bábáji Sakhoji* v. *Rámshet et al*, 2 Bom. H. C. R. 23. The decisions have been influenced by

sible only to the extent of the assets received by him; (a) and his property cannot perhaps be aliened or encumbered by the father, except for good reasons into which the encumbrancer is bound to inquire. (b) The tendency of the decisions however has been to extend the father's power of disposal and incumbrance as against his sons. (c)

In the case of a united family consisting only of brothers or collaterals, it has been laid down, that the presumption usually arises of a debt incurred by a managing member being for the benefit of the family, (d) but that in the case of a minor coparcener's interests being affected, the creditor, seeking to enforce the liability, must prove that it was *bonâ fide* incurred by the manager, or at least that there were good grounds for supposing it to have so been incurred. (e) Under the Bombay Act, above quoted, Sec. 5, the liability of a coparcener, as to debts contracted before he was 21 years of age, is limited to the amount of the portion of the common property received by him. Even when the other coparceners are adults, charges incurred by the manager are binding,

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suspected collusion, which, however, is not to be taken as having been a ground of decision in *Girdharilal's* case, as said by the Judicial Committee in *Muttayan Chettiar's* case, L. R. 9 I. A. 128; *Balmokund et al* v. *Jhoona Lall*, N. W. P. S. D. A. R. for 1857, page 14; *Musst. Kooldeep Kooer et al* v. *Runjeet Singh et al*, 24 C W. R. 231; *Sheo Pershad Singh et al* v. *Musst. Soorjbunsee Kooer*, *ibid.* 281; *Burtoo Singh* v. *Ram Purmessur Singh et al*, *ibid* 364.

(a) *See* above, pp. 80, 165.

(b) See *Narain Singh* v *Pertum Singh et al*, 11 Beng. L. R. 397, S. C., 20 C. W. R. 192; *Modhoo Dyal Singh* v. *Goolbar Singh et al*, 9 *ibid.* 511 C. R.; *Brojo Kishore Gujendar* v. *Huree Kishen Doss et al*, 10 *ibid.* 58 C. R., as compared with *Kanto Lall et al* v. *Girdhari Lall et al*, 9 C. W. R. 471 C. R, reversed in P. C., L. R. 1 I. A. 321; *Hari* v. *Lakshman*, I. L. R. 5 Bom. 614, 618. Above, pp. 614 ss.

(c) *See* above, pp. 81, 167 ss, 207, 645.

(d) See *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 666; *Vrijbhukandas* v. *Kirparam*, Bom. H. C. P. J. 1879, p. 263.

(e) *See* above, pp. 609, 620, 634, 637. But in *Chamaili Kuar* v. *Ram Prasad*, I. L. R. 2 All. 267, good faith was held not to protect a purchaser of property sold for immoral purposes even by a father.

except as against him, only when incurred for the needs of the united family, or with the assent, express or implied, of its members. (*a*)

For a debt incurred by any member of the family under the pressure of distress, all members are liable, (*b*) and the property even after partition, but not for a debt incurred needlessly or for purposes not constituting a duty, which, as a member of the family, the debtor was bound to discharge

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(*a*) 1 Str. H. L. 199; 2 *ibid.* 344, 434, 457; Coleb. Dig. Bk. I. Chap. V. T. 180 ss; Bk. II. Chap. IV. T. 54, Comm. *sub fin.*; above, p. 634; *C. Colum Comara Vencatachella* v. *R. Rungasawmy,* 8 M. I. A. at p. 323. A member defrauded by the contract of a manager with a third party cognizant of the fraud may have the contract rescinded, *Ravji Janardan* v. *Gangadharbhat,* I. L. R. 4 Bom. 29, though generally bound by his dealings and under circumstances by decrees against him, *Bhimasha* v. *Ramchandrasha,* Bom. H. C. P. J. F. for 1878, p. 286; *Annaya* v. *Hoskeri Ramappa,* Bom. H. C. P. J. F. for 1875, p. 75; *Upooroop Tewary* v. *Lalla Bandhjee,* I. L. R. 6 Calc. at p. 753 (*see* above, pp 634 ss.; Steele, L. C. 209). At Calcutta it seems to have been intimated that the question of the propriety of the alienation arises only when infants' shares have been disposed of, and as to their shares, since as regards those of adult members their assent is indispensable, *Kameshwar Pershad* v. *Run Bahadur Singh,* I. L. R. 6 Calc. 843; and in all cases due inquiry must be made by a purchaser or incumbrancer of the family property. For Bombay the general liability for a manager's acts is asserted in *Samalbhai Nathabhai* v. *Someshvar Mangal Harkisan,* I. L. R. 5 Bom. 39. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself, in *Gunga Narain* v. *Umesh Chunder Bose et al,* C. W. R. for 1864, p. 277.

(*b*) May. Chap. V. Sec. 4, para. 20; Stokes, H. L. B. 154; Colebrooke, Dig. Bk. V. Chap. VI. T. 373, Comm. *ad fin. See* also under the three preceding texts; Bk. I. Chap. V. T. 181, 193, 194; and 1 Str. H. L. 276. *See* also *Mahada* v. *Narain Mahadeo,* 3 Morris 346; *Sadabart Prasad Sahu* v. *Foolbash Koer et al,* 3 B. L. R. 31 F. B. R.; *Mahabeer Persad* v. *Ramyad Singh et al,* 12 B. L. R. 90; and above, p. 632. On the same principle a mortgage or sale of the common estate by an ordinary member, if made to meet some pressing family exigency, is generally recognized as valid by the customary law, *see* Steele, L. C. pp. 54, 210, 399.

under the circumstances. (*a*) If a member of the family owes to the estate a debt barred by limitation this may still be made a deduction from his share in the gross accumulations. (*b*)

§ 6 B. *Provisions for relations, &c.*—Subject to provision for the debts for which the joint estate is liable, (*c*) certain relations, though not themselves entitled to definite aliquot shares of the common property, even when a partition is made, are yet entitled, while the family is united, to maintenance or provision by way of marriage portion, and this right continues to subsist, notwithstanding an agreement for partition amongst the co-sharers. (*d*) To this class belong—

(*a*) *See* above, pp. 161, 164, 167.

(*b*) *Lokenath Mullick* v. *Odoychurn Mullick*, I. L. R. 7 Calc. 644.

(*c*) *Lakshman Râmchandra* v. *Satyabhâmâbâi*, I. L. R. 2 Bom. 494; *Damodar* v. *Bai Meva*, Bom. H. C. P. J. 1882, p. 398.

(*d*) As to the person disqualified " if there happen to be no property, his relatives must still afford him maintenance," Borr. Collection, Bk. F. *sub init.* Broach Brâhmans. So amongst Sonis, *ib.* Sheet 22; Salvee, Sheet 43. " Sons and others, who by reason of infirmity, &c., are disqualified from taking the share in an inheritance, which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over, and a direction of this kind, given by the lawgiver, when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance," Phear, J., giving the judgment of himself, Jackson, and Hobhouse, JJ., in *Khetramani Dossee* v. *Kasheenath Dos*, at 10 C. W. R. 97 F. B. S. C., 2 B. L. R., A. C. J., at p. 52. Their right however is simply one of maintenance. *See* the Smṛiti Chandrikâ, Chap. V. para. 20. The same term " bhartvyam" is used by Yâjnavalkya to signify their claim and the claim of their wives, and the same verb " bharaṇe " is used to express the right to support of a deceased coparcener's widow in Nârada, Pt. II. Chap. XIII. para. 28. *See* as to a widow's and mother's right, 2 Str. H. L. 292, 294; above, pp. 163, 232, 248, 259. If the father is superseded as manager on account of misconduct or incompetence his maintenance must be provided for by the managing member. This remains a charge on the property, for which, like the mother's subsistence and the funeral expenses of both

1. All persons by connexion entitled but by some defect disqualified from inheriting, their wives, daughters, and disqualified sons. (*a*)

2. Female relations not entitled to a specific share.

§ 6 B. 1. Regarding the former, *see* Book I., Introd. p. 153, 248, and above, p. 751, note (*d*). The Smṛiti Chandrikâ, Chap. V., paras. 24, 25, says that the obligation of support is

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the sons, are bound to make a reserve in any subsequent partition before the necessity has passed away; Steele, L. C. pp. 208, 404, 405, 413.

Should the sons or other near relatives fail to perform the funeral ceremonies of the deceased, they may be put out of caste. But the non-performance does not destroy the right of inheritance, nor does performance by a more distant relative give him a preference over a nearer one; Steele, L. C. pp. 413 ss.

(*a*) *See* Bk. I Chap. VI. Sec. 3 *b*, Q. 3; above, p 587 For the cases of exclusion from sharing the patrimony under the customary law of particular castes, *see* Steele, L C pp. 224, 411. The many exceptions admitted to the harsh rules of exclusion mark a gradual abandonment of those rules of the archaic law which can least be reconciled with the dictates of natural sympathy. Comp. Steele, L. C. 234, 235. That the continuation of the family rites and the inheritance were in ancient law regarded as essentially connected, *see* Manu, IX. 142, and the Commentary; Vyav. May. Chap. IV. Sec 5, paras. 21, 22; Stokes, H. L. B. 65; Sec. 11, para 8; Stokes, H L. B. 109; Bṛihaspati declares the vicious son liable to exclusion, since the patrimony "is declared to belong to those kinsmen who offer funeral oblations to the deceased and are virtuous" It is however an inversion of the proper order of ideas to conceive the right to sacrifice to a deceased as a source of the right to succeed to his estate. *See* above, p. 751, note (*d*); Steele, L. C. 226. The right to succeed resting on consanguinity, *see* above, pp 62, 66, takes with it the duty of sacrifice with a more or less definite condition of defeasance in the event of failure or incapacity to perform the duty, but the duty subsists though there be no property at all (Vishṇu XV. 43), and the right arises to the heir immediately on the death of the owner, not mediately, through the celebration of the Śrâddhs or the right to celebrate them, except perhaps where a defeasance has occurred or the heirship has been renounced by the person entitled.

avoided by not taking the disqualified person's share, (*a*) but as to this *see* above, pp. 284, 249. It will have been seen that the wives and widows of members equally with the members themselves who could take no share in the common estate are held entitled to maintenance by the co-members in virtue of the membership of such women in their family of marriage. (*b*) This illustrates the statement in the Introd. to Bk. I. above, p. 251.

§ 6 B. 2. Female relations, not entitled to a specific share but to maintenance, are widows of predeceased sons and other descendants (unseparated) of the common ancestor, (*c*) and daughters of such persons, in case of their having left no sons. (*d*) Such daughters are also entitled

(*a*) Brethren who have retired from the world take no share. Eunuchs and madmen excluded must be provided with maintenance; Vasishṭha, Chap XVII. paras 27, 28. So also idiots, cripples, and those afflicted with apparently incurable and disabling disease; Nârada, Pt. II Chap. XIII. para. 22.

(*b*) Mit. Chap II. Sec. 10, para. 14. Failing the husband's family, a widow's brothers support her; Steele, L. C. 215.

(*c*) The disposal of a widow is one of the duties cast on the nearest relative of her deceased husband. (Vasishṭha, XVII. 56.) Nârada says he may appoint her to a kinsman (viniyog). In the Vyav. May. Chap. IV. Sec. IV. paras. 41, 44, and the Vîramitrodaya (Transl. p. 105 ss) the begetting of a son by this agency (a Kshetraja) is provided for as though it still formed part of the jural system This can hardly have been the case, but the Mitâksharâ gives him the second place amongst the subsidiary sons, the appointed daughter's son (putrikâ-putra) being assigned the first.

The interest of the brethren in their brother's wife under the ancient law has been referred to above, p. 417 ss.

(*d*) The daughter of a deceased coparcener must be maintained. *See* above, p. 501; May. Chap. IV. Sec. 8, para. 6; Stokes, H. L. B, 85; *ibid.* Sec. 9, para. 22; Stokes, H. L. B. 97; Mit. Chap. II. Sec. 1, paras. 7 and 20; Stokes, H. L. B. 429, 433; *Jykowur et al* v. *Musst. Bhaotee*, N. W. P. Sel. Ca. for 1863, p. 613. *See* Nârada, Pt. II. Chap. XIII. and as cited by the Vîramitrodaya, Transl. p. 255; Bk. I. Chap. II. Sec. 3, Q. 14, p. 384. *See* above, Bk. I. Chap. II. Sec. 1, Q. 17, p. 363; Bk. I. Chap. II. Sec. 6 A, Q. 27, p. 408; Bk. I. Chap. II. Sec.

to a marriage portion (*a*) This last rule regarding daughters, though not given explicitly for undivided coparceners by the Hindû lawyers, may be deduced from the injunction given to reunited coparceners at May. Chap. IV. Sec. 9, para. 22, (*b*) Mit. Chap. II. Sec. I., pl. 20, (*c*) and from that given to the relations of persons disabled from inheriting, to maintain and to marry the daughters of such persons, Mit. Chap. II. Sec. 10, para. 12. (*d*) Even concu-

7, Q 10, p. 436. In some castes provision has to be made by a reserve for an indigent widowed sister residing with the family; Steele, L. C. p. 405. Comp. above pp. 232, 241, 246.

(*a*) Steele, L C. 233, 234.

(*b*) Stokes, H. L. B. p. 97

(*c*) Stokes, H. L. B. p. 433.

(*d*) Stokes, H. L. B. p. 457. The marriage expenses of boys and girls of the family are to be provided for by a reserve for the purpose in a partition, Steele, L. C. p 404, 422; *see* Nârada, Pt. II. Chap. XIII. para. 33 A present made by a deceased father is excluded from partition, *see* above p. 211, and comp. Steele, L C p. 424; Nârada, Pt. II. Chap. XIII. para. 6.

In the case of *Laroo* v. *Manickchund Shajee*, at 1 Borr. 461, there being a son initiated and one uninitiated, by different mothers, and a daughter, it was held that the initiation of the son should take place at the cost of the estate, that the daughter should have a portion of $\frac{1}{4}$ of $\frac{1}{3} = \frac{1}{12}$ of the property, and that the remainder should be evenly divided between the half-brothers, each of whom was to maintain his own mother, Mit. Chap. I. Sec. 7, pl. 3, 4, 5, 7; Stokes, H. L. B. 398–9.

The property for partition was in one case pronounced subject to the following charges:—

(*a*) Debts due by the family.

(*b*) Bad debts due to the family included in the aggregate assets.

(*c*) Marriage expenses of unmarried brothers and sisters.

(*d*) Maintenance of female members:—

(1) Aunt of parties.

(2) Mother of plaintiff.

(3) Sisters, if unmarried.

A deduction on account of a Mandir, as after separation the plaintiff would not be interested in it, was disallowed, *Damodarbhat* v. *Uttamram*, Bom. H. C. P. J. F. for 1878, p. 231.

bines are entitled to maintenance out of an hereditary pension. (*a*) A widowed sister, left destitute by her husband, must be provided for by the widows of the deceased in a distribution of his property. (*b*)

The rule that all widows of predeceased coparceners, though not entitled to a share on partition, have a claim to maintenance as against the estate, (*c*) which is supported by the analogy of the rules regarding wives of persons disqualified from inheriting, (*d*) has been laid down by Sir R.

(*a*) 2 Str. H. L. 32; above, p. 164.

(*b*) *Ibid.* 83, 90.

(*c*) If there be joint estate sufficient the widow of a deceased coparcener is undoubtedly entitled to maintenance, ***Savitribai*** v ***Laxmibai***, I. L R. 2 Bom. 573.

The widow of a predeceased son (undivided) is entitled to maintenance from his father and brothers out of the joint aucestral estate, *Musst Lalti Ku (r* v. *Ganga Bishan et al*, 7 N. W. P. 261 F. B. The possession of jewels, &c., suited to her station and not productive of income, does not affect a widow's claim to maintenance against her father-in-law Her productive property should be taken into account, *Shib Dayee* v. *Doorga Pershad*, 4 N. W. P. 73.

The Smṛiti Chandrikâ, Chap. XI. Sec. 1, pl. 34, 35, fully recognizes the right to maintenance, or by way of compensation to an allotment for life of a share of the undivided property. It assigns a higher right to the Patnî, paras. 37, 38.

"The maintenance of *Net Konwar*, the widow of ***Muddun Mohun***, was a charge upon the inheritance, which came from ***Muddun Mohun***" (in the hands of his son's widow), *per* Sir B. Peacock, in ***Baijun Doobey*** v. *Brij Bhookun Lall Awasti*, at L. R. 2 I. A. 279.

As to the recognition of the duty by sharers in the mirási villages of the N. W. P., *see* Fortescue's Report on Delhi, dated 28th April 1820, III. R. &. J. Sel. at p. 404.

(*d*) Mit. Chap. II. Sec. 10, paras. 14, 15; Stokes, H. L. B. 457–8. In *Ujjal Mani Dasi* v *Jaygopal*, 4 C. S. D. R. 491, the Pundit said that a predeceased son's widow was entitled to maintenance proportionate to the father's estate. In ***Rai Sham Ballabh*** v. ***Prankishan***, 3 C. S. D. R. 33, the widow of a predeceased son was held after the father's decease entitled to no charge but to food and raiment only; to be received in her father-in-law's house, ***Ramsoondri Debra*** v. ***Randhun Bhuttacharjee***, 4 C. S. D. A. R. 796. *See* further ***Khetramani Dasi*** v. ***Kashinath Das***, 2 B. L. R. 55 A. C. J. Sir

Couch, C. J., in *Ramachandra Dikshit* v. *Savitribai.* (a) The question of a widow's right to maintenance is discussed at length in the Introduction to Book I. Sec. 10, (b) and the rights as they subsist against the family are those which the heirs must satisfy when they propose to divide the common estate. In Madras a daughter-in-law was held entitled to maintenance (c) as a charge on ancestral property held by her deceased husband's father, and free from the condition

L. Peel says, in *Judeemani Dasi* v. *Khetra Mohun Shil,* Vyav. Darp. 384: "Strange......................treats the right to maintenance as a charge on the property in the hands of the heir, and it certainly has always been so considered in this Court." He considers the duty to reside with the husband's family merely a moral one; but adds "we shall award Rs. 10 a month, and the back maintenance must date only from the date of the demand. We might in a proper case say there shall be no back maintenance, and further maintenance should be enjoined only on the condition of residence with the late husband's family......" See *Śrinivasammal* v. *Vijayammal,* 2 Mad. H. C. R 37; *Ramchandra Dikshit* v. *Savitribai,* 4 Bom H. C. R. 73 A. C. J. In *Musst. Bhilu* v. *Phul Chand,* 3 B. S. D. A. R. 223, a surviving brother was compelled to afford maintenance to his deceased brother's widow, and in a similar case a widow was told that she ought to have sought maintenance and not a share. *Musst. Himulta Chowdraya* v. *Musst. Pudoo Munee Chowdraya,* 4 B. S. D. A R. 19.

(a) 4 Bom. H. C. R. 73 A C. J. The learned Judge, however, on a subsequent occasion, refused to recognize the authority of this case. See *S. M. Nistarini Dasi* v. *Makhanlal Dut et al,* 9 B L. R. 27. He says, "The question there was, as to whether one brother could be sued alone, and it was held that he could." Still the brother appears to have been sued as holding part of the family property, not as liable apart from that circumstance In *Lakhsman Ramchandra et al* v. *Satyabhamabai,* I. L. R. 2 Bom. 494, it has been held that the claim is against the estate in the hands of surviving coparceners, and that its non-liability in the hands of an alienee depends on the apparent necessity or propriety of the sale and the absence of fraud on the widow. *See* also *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai,* I. L. R. 1 Calc. 365; *Sonda Miney Dossee* v *Jogesh Chunder Dutt, ibid.* 2 Calc. 262; above, pp. 246, 248, 259.

(b) Above, p. 245 ss.

(c) *Visalatchi Ammal* v. *Annasamy Sastry,* 5 M. H. C. R. 150.

of residing with him. A Hindû widow's maintenance was pronounced a charge on the estate in any hands, in *Mussamut Khukroo* v. *Joormuk Lall.* (a) In *Rango Venayek* v. *Yamunabai* (b) it was held that a widow of a coparcener in Bombay, though entitled to maintenance, cannot generally claim a separate maintenance. So also the Śâstris, above, pp. 348, Q. 12, and 354, Q. 25, and in *Kashee Chander's* case referred to in 3 Morl. Dig. 178, (c) but in *Kasturbai* v. *Shivajiram* (d) it is said "where there is family property available for maintenance it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto." (e)

(a) 15 C W R 263. A person entitled by a decree to maintenance out of an estate may apparently enforce it as a charge on the property into whatever hands it goes. See *S. Baghabati Dasi* v. *Kanailal Mitter et al*, 8 B. L R 225; *Koomaree Debia* v *Roy Luchmeeput Singh*, 23 C. W. R. 33 See *Heera Lall* v. *Musst. Kousillah*, 2 Agra H. C. R 42. In a partition enforced by a creditor in order to make the father's share available for payment of his claim, the share of the wife should be provided for, *Babu Deendayal Lal* v. *Babu Jugdeep Narain Singh*, L R. 4 I. A 247. Arrears may be awarded as well as future payments, *Rájá Pirthee Singh* v. *Rání Rájkooer*, 12 B. L. R. 238

(b) I. L. R. 3 Bom. 44. See above, p. 79.

(c) In *Shiva Sundari Dasi's* case (Vyav. Darp. 381), Sir L. Peel held that the widow of a predeceased son was entitled to maintenance as against the father-in-law and brothers-in-law though she had quitted the family house at her own mere pleasure. This is quoted with approval in *Raja Pathan Singh's* case, L R S. I. A. at p. 247 So *Koodee Monee Dabea* v. *Tarachund Chuckerbutty*, 2 C. W. R. 134. But where father and son had been separated it was held that the son's widow was not entitled to maintenance, *Rujjomoney Dossee* v. *Shibchunder Mullick*, 2 Hyde 103; *Parvati* v. *Kisansing*, I. L. R. 6 Bom. 567. *See* above, p. 235 ss.

A widowed daughter or sister after being supported by a man in his life must, in parts of the Panjâb, be supported by his heirs after his death, Panj. Cust. Law, Vol II p 180.

(d) I. L. R. 3 Bom. 372.

(e) *See* above, p. 261.

This doctrine must now be regarded as that of the Judicial Committee, which has declared that a Hindû widow is not bound to residence in her husband's family. (*a*) The cases therefore decide that a coparcener's widow *is* entitled to maintenance, (*b*) and *is not* bound to residence. In a case of actual partition it is generally necessary to provide for the widows by separate allotments or charges, both in order to secure their maintenance and as a necessary element of an exact distribution of the estate and its burdens amongst the coparceners. (*c*) In Bengal the liability of the ancestral

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(*a*) *See* above, p. 260 ss

(*b*) *See* above, p 363, Q. 17; p. 408, Q. 27; p. 436, Q. 10.

(*c*) In the case of *Kalu* v. *Koshibai*, Bom. H. C P J 1882, p 420, decided since the earlier part of this work was printed, a claim was made by a son's widow against her father-in-law to maintenance for herself and her children. It was held that neither the widow nor the children were entitled to subsistence, the father-in-law's property being self-acquired. As to the former the Court relied on the case of *Savitribai* v. *Laxmibai*, I. L R 2 Bom 574. If the reasons given in Sec. 10 of the Introd. to Bk. I. are valid the claim of a son's widow in a united family is not, according to the Hindû law, dependent on the existence of joint family property: it is founded on the family relation, and the value of the property is significant only as a means of determining the proper amount or style of maintenance. The judgment of Nanabhai Haridas, J., in *Udaram* v. *Sonkabai* expresses the view of the Hindû authorities more correctly than the recent one in which he concurred with Sir C Sargent, C. J.

The Mit. in the chapter to be presently referred to insists most strongly on a man's duty to support all members of his family, and forbids his parting with even his self-acquired property so as to impair his ability to discharge the duty. How far the duty extends is not defined, as far probably as the united family, which seldom comprises relatives more remote than first cousins, and can be broken up at will. It may safely be said to reach as far as a son's family, seeing that the precepts expressly include grandchildren, and the connexion is so strong that the son and the grandson are the first heirs, and must by Hindû law pay their ancestors' debts irrespective of family estate. *See* above, pp. 263, 264.

The Hindû girl has no voice in choosing her husband. She has no claim on her family of birth so long as her family of marriage can sustain her. See Nârada, Pt. II. Chap XIII. paras. 27—29; above, p.

estate to support a widowed daughter-in-law has been

79,163. Her already pitiable lot as a widow must become in many cases desperate if she is reduced to homelessness and starvation in the face of the strongest precepts, hortatory or imperative, of her national law. *See* above, pp. 231, 246. In denying the claim of the grandchildren the Court refers to *Savitribai's* case as expressing the opinion of three judges that the direction to support a child is imperative. But the legal obligation does not extend, it is said, beyond the son. For this a passage is cited from Strange's Manual, Sec. 209, purporting to be an extract from the Mit. "On the Retraction of Gifts," but which is not to be found there. That Section is a commentary on Yâjñavalkya, Bk II. Sl. 175, the sense of which is that a man may bestow his own in so far as he does not thereby injure the family, but never his whole property while his posterity survive. Vijnâneśvara expounds "svam" in the Smṛiti as meaning "âtmyam" (= specially his own, or personal property, as contrasted with the common estate). He divides things with reference to gift into four classes, alienable and inalienable, and (the usual forms of alienation having been gone through) into alienated and unalienated. In distinguishing the first two classes he repeats that of a man's (proprium) self-acquired property only so much is alienable as exceeds the family's needs. As a ground for the limitation he insists on the paramount right of the family to support. To establish this he quotes Manu's text: "Aged parents, an honourable wife, an infant child, must be maintained even through a hundred trespasses" (Comp. Manu VIII. 389) Presently afterwards he incidentally quotes Nârada (*see* Transl p. 59) to the effect that a man having issue must not alienate his whole property. Lastly he construes the text as forbidding the alienation of the whole property, however completely one's own, that is though self-acquired, while issue (son or grandson or the like "putra-pautrâdi") survive. Thus the obligation imposed by Manu, so far from being treated as exceptional or as limited to the literal sense of the precept, as Mr. Strange must have thought, is made an example of the duty to the family generally. The precept that he who has begotten a son and performed his tonsure shall provide for his sustenance is relied on for the rule that the alienation of his (proprium or personal *i.e.*) self-acquired property is subject to restrictions so long as posterity exist. The Section of the Mitâksharâ is translated in the Appendix. It is in accordance with the chief Hindû authorities that Jagannâtha says: "If the person entitled to subsistence be not excessively vicious and the householder being mad give away his estate the donation is void," Coleb. Dig. Bk. II. Chap. IV. Text XV. Comm. *See* also Steele, L. C. 68. If the family of an outcast son can claim maintenance it seems that the right subsists

asserted (*a*) and denied. The actual decision in the latter case did not necessarily involve an absolute negation of the right as it was limited to a statement that "as long as she elects to live with her own father she has no legal right to be maintained by her father-in-law," (*b*) a rule quite in accordance with the native authorities (*c*) and the customary law of Bombay; but it was said that "a daughter-in-law has no legal right to be maintained whether she lives with her father-in-law or not." This is opposed to the Hindû authorities (*d*) and to the custom of the Bombay presidency. Where there was ancestral property it is opposed in its result to the recent Bombay decisions; but it agrees with them in principle, and has been relied on in them as an authority. (*e*) If the right of a widow of a son, or other member of a united family, depends altogether on her deceased husband's having been, not a co-member of an undivided family, but a joint owner of property with the surviving members against whom the widow's claim is directed, then as the son in Bengal does not in any practical sense become a co-owner with his father by birth, he cannot, on his predecease, leave anything out of which his widow can claim maintenance. That this is not the real basis of the widow's right has been shown in the Introduction to Book I., (*f*) but it seems unlikely now that the Hindû theory should reassert itself against that by which it has been replaced.

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equally where the son has died. *See* Coleb. Di. Bk. V. T. 334, and comp. Vivâda Chintâmani, Trans. p. 291.

(*a*) *Musst. Heera Kooeree* v. *Ajoodhya Pershad,* 24 C. W. R. 475.

(*b*) *Khethu Monee Dossee* v. *Kasheenath Doss,* 10 C. W. R. 89 F. B.

(*c*) *See* Vyav. May. Chap. IV. Sec. 8, para. 7; Stokes, H. L. B. 85; Nârada, Dâyabhâga, paras. 28, 29, Transl. p. 98; above, pp. 232, 254 ss.

(*d*) Above, pp. 232, 254, 257, 363, 408, 436. The Vîramitrodaya, in arriving at the conclusion that women are generally incompetent to inherit says "The daughter-in-law and the like are entitled to maintenance only." *See* Transl. p. 244.

(*e*) See *Savitribai* v. *Laxmibai,* I L. R. 2 Bom. at p. 617.

(*f*) Above, pp. 239, 246 ss. Comp. Coleb. Dig. Bk. II. C. IV. T. 28 Comm. *in med.* on the mother's right.

Subject to any qualifications which the recent decisions have introduced, it may be said that the daughter-in-law's right, like every coparcener's widow's right, to maintenance has always been recognized in the Bombay presidency (*a*). In the case of *Ramkoonwur* v. *Ummur et al*, (*b*) a daughter-in-law and her daughter were pronounced entitled to maintenance by the step-mother-in-law, who had succeeded to the father-in-law's property. The mother-in-law was pronounced incompetent to dispose of the immoveable property. At 2 Macn. H. L. 111 it is similarly laid down that a widowed daughter-in-law is entitled to board and residence with her mother-in-law, but not to an allowance if she choose to live apart. (*c*) The latter part of this rule may now probably be held superseded by the decisions, except perhaps where it can be maintained as a caste law.

(*a*) *See* above, pp. 246 ss. 436 ; 1 Str. H L. 124, 172, 244; 2 *ibid.* 412, 235, 233, where Colebrooke (referring to Mit Chap. II Sec. 1 and 2, Stokes, H L. B 364-380,) and Sutherland recognize the daughter-in-law's right in a case wherein the deceased son had no separate property. At page 297, Colebrooke, referring to Mit. Chap. II. Sec. 1, p 7 (Stokes, H L. B. 429). says that even half-brothers of a widow's deceased husband are bound to maintain her. *See* the case of *Sávitribái* v. *Laximibái*, I. L R. 2 Bom. 573, discussed above, pp. 235 ss In *Apaji Chintaman* v. *Gangabai*, Bom. H. C. P. J. 1878, p. 127, a widow's claim against her brother-in-law to a pecuniary allowance and the expenses of a pilgrimage was rejected. See *Ambawow* v *Rutton Krishna et al*, Bom Sel. Ca p. 150. The decision in *Chandrabhagabai* v. *Kasinath*, above p. 234, is supported by 1 Str. H L 172, but cannot be thought consistent with the more recent decisions As to the measure of maintenance of a predeceased coparcener's wife *see* 2 Str. H. L. 291, 294, 299 ; *Satyabhámábái* v. *Lakshman Ramchandra*, Bom H. C P J 1880, p. 62. Some of the elements in determining what is a suitable maintenance for a Hindû widow out of her deceased husband's estate were considered in *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick*, L. R. 5 I. A 55.

(*b*) 1 Borr. 458

(*c*) *See* also Book I. Chap. I. Sec. 2, Q. 23. 24 ; Chap. II. Sec. 1, Q. 6, 17 ; Sec 3, Q. 9 ; Sec. 6A, Q. 27, 28 ; Sec. 7, Q 10 ; 2 Str. H. L. 235.

Where a separate maintenance has been awarded, it may be increased or diminished upon proper cause shown. (*a*) The order may be made subject to variation. (*b*) Arrears may be awarded (*c*) contrary to the opinion of the Śâstri, (*d*) who thought the widow entitled only to maintenance from day to day. The case of *Saruswutee Bace* v. *Kesow Bhut,* (*e*) taking the Śâstri's view, is counterbalanced by that of *Sakvârbâi* v. *Bhavânji Raje* (*f*) which regards the point as unsettled. A widow's right to maintenance cannot be sold in execution of a decree or otherwise transferred. (*g*) It is a proper course to make an investment in order to secure the maintenance. (*h*) Limitation barring a claim for maintenance

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(*a*) See *Sreeram Buttacharjee et al* v. *Puddomokee Debia,* 9 C. W. R. 152 C. *R* ; *Ram Kullee Koer* v. *Court of Wards,* 18 C W. R 478; *Rukka Bai* v. *Gonda Bai,* I. L. R. 1 All 594. Above, p. 262.

(*b*) Above p. 265 ; *Nubo Gopal Roy* v. *S. Amrit Moyee Dossee,* 24 W. R 428, and cases under (*a*), and *Ramchandra Vishnu* v. *Sagunbâi,* Bom. H. C. P. J. 1879, p. 450. A Court is not justified in reducing, as a punishment for a vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded, *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick,* L. R. 5 I. A. 55 See *Moniram Kolita* v. *Kerry Kolitany,* above, p. 258. Where maintenance was withheld the Śâstris have in several instances recognized a right in the widow by a kind of *pignoris capio* to seize a part of the estate for her support. Comp. the cases under Sec. 3 A, above, p. 653, note (*d*).

(*c*) *Venkopadhyaya* v. *Kâvari Hengusu,* 2 M. H. C. R. 36.

(*d*) *Ramachendra Poy* v. *Luxoomy Boyee,* M. S D A. R. for 1858, p. 236.

(*e*) 1 Morr. 247.

(*f*) 1 Bom. H. C. R. 194.

(*g*) *Bhyrub Chunder* v. *Nubo Chunder,* 5 W. R. 112; *Ramabai* v. *Ganesh Dhonddev,* Bom. H. C. P. J. 1876, p. 188. *See* above, pp. 254, 302.

(*h*) Above, pp. 79, 163. As to a concubine's right to maintenance out of a family pension, *see* 2 Str H. L. 32. But where a Saranjâmdâr had made a grant of land to a lady it was held that she could not retain it against the will of his descendant, as the Government

runs only from the time when maintenance was refused or the right denied. (*a*)

V.—RIGHTS AND DUTIES ARISING ON PARTITION.

§ 7. The rights and duties of the coparceners towards each other, arising upon partition, relate to

A. The determination of the shares to which the sharers are severally entitled.

B. The distribution of the common liabilities :—

1. Of debts. 2. Of other liabilities.

A. With respect to the determination of the shares for actual enjoyment, this has regard only to the property as it actually subsists without allowances for previous inequalities of expenditure. (*b*) In the case of an enforced partition

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had, in bestowing the Saranjám, intended it, as they declared, as a "provision for an ancient house" inalienable from the family, *Jamna Sani* v. *Lakshmanrav*, Bom. H. C. P. J. 1881, p. 6.

(*a*) *Timmappa Bhat* v. *Parmeshriamma*, 5 Bom II. C. R. 130 A. C. J.; *Narayanrao Ramchandra* v. *Ramabai*, L. R. 6 I. A. 114; *Rámchandra Dikshit* v *Sávitribái*, 4 Bom. H. C. R 73 A C J.; Act XV. of 1877, Sch II. 129 *See* above, pp. 261, 262.

(*b*) *See* above, "SEPARATION;" Coleb Dig. Bk. V. Chap. VI. T. 377, 378; *Chuckun Lall Singh* v. *Poran Chander Singh*, 9 C. W. R. 483 C. R, where however what is said as to a manager's accountability to a minor coparcener, is opposed to Coleb. Dig. Bk. V. T. 136, and Vîram. Tr. p 41, 247. At 5 B. L. R. 317 (*Abhaychandra Roy Chowdhry* v. *Pyarimohan Guho et al*) also it is said that a manager is liable to render an account to the other members of the joint family; but this is to be taken only in a qualified sense, at least in Bombay. *See* also the case of *Ranganmani Dasi* v. *Kasinath Dutt et al*, 3 Beng. L. R. 1 O. C. J. As to charges that may be thrown solely on the manager's share, *see* 2 Str. H. L. 339-345. *See* also the case of *Appovier* v. *Rama Suba Iyen et al*, 11 M I. A. at p. 89; *Joitárám Bechur* v. *Bai Gangá*, 8 Bom. H C R. 228 A. C. J.; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; Dâyakrama-Sangraha, Chap. VII. para. 29; Stokes, H. L. B. 512. A liability does not arise to account for assets until they are realized, *Lakshman Dada Naik* v. *Ramchandra D. N.*, I. L. R. 1 Bom. 561. If only one member

complete accounts must be taken. (*a*) Securities are to be given up to the Court, and if necessary a receiver and manager is to be appointed. (*b*) All the coparceners must be before the Court. (*c*) (Kâtyâyana says) "The unequal consumption of unseparated kinsmen shall not be removed (= rectified). The purport is that unequal consumption cannot be prevented as it is unavoidable." (*d*) This is the view expressed by Sir C. Turner, C. J., in Madras, (*e*) and by Melvill, J., in *Konerav* v. *Gurrav*, (*f*) in which case there had been not only joint enjoyment but a separate enjoyment of portions by different members but in the exercise of the common right. The Supreme Court of Bengal threw out an opinion (not deciding the point) in *S. Soorjeemoney Dossee* v. *Deeno-*

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separates there is merely a computation and a severance of his share, Steele, L C. 214. The customary law in most castes is very jealous of a single parcener's right to acquisitions made by himself, especially as to immoveable property. Traditional sentiment, unreasonable as it is, connects such property at once with the whole family, *see* Steele, L C. 401. All that has been gained by individual parceners therefore, is generally an accession to the estate to be divided, (*see* above, p 725 ss) though the Smritis, as Vasishtha, Chap. XVII. para. 26, recognize the acquirer's right to a double share, or as Gaut Chap. XXVIII. para. 27, to the whole gain of learning. Where a business was carried on in a son's name it was still presumed to be joint property, *Narayan Jivaji* v *Anaji Konerrao*, Bom. H. C P. J. 1883, p 91.

(*a*) Three sons out of six sued for partition of an estate wrongly maintained to be impartible. They were awarded their moiety and three years' arrears on an account of income and of expenditure for the benefit of the joint family, *Rajah Venkata Kanna Kamma Row* v. *Rajah Rajagopala Appa Row Bahadur*, L. R 9 I. A 125.

Here, the claim having been wrongly resisted, the relief to the plaintiffs was substantially put on the same footing as if that had been done which ought to have been done.

(*b*) *Rangrav Subrav* v. *Venkatrav Vithalrav*, P. J 1878, p. 184.

(*c*) *Rakhmaji* v. *Tatia Ranuji*, P J. 1878, p. 188.

(*d*) Vîram. p. 245, 247, which also pronounces a co-sharer answerable for positive fraud.

(*e*) *Ponnappa Pillai* v. *Pappuváyyangár*, I. L. R. 4 Mad. at pp. 59, 60.

(*f*) I. L. R. 5 Bom. 589.

bundoo Mullick, (*a*) that inequalities of expenditure are commonly in the present day taken into account on a partition, and that, according to Coleb., Dig. Bk. V., T. 373, a co-sharer is liable for sums expended on personal enjoyment, not for the benefit of the family. (*b*) The question is discussed at some length in the case of *Meghashâm* v. *Vithalrâo,* (*c*) from the judgment of which, as it is not reported, the following extract may be given :—

"As to the next two objections, the object in taking accounts with a view to partition of an estate must, in the absence of fraud or gross misconduct, be simply to ascertain the existing nature and value of the property. The Hindû Law does not subject each and every member of a united family to an account of the portions taken by him from the common stock, and make him liable to restore all that he has taken in excess of his proper proportional share. So long as the family subsists undivided, it is regarded by the law rather as an integral unit in the community than as an aggregation of members, with reciprocal duties and rights admitting of precise arithmetical definition, and completely enforceable by the state. This, which was a common and prevailing conception in the earlier ages of the world, as Sir H S Maine has shown in his Ancient Law, pages 134, 183, is supported as to the Hindû community by many texts of recognized authority. Kâtyâyana, quoted by Jagannâtha in his Digest, Bk. V. Chap. III. T. 136, says 'Let not a co-heir be obliged to make good what he expended before partition.' There is even added this precept, 'Effects which a kinsman has embezzled, let not a co-heir use violence (compulsion) to make him restore' So intimate down to the period of partition is the union of the family

(*a*) 6 M. I. A. 540.

(*b*) "A coparcener is not, as a rule, entitled to an account against another in respect of payments made by the former." Hence the Court inferred that one could not sue another in union for contribution towards land tax paid by the former, *Nanabhai Valubhdas* v. *Nathabhai Haribhai,* Bom. H. C. P. J. 1880, p. 154.

The position of the coparceners may in this respect be compared to that of a husband and wife liable to each other for positive fraud, but not for ordinary inequalities of expenditure.

(*c*) S. A. No. 148 of 1871, decided 14th September 1871, Bom. H. C. P. J. F. for 1871.

that protection otherwise than by remonstrance against unauthorized individual appropriations, is hardly thought compatible with it. Even in Bengal, where the power of each member of a united family to deal with his own share of the property has long been recognized, traces of the earlier and more general system are still very easily discovered; Jîmûta Vâhana (Dâyabhâga, Chap XIII., Stokes H. L. B. 355-360) treating of this very subject of embezzlement or unauthorized appropriation, denies to it a strictly criminal character like theft; for he says, in accordance with the law of the Benares and Western Schools, though not with his own previous precepts, 'previous to partition a discriminative (several) property referable to particular persons relatively to particular things is not perceived.' A similar principle underlies the reasoning of Jagannâtha in his Commentary on Texts 136 and 378 of Bk. V. of Colebrooke's Digest, and it is to be observed that the ancient texts are much more curt and decisive in their original form than as toned down by the glosses of more recent commentators. The position and responsibilities of the Kartâ or manager do not at present differ materially from those of any other member of the family. He holds a precarious office from which he may at any moment be deposed by the general wish of the family. He is not a trustee required as in ordinary cases of trusteeship to keep accounts of his own expenditure, or of that of the other members, or of supplies taken out of the common stock. (a) The remedy for his misconduct is his deposition, or a partition of property in which, as will be seen, an adequate account can in general be taken

(a) In the recent case however of *Doorga Persad* v *Kesho Persad Singh*, L R. 9 I. A. 27, it was contended that Shev Nandan Persâd, the elder uncle of two infants, had represented them sufficiently in a suit as defendant, he being their co-proprietor and manager of the estate, and having been retained as their guardian on the record when their mother's name as guardian was struck out The Judicial Committee say that "the manager.........is not the guardian of infant co-proprietors...........for the purpose of defending suits against them in respect of money advanced with reference to the estate." Reference is then made to Act XL of 1858, corresponding generally to Act XX. of 1864. This says: "the care of the persons of ....minors.........and the charge of their property shall be subject to the jurisdiction of the Civil Courts;" and again "Every person who shall claim a right to have charge of property in trust for a minor under a will or deed or by reason of nearness of kin or otherwise may apply to the Civil Court for a certificate of administra-

"As regards a minor this remedy is not to the full extent available. He cannot himself join in deposing a Kartâ or make a claim for a partition. It is not reasonable that he should suffer by the mere misfortune of his possessing no friend so interested in his welfare as to bring a suit in his name for a partition. The Hindû law appeals as emphatically (Colebrooke, Dig. Bk. II. Chap. IV. T 17) as the English to reason, the reason of the law (Coke, I Inst. L II S. 138), and the misappropriation, which a minor is powerless to check at the time, he may yet claim to have remedied as soon as he is *sui juris* Gross and reckless waste, as well as down-right fraud, which an adult coparcener would have guarded against by insisting on partition, forms a proper ground of action on the part of one who could not at the time adopt that remedy. Yet mere ordinary extravagance does not entitle a minor on attaining his majority to an account of sums expended, and a compensation for those in excess of the Kartâ's proportional share, for which the texts of the Hindû Law make no provision, and which would be plainly opposed to its fundamental principle of the integrity of a family united in sacra (Maine A. L. 192) and in interests. If such an account could be exacted indeed, the birth of a son would imme-

tion; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." On this it is said "No certificate was obtained by Shev Nandan Persâd, and although it is stated that he was guardian of the infants, he clearly was not the legal guardian, and had no right to defend the suit in their name. The decree in the suit therefore was not binding on the infants." Yet as the debt had originally been that of their father they were held responsible for one-sixth, which it seems was the share assumed by some one on account of the infants in a partition (comp. p. 613, *supra*). It does not seem that Sheo Nundan really sought or held charge of joint property in trust for the minors As senior member of a united family, he would be their joint tenant if any English law-term is appropriate, holding every part of the property as his own, (*per mie et per tout*) accountable in no other way than as the Hindû law makes a managing member of a family accountable for gross malversation. As manager he could, according to most of the decisions represent the aggregate interests of the family in the Civil Court (*see* above, p. 615). The family however had manifestly become divided when the nephews by their suit sought exoneration from liability. This division may have occurred before the suit against Shev Nandan and the nephews. In that case they might remain co-proprietors with

diately impose on his father the necessity of recording every item of income and expenditure. The adult member of a family, who sees a way opening by which he may attain opulence, cannot easily free himself from the embarrassment of minor members entitled to share his gains, and the same closeness of connexion, which thus makes them sharers of his gains, (a) makes them sharers also in the losses occasioned by his indiscretions, so long as these do not proceed to an outrageous length.

"It must, therefore, in a suit, brought by a Hindû on attaining his majority, for partition against the other member or members of his family, always be a matter very much within the discretion of the Court to determine whether all just and reasonable bounds of expenditure have been so exceeded that the member sued may properly be made responsible for the excess. The social position of the

Shev Nandan as manager, and still hold separate interests like tenants in common under the English law. Such separate interests could not be taken charge of without breaking up the integrity of the estate essential to the united family In the beginning of the report however the uncle and nephews are described as members of a joint Hindû family. If in such a case the joint right of infant members along with the manager is a property which can be taken charge of by way of trust, and must be so taken for proceedings at law, the manager is necessarily deposed from the place assigned to him by the Hindû law. The distinction of rights is in fact incompatible with a continuance of the joint family as shown in *Appovier's* case, *see* above, pp 699, 703.

On the point of whether the decree obtained by the creditor could bind the infants without their having been represented by a guardian, their Lordships say: " It is not necessary now to inquire, because the Courts below went into the question of whether the bond was given for a debt for which the infants were liable, and held that it was not." But the High Court had decreed that the infants were liable and must pay the share of the debt apportioned to them This, according to the view taken in the Judicial Committee was opposed to the principle laid down in *Deen Dayal's* and *Suraj Bunsee Koer's* cases, but the decree of the High Court was affirmed. The case thus presents difficulties and has perhaps been imperfectly reported.

(a) Though the cleverest of a family take the management from an inefficient senior, and make gains, he is not therefore entitled to a larger share than his brethren in partition; Steele, L. C. 397 But he is entitled to a recoupment of losses sustained or of debts paid out of his separate property on the joint account; Steele, L. C. 213, 214.

parties, the recognized customs of their class, and many other circumstances may be taken into account; and the presumption, in the absence of evidence, is always that the estate simply as it subsists at the moment of the suit is that of which the claimant can demand his proper aliquot part. (*a*) For the event of fraud distinct provisions are made. The Vyavahâra Mayûkha (*b*) lays down what is to be found in many other works, that the brother, who by concealing the extent of the property defrauds co-heirs, shall be punished by the King; and property whether purposely concealed or accidentally omitted from the partition is everywhere recognized as a proper subject on its discovery for a further distribution on the same principle as the former one.

"As to the determination of what the subsisting estate really is, what the Hindû Law prescribes as a test in doubtful cases is an application of the Kosha ordeal. (*c*) We have got beyond that stage of progress in which so rude a method of investigation can any longer be effectual, as once sometimes it was, by its operation on the conscience of the person exposed to it. The more practical method of an enquiry into facts as they can be proved by testimony must be pursued, as that which, however imperfect, is the one that can be applied with the best hope of success. This resolves itself virtually in a case like the present into the preparation of an account on the principles already laid down of the existing property and of those further sums, if any, for which the person sued may properly be made answerable." (*d*)

(*a*) *See* the remarks of Jagannâtha in Colebrooke, Dig. Bk. V. T. 374; *Venkatesh* v. *Ganpaya*, Bom. H C. P J 1876, p. 110; *Ridhakarna* v. *Lakhmichand and others*, P. J. 1878, p. 238; *Konerrav* v. *Gurrav*, I L R 5 Bom 589. In the case of *Appa Rāv* v. *The Court of Wards*, I. L. R. 5 Mad. 236, the same principle was acted on by the Privy Council. The plaintiffs were awarded as against the defendants their moiety of a Zamindâri and of the mesne profits from the time of their dispossession, but subject as to the profits to the statutory limitation of three years before the institution of the suit. The moiety of the estate would necessarily, in the absence of a special direction, be a moiety of it as it existed at the time of the plaintiffs' ouster.

(*b*) Chap. IV. S. 7, para. 24; Stokes, H. L. B. 79.

(*c*) Vyav. May. Chap. IV. Sec. 6, para. 3 (Manu, cited Colebrooke, Digest, Bk. V. T. 374); Stokes, H. L. B. 73.

(*d*) *See* also below, Bk II Chap II. Sec. 1, Q. 9; Chap. III. Sec. 2, Q. 4, Remarks; Steele, Law of Caste, 53, 208.

The partition is regulated by the nature of the property, as 1. divisible, or 2. naturally indivisible. In the former case the partition proceeds regularly by a distribution in specie of portions amongst the sharers. The amount of the portions varies according to the status of the sharer in the family, and, in some cases, according to the nature of the property.

We have to distinguish

a. The partition between an ancestor and his first three descendants.

(1) Of ancestral property.

(2) Of self-acquired property.

b. The partition between brothers and collaterals undivided.

c. Between coparceners reunited.

A. 1. *a.* (1) *Partition between ancestor and his first three descendants.*—On a partition between an ancestor and his descendants to three generations of ancestral property, the shares are equal. (*a*) As between the ancestor and each of his sons or the issue of each, and between the several sons or the representatives of each. (*b*)

(2) On a partition of self-acquired property made spontaneously by the head of the family, he may reserve for himself a double share. (*c*) But not if the partition be

(*a*) Mit. Chap. I Sec. 5. para 8; Stokes, H L B. 393; Nârada, Pt. II. Chap. XIII. sl. 12. Traces of the ancient rule giving a larger share to the eldest son are still to be found. *See* Bk. II. Chap. I. Sec. 2, Q. 2, Rem.; Steele, L. C. 210, 218.

(*b*) In a few castes the sons share according to a patnibhâg, *see* above, pp. 285, 422, but in the great majority they take equally, Steele, L. C. p. 419, 420.

(*c*) Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B. 392; May. Chap. IV. Sec. 4, para. 12; Stokes, H L. B. 50. *See* Coleb. Dig. Bk. V. T. 388, Comm. *ad fin.* The limited power of a father over his patrimony and even over his own acquisitions may be looked on as

enforced by the descendants. This follows from the text which states that 'if the father makes a partition *by his own* desire, he receives a double share, (a) and is also particularly stated in the Vîramitrodaya. (b) The descendants take equal shares *per stirpes*; (c) unequal partition by deduction formerly recognized is not admitted in the present (Kali) age. Under the ordinary law, a father is not at liberty to dispose of his property in favor of one son to the prejudice of the others, either by way of gift *inter vivos* or by way of bequest. (d) As the Hindû Law, however, admits the father's right of disposal over self-acquired moveables there would be no objection to his making an unequal distribution of this portion of his property amongst

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the general rule in jurisprudence, wherever the family has risen to importance. In France and the countries which have adopted the French Code, the portion of which a father can dispose in his estate is limited to his aliquot part, counting himself and his children together Thus with three sons he can by gift or by will alien only one-fourth of his property To a wife however he may give one-fourth in full ownership, and the usufruct of one-fourth more, provided that if he were a widower with children when he married her she cannot have more than the smallest portion given to a child. The contradiction in some cases between these rules and the question of whether the widow's capacity as a beneficiary is or is not, where there is but one child, less extensive than that of a stranger, have given rise to discussions amongst the Continental jurists of Europe, at least as subtile and inconclusive as any with which Jagannâtha and his precursors in India have been reproached.

(a) That this is the law only as to self-acquired property is stated in *Badri Roy* v. *Bhagwat Narain Dobey*, I. L. R. 8 Calc. at p. 653.

(b) Tr. p. 63, 65.

(c) *Debi Parshad* v. *Thakur Dial*, I. L. R. 1 All. at p. 113.

(d) *Bhujangrav* v. *Malojirâv*, 5 Bom. H. C. R. 161, A. C. J.; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; S. C. in App. L. R. 7 I. A. 181; Coleb. Dig. Bk. V. Chap. I. T. 27, 28; and *infra*, Bk. II. Chap. I. Sec. 2, Q. 2 and 5; Mit. Chap. I. Sec. 3, para. 4, Stokes, H. L. B. 382; May. Chap. IV. Sec. 4, para. 11, *ibid*. 50.

his sons. (a) The Bombay High Court has ruled (b) that "a father united with his son has full power to alienate self-acquired land," which implies a complete power of disposal. (c) According to this principle, the head of a family would be equally unfettered in the distribution of his immoveable as of his moveable self-acquired property. (d)

(a) Mit. Chap. I. Sec. 1, para. 27, Stokes, H. L. B. 375; May. Chap. IV. Sec. 1, para. 5, *ibid.* 43. A testamentary bequest cannot be made so as to cause an unequal division of ancestral moveables, *Manakchand* v. *Nathu Purshotam*, Bom. H. C. P. J. 1878, p. 204.

(b) *Gangâbâi* v. *Vâmanâji*, 2 Bom H. C. R. 304.

(c) *See* also *Muddun Gopal Thakoor et al* v. *Ram Buksh Pandey et al*, 6 C. W. R. 71 C R; *Bawa Missir et al* v. *Rajah Bishen Prokash Narain Singh*, 10 *ibid.* 287 C R.; *Gunganath* v. *Joalanath et al*, N. W. P. S. D. A. R. for 1859, p. 63; and below, Bk. II. Chap. I. Sec. 2, Q. 2–8, Rem.; and Sec. 3, Q. 1, Rem. An unequal distribution of acquired property by the father is in some degree generally recognized by caste custom, subject only to the claims of the family to maintenance, and to protection against mere caprice Steele, L. C. pp. 58, 62, 216, 408.

(d) But *see* also 1 Str. H. L. 20, 21; 2 *ibid* 9, 11, 13, 439; and Coleb. Dig. Bk. II. Chap. IV. Sec. 1, T. 13, 14.

As to what is included in immoveable property according to the Hindû Law, *see* Smriti Chandrikâ, Chap. VIII. para. 18 and note; Chap. XI. Sec. 1, paras. 44-48; *Jamiyatrâm* v. *Parbhudâs*, 9 Bom. H. C. R. 116; *Maharana Fatesanji* v. *Desai Kalyanraya*, 10 *ibid.* 189 P. C.; *Raiji Manor* v. *Desai Kallianrai*, 6 *ibid.* 56 A. C. J.; *The Government of Bombay* v. *G. Shreegirdharlalji*, 9 *ibid.* 222; *Balvantrao* v. *Purshotam et al*, 9 *ibid.* 99; *Krishnabhat* v. *Kapabhat et al*, 6 *ibid.* 137 A. C. J.; *Bharatsangjee* v. *Navanidharaya*, 1 *ibid*, 186; *Sangapa* v. *Sanganbasapa*, R A. No. 40 of 1875, Bom. H C. P. J. F. for 1876, p. 214; *Shivagavda* v. *Dharangavda et al*, R. A. No. 7 of 1875, *ibid.* for 1875, p. 144; *Sitaram Govind* v. *The Collector of Tanna*, S. A. No. 193 of 1874, *ibid.* for 1875, p. 141; *The Collector of Thana* v. *Hari Sitârâm*, I. L. R. 6 Bom. 546. According to these decisions a hak or right appendant to an hereditary office or to membership of a group of village Mâhârs is immoveable property within the meaning of the Limitation Acts, and is not personal property within the meaning of Sec. 6 of Act XI. of 1865 (the Small Cause Court Act for the Mofussil). Consequently the

An adopted son receives a fourth part of a share, if le-

Small Cause Courts have not jurisdiction in such cases even over claims for definite sums sued for as arrears. The contrary view, suggested by *Hanmantrav Sadashiv* v. *Keru*, Bom. H. C. P. J. 1875, p. 291, and *Naru Pira* v *Naro Shidheshvar*, I. L. R 3 Bom. 28, cannot safely be followed. The recent rulings have been embodied in Act XV. of 1877, Sec. II. Art. 132, which says that Malikana and Haks are for limitation to be deemed charges on immoveable property.

Tithes under the English statute law are hereditaments, and a rent was regarded in early times as an estate subject to the " assise " for possession; but all things of value not being land or interests in land (and some interests in land) are by the English law " personal property," a term by no means identical with moveable property, (see *Freke* v. *Lord Carbery*, L. R. 16 Eq Ca. 461,) and peculiar to the English law, in the sense in which that law uses it. *See* Butler's note to Co Lit. 191*a*, Sec. II. 2. A royal grant of an annuity therefore would be " nibandha " according to Hindû Law, but according to the English Law it would, unless issuing from land, be a merely personal inheritance. *See* Co. Lit. 20*a*, and Hargrave's note. In *The Government of Bombay* v. *Desai Kallianrai Hakoomatrai*, 14 M. I. A. at p. 563, the Judicial Committee say of a Palanquin allowance: " They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunna, can properly be said to be ' immoveable property,' within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dowlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury." In the case of *The Collector of Thana* v. *Hari Sitárám*, I. L. R. 6 Bom. 546, a Full Bench on appeal from a decision in which the judgment of Sir C. Sargent, J., had prevailed against that of Melvill, J., upheld the former. In the judgment delivered by Sir M. Westropp, C. J., it is laid down that a grant to a temple of an annuity in cash and grain payable out of the extra assessments of particular divisions of a district is a charge on the districts, because the assessment is so. It is therefore, as a charge on immoveable property, itself immoveable property. This seems open to the logical objection that " charge" is used in a double sense. As a real right a charge being an interest in land is immoveable property, as a tax it is not.

gitimate sons of the body have been born after his adop-

(See *Ashton* v. *Lord Langdale*, 4 De G. and Sm. 402, compared with *Attree* v. *Hawe*, L. R 9 C. D. 337, and *Jervis* v. *Lawrence*, W. N. for 1882, p. 157. A charge confers a right to realization by sale of that on which it is imposed. *See* Fisher, Mortg. Sec. 8; Transf. of Prop. Act, IV. of 1882, Sec. 100) Again it is said that "a grant by a Hindû sovereign to a Hindû temple, which can only be held by the managers of the temple, is immoveable property, *i.e* "*nibandha*" This seems to assume the point in issue. If not, then the question is whether "nibandha" is necessarily immoveable property, and to say that because some or even all immoveable property is nibandha, all nibandha is immoveable, is not a permissible conversion. "The question [is] whether the subject of the suit is in the nature of immoveable property, (*see* above p 229) or of an interest in immoveable property, and if its nature and quality can be only determined by Hindû law and usage, the Hindû law may properly be invoked for that purpose." But the "nature and quality" of a temple grant having been thus determined, the question of whether it falls within the class of "immoveable property" is one of English construction, *i.e* do its characteristics as ascertained (not the mere Hindû name by which it may be called) place the object within or without the comprehension of "immoveable property." This includes fixed objects and such incorporeal rights exercisable in immediate relation to them as the local law on that account recognizes as immoveable. The latter are *jura in re* carved out of the full ownership of the object of property. *See* Story, Confl. of Laws, Sec. 417; *Freke* v. *Lord Carbery*, L. R. 16 E. C. 461. A temple allowance payable by officials out of a tax levied by them, even a land-tax, does "not constitute a charge... against the land," and therefore according to the Judicial Committee in *Desai Kalianrai's* case, 14 M. I. A. 551, cannot certainly be said "though payable out of the Government revenue of a particular pargunna"... to be "immoveable property." (*ib*) The opinion then may perhaps be hazarded that where the Hindû law in a matter explicable by it alone shows a particular right to be a *jus in re* over fixed property it may be regarded as included amongst immoveables, whether it be also *nibandha* or not, and that where the right is not a *jus in re* (a real right as it is called) it is not immoveable property even though it should be *nibandha* according to the Hindû law, as *ex. gr.* in case of a nemnuk (periodical payment) from the Government treasury. This agrees with the definition given in the General Clauses Act I. of 1868, and in the Registration Act III of 1877. In the Limitation Acts subsequent to Act XIV. of 1859 (Acts IX. of 1871, XV. of

tion. (*a*) The illegitimate son of a Śûdra may also receive a share at the father's choice (*b*) ; but those excluded from

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1877)," Immoveable" must necessarily be construed according to the definition given in Act I. of 1868, Sec. 2. *See* also Wilks's Mysore, Vol. I. p. 126.

As to the English law respecting annuities, stocks and shares which are generally personal property, *see* Wms Exec. Pt. II. Bk. III. Chap. I Sec. 2. How these, when held by Hindûs, would be regarded now that " immoveable " and " non-personal " or " real " have been identified with " nibandha " (=productive of a permanent income) may be a question of some difficulty. Shares in the Government Banks, it is expressly enacted by Act XI. of 1876, Sec. 19, shall be " moveable property, " and by Sec. 22 the Banks are free to ignore trusts to which the shares are subject except for the purpose of excluding the Bank's own claims for debts due to them from the registered shareholders The Indian Companies Act, VI. of 1882, Sec. 44, provides similarly in the case of all Companies under the Act, that the shares shall not be " real estate or immoveable property " Annuities under the Indian Loan Act, 22 & 23 Vic. Cap. 39, Sec 8, are declared to be personal property. Government loan notes, registered or enfaced for payment in London, are as assets of holder deceased declared personal property by St. 23 and 24 Vic. Cap. V. Sec 1 In other cases the particular provisions of the constituting Statutes must be looked to, in order to determine the nature of the property, and then in the case of Hindûs the Hindû law will govern the relations of the representatives or co-owners of the deceased owner *inter se*. The property will, in the first instance, usually vest in the executor or administrator under Act V. of 1881, Sec. 4.

A pension, in the proper sense of a stipend proceeding from the bounty of the Government, is protected against attachment by the Pensions Act, XXIII of 1871, Sec 11, but a grant of money or land revenue, such as a " Toḍa Girâs " Hak, is not exempt, though under the same Act it cannot be made the immediate object of a suit cognizable by the Civil Court, *Secretary of State for India* v. *Khemchand Jeychand*, I. L. R. 4 Bom. 432; *Syed Mahomed Isaack Mushyack* v. *Azeezoon Nissa Begam*, I. L. R. 4 Mad. 341; *Radhabai* v. *Ragho*, Bom. H. C. P. J. F. for 1878, p. 292.

(*a*) Mit. Chap. I. Sec. 11, para. 24, Stokes, H. L. B. 420; May. Chap. IV. Sec. 5, para. 17, *ibid.* 63.

(*b*) Mit. Chap. I. Sec. 2, paras. 1 and 2, Stokes, H. L. B. 426; May. Chap. IV. Sec. 4, para. 32, *ibid.* 55; 2 Str. H. L. 70. In the

a share are entitled to maintenance. (*a*) On a partition being made by a father, head of a family, his wives receive each a son's share, (*b*) in case they had received no Strîdhana. If they had received Strîdhana, they obtain half a share, *i.e.*, so much as, together with their Strîdhana, will make up a son's share.

A son born to the father after partition inherits his wealth either solely or in common with sons who have become reunited with him. (*c*) The already severed sons are disregarded in a further partition between the father and sons in union with him.

higher castes he is entitled only to maintenance, *ibid.* 71. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*, 13 M. I. A. 141. The statement of the Pandits in the same case as to marriages between persons of different castes being unlawful except when sanctioned by the customary law of the castes, expresses the Hindû law as received in Western India; Steele, L. C. 29, 163, 166. But a woman, being of a somewhat higher caste, is received into her husband's, *ibid.* *See* above, pp. 83, 194, 263.

(*a*) 2 Str. H. L. 68.

(*b*) Mit. Chap. I. Sec 2, paras. 8 and 9, Stokes, H. L B. 379; May. Chap. IV. Sec 4, para. 15, *ibid.* 51; and compare the Dâyakrama Sangraha, Chap. VI. para. 22, *ibid.* 512; and Smṛiti Chandrikâ, Chap. II. Sec. 1, para 39 The mother gets a son's share in every partition, *Lalljeet Singh* v. *Raj Coomar Singh*, 20 C. W. R. 336, and the other cases cited and followed in *Sumrun Thakoor* v. *Chunder Mun Misser*, I. L. R 8 Calc. 17 A step-mother must live with her step-son to be entitled to maintenance, p. 358, Q 6; but *see* also Introd. to Bk. I. Sec. 10. The Smṛiti Chandrikâ, Chap. XI. Sec. I. para. 34, as quoted by the Vîram. Transl. p. 136, regards the widow of an undivided parcener as taking a portion of the common property for her maintenance only when the father-in-law, &c. are unable for some cause to protect her, as Nârada gives them guardianship with full power of control accompanying their liability for maintenance, Vîram. Tr. p. 138. Her right is intransferable, *see* above, pp. 254, 302.

(*c*) Mit. Chap. I. Sec. VI. paras. 1, 4; *Nawal Singh* v. *Bhagwan Singh*, I. L. R. 4 All. 427.

The share allotted to a wife or sister in partition becomes Strîdhana heritable by her sons only in default of daughters, (a) or according to the Mayûkha in preference to daughters. (b) This rule is inconsistent with any intention to make property derived by a woman from her husband "revert" to his family on her death. Vijñâneśvara recognizes inheritance and partition equally as means by which a woman acquires property, and gives a single set of rules for the devolution of this property, all of which he calls Strîdhana. (c)

(a) Above, pp. 298, 308 ; Mit. Chap. I. Sec VI. para. 2.

(b) Vyav. May. Chap IV. Sec. II Sec. X. paras. 25, 26 ; comp. p. 329, note (e), above.

(c) *See* Mit. Chap. II. Sec. XI. paras 1, 2, 3, 8 ss, on which Sec. VI. para. 2 serves as a comment. But for the prevailing doctrine *see* also above, p. 334, and comp p. 781 below.

The widow's power of dealing with property inherited from her husband or given or bequeathed to her by him has recently been discussed by Scott, J., in a terse and comprehensive judgment which applies equally to a share taken in partition. The conclusion arrived at by the learned judge was that according to the law of Western India, the widow may dispose at pleasure of moveable property thus taken by her while subject to restrictions as to immoveables for the preservation of the estate, *Dâmodar Mádhavji* v. *Thakar Parmanandas Jivandás*, 13th February 1883, citing the cases of *Bhagwandeen Doobey*, 11 M. I. A. at p. 573 ; *Rajender Narain* v *Bija Gobind Singh*, 2 M. I. A. 181 ; *Bechar Bhagvan* v. *Bai Lukshmee*, 1 Bom. H C. R. 56 ; *Pranjivandas Toolseydas* v. *Devkuvarbai*, 1 Bom. H C. R. at p. 133 ; *Balvantrao T. Bapuji* v. *Purshotam*, 9 Bom. H. C. R. at p. 111; *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R 5 Calc. 685 ; *Venkat Ramrav* v. *Venkat Suriyarav*, I. L R. 2 Mad. 333 *See* also above, pp. 98, 100, 301, 334, 507. As to the quantum of the estate taken, *see* above, pp. 297 ss, 336 ss ; and as to an extension of this by express agreement, gift or bequest, pp. 184, 315, and *Koonjbehari's* case, *supra* : as to the widow's power of bequest, pp. 181, 219, 309 ; Vyav. May. Chap. IV. Sec. X. para. 9. Where a widow had inherited a house from her deceased son, and was alive, it was held that " whether her mortgage was made for such purposes as will render it valid against her successor after her death, is a question which it is not necessary to determine in the present suit." The mortgagee was awarded present possession,

§ 7 A. 1. b. *Partition between brothers or collaterals.*—On a partition between brothers the shares are distributed equally; on partition amongst collaterals, *per stirpes.* (*a*) As to the extent of the property, thus subject to equal partition, (*b*) *see* above, § 5 A, pp. 708 ss; § 7 A 1 *a*, pp. 770 ss.

If there has been a partial distribution giving part of its share to one branch, it is debited with so much in account with the whole body of co-sharers. (*c*) But there is no general mutual right to an account of past transactions. (*d*)

If previously to the separation a particular member had had sole possession with the assent of his coparceners of some portion of the estate, he may retain that portion, (*e*) and where a member had built a house out of his separate funds on a piece of the ancestral land, it was held that this

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Malapa v. *Basapa,* S. A. No. 379 of 1880, Bom. H. C. P. J for 1881, p. 43. A "reversioner," however interested, (*see* above, p. 96) is estopped from questioning the validity of an agreement in which he concurred and which he attested, whereby the widow of a person deceased, his mistress, and an illegitimate daughter by her, made a distribution of his property, *Sia Dasi* v *Gur Sahai,* I. L R. 3 All. 362. See further § 7 A. 1 *b.*

(*a*) See *Sumrun Singh* v. *Khedun Singh et al,* 2 Calc. Sel. R. 11; Coleb. Dig. Bk V. T. 95, Comm.; Mit. Chap. I. Sec. 3, para. 1; Stokes, H. L. B. 381; Chap I. Sec. 5, para. 1; *ibid.* 391; Smṛiti Chandrikâ, Chap. VIII para 5; 2 Str. II L 286, 358, 393. A mother cannot enforce a partition on an only son, 2 Str. H. L 290; but if a partition is made they take equal shares, Steele, L C 49, 56.

(*b*) A gift from a parent to one of the sons while undivided is exempted from partition, Vîram. Tr 250. It must be of reasonable value; above, p. 211.

(*c*) *See* above, p. 698, note (*b*)

(*d*) *See* above, § 7 A, p. 763; *Konerrav* v. *Gururav,* Bom. H. C. P. J. 1883, p. 77. A duty to account arises from the time when a partition is wrongly refused. *Ib.*

(*e*) *Sreenath Dutt et al* v. *Nand Kishore Bose et al,* 5 C. W. R. 208 C. R. The charge created by attachment of an undivided share and the effect given to it by an actual transfer of part of the property to the possession of an execution purchaser are to be distinguished from

did not become part of the family property subject to partition. All that the coparceners can claim in such a case is a proportionate addition to their shares by way of compensation for the land withdrawn from the general partition. (a) So in a case of partition of interests without one in specie. (b) In *Vithoba Bâvâ* v. *Haribâ Bâvâ*, (c) however, a house was divided, because built on family property. (d) In *Jotee Roy et al* v. *Bheechuck Meah et al*, (e) Phear, J., says that by a long holding in severalty with consent of other sharers, a member of the family acquires a right to have that particular portion of the ancestral estate assigned, on a partition, to his share, and that a lessee under him may compel him to assert this right. Such a lessee holding on after a partition under other co-sharers, their acquiescence in his lease is presumed after some years. A purchaser may build a wall on the part in his possession, and unless it is injurious, the Court will not order its removal. But there is no right, without permission, to injure the other's interests. (f)

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this case. But should the parcener in separate possession deal with the part so possessed effect would be given to the transaction so far as consistent with justice to the coparceners. See above, pp. 631, 633; *Pándurang Anandráv* v. *Bháskar Sadáshiv*, 11 Bom. H C. R 72.

(a) 2 Macn. H. L. 152.

(b) *The Collector of 24 Pergunnahs* v. *Debnath Roy et al*, 21 C. W. R. 222.

(c) 6 Bom. H. C. R. 54 A. C. J.

(d) Contra, *Guru Das Dhar* v *Bijaya Gobinda Baral*, 1 B L R 108.

(e) 20 C. W. R. 289.

(f) *Lalla Bissumbhur Lall* v. *Rajaram et al*, 16 C. W. R. 140; *Bissambur Shaha* v. *Shib Chunder Shaha et al*, 22 *ibid* 287. Under the English law when a partition is made each parcener is entitled to a deduction of the value added at his sole expense to the part assigned to him from the valuation of such part with which he is charged in the account with his co-owners, *Watson* v. *Glass*, L. R. W. N. for 1881, p. 167.

Rights and duties arising on partition.—The rule regarding adopted sons given above holds good here also. The illegitimate son of a Sûdra is entitled to half a share. (*a*) Regarding the interpretation of the term 'half a share,' *see* Book I., Introd. p. 72, 82. (*b*) On partition amongst brethren not only mothers, but step-mothers, paternal grandmothers, and step-grandmothers (*c*) receive a son's or grandson's share,

(*a*) If there be no legitimate offspring, he is entitled to share equally with a daughter's son, 2 Str. H L 70. But the Mitâksharâ, Chap. I. Sec. 12, paras. 1, 2 (Stokes, H. L. B. 466) postpones him to the grandson, except for half a share. So Yâjn. II. 134.

(*b*) *See* also above, pp. 379, 382, 383.

(*c*) Coleb. Dig. Bk. V. Chap. II. T. 85 Comm. *Mohabeer Pershad* v. *Ramyad Singh et al,* 20 C. W. R 195; *Badri Roy* v. *Bhagwat Narain Dobey,* I. L. R. 8 Calc 649; *Damodhur Misser* v. *Senabutty Misrain, ib.* 537. But the last quoted judgment says the step-mother takes her allotment only for life as a maintenance. As to this *see* above, pp. 303, 308, 310, 777. "The mother's title to her share is not founded on her former property but on positive texts," Coleb. Dig. Bk. II. Chap. IV. T. 28 *in med.*

In his wide construction of the term "Strîdhana," Vijñâneśvara is followed nearly a century later by Aparârka. This author says: "The word 'Âdya' is intended to include other kinds of woman's property; that for instance acquired under Yâjñavalkya's texts, 'The wives must be made partakers of equal portions'; 'Let the mother take an equal share'; 'Sisters take a quarter of a brother's share'; 'Daughters share the nuptial present of their mother.' Everything else (in like manner) over which a woman has control, is by Manu and the rest called woman's property," (Strîdhana.) In *Sibbosoondery Dabia* v. *Bussoomutty Dabia,* I. L. R. 7 Calc. 191, it was held that a suit by a grandmother would lie for an equal share with her grand-daughter and grandsons in the properties, which, under a previous partition decree, had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned.

In the mean time the widows are entitled to maintenance; *see* above, p. 259. But where two widows sought to enforce the terms of a partition deed, superseded by other arrangements, they were not allowed to turn their suit into one for maintenance, *Naro Trimback* v. *Haribai,* Bom. H. C. P. J. 1879, p. 33.

Ganga Bai v. *Sitaram,* I. L. R. I All. at p. 174, deals with the widow's maintenance as a charge on the joint estate, a question which

provided they have obtained no Strîdhana. If they have obtained Strîdhana, they are then entitled to so much only as, with the Strîdhana, will make up their proper portion. (*a*)

On partition between brothers, the marriage expenses of the unmarried brother form a charge on the whole fund to be divided, and are to be provided for by a deduction there-

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is discussed at length in *Lakshman Ramachandra et al* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, S. C.; Bom. H. C. P. J. F. for 1877, p. 349. The precepts of the Śâstras on the subject of the widow's residence have been variously construed, even by the Native commentators, as may be seen by comparing the Vivâda Chintâmani, p. 265, with Jîmûta's Dâya Bhâga, Chap. IV. Sec. 1, para. 8 (Stokes, H. L. B. 237), and Coleb. Dig. Bk. V. T. 483, with Varadrâja, p. 50.

(*a*) Mit. Chap. I. Sec 7, paras. 1 sqq.; Stokes, H. L. B. 397; May. Chap. IV. Sec. 4, paras 18 and 19, *ibid.* 52. *See* Bk. I. Chap. IV. B. Sec. 1, Q 10, Remark, p. 507; Coleb. Bk. V. T. 87, Comm.; *Jodoonath Dey Sircar et al* v. *Brojanath Dey Sircar et al*, 12 B. L. R. 385. The share given to a mother, &c., on partition, may, according to Jagannâtha, be dealt with by her at her own pleasure, but, on her death, is inherited by her husband's heirs. He distinguishes between property originating in a gift on account of affinity, and in affinity alone, Coleb. Dig. Bk V. T 87. But *see* Nort. L. C. 295. The texts cited there may, however, be differently explained. In the case of a widow of a coparcener put on a partition amongst survivors, into possession of a defined share, the Privy Council say, in *Bhugwandeen Doobey* v. *Myna Baee*, at 11 M. I. A. 514 :—" It may be a question whether her share does not become absolute, though in a case coming from Lower Bengal, the contrary was decided by this Committee." Prof. H. H. Wilson, Vol. V. of his Works, p. 26, favours her absolute power of disposal. Coleb., in 2 Str. H. L. 383, says the Mit. and Madh. Âch. treat the allotment as an absolute assignment, contrary to the Smṛiti Chandrikâ; *see* above, pp. 298, 303, 307 ss, 338. She holds only the position of a tenant for life however, and has no right to destroy buildings, according to *Umapá Kantapá* v. *Ningosá Hirásá*, S. A. No. 123 of 1876, Bom. H. C. P. J. F. for 1876, p. 144. *See* further below, p. 782, note (*d*).

The construction of a deed, allotting money, &c., to a widow of a deceased coparcener, may be made according to the situation of the parties, *S. Rabutty Dossee* v. *Sib Chunder Mullick*, 6 M. I. A. 1; *Boyle Chund Dutt* v. *Khetterpaul Bysack*, 11 B. L. R. 459.

from, but not those of a brother's son. (*a*) A mother's share is equal to a son's. (*b*) A sister's share is one-fourth of a brother's. (*c*) Colebrooke, resting on the Mitâksharâ, makes this allotment an absolute assignment of a share, (*d*)

(*a*) 2 Str. H. L. 286, 288, 338, 423; Mit. Chap. I. Sec. 4, para. 19 (Stokes, H. L. B. 388); Sec. 5, para 2 (*ibid.* 391); Sec. 7, p. 4 (*ibid.* 398); Vîram, Tr. p. 81; Steele, L. C. 57, 214, 404.

(*b*) 2 Str. H L. 296; Mitâk. Chap. I. Sec. 7, para. 1. In Bengal a mother is entitled to obtain a share as representative of a deceased son, *Jugomohun Holdar* v. *Sarodamoyee Dossee,* I. L. R 3 Calc. 149.

(*c*) 2 Str. H. L. 288, 366; Mit Chap. I. Sec. 7, p. 5-14; Stokes, H. L. B. 398—401; May. Chap. IV Sec. 4, paras. 39, 40 (*ibid.* 57); Vîram. Tr. pp 84, 85. Nârada, Pt II. Chap. XIII. sl. 13, says that the eldest receives a greater share, the youngest a smaller, and the others equal shares, as also a sister unmarried. The variance of precept is explained by the Smṛiti Chandrikâ, Chap. IV. as having reference to the extent of the estate, the sister's claim on her brothers being greater in proportion as the aggregate is smaller. Devâṇḍa Bhaṭṭa adds that, failing the patrimony, the brothers must perform their sister's marriage out of their own funds, as the Vîramitrodaya, Tr. p. 81, imposes the duty of initiation on the brethren even though they have inherited nothing In the case at 2 Str. H. L. 312, the Śâstri, apparently with the concurrence of Colebrooke, on a partition claimed by one of four nephews against his brothers and uncles, directed that the property, being divided first amongst the different branches, sprung from the common stock, the portion allotted to the plaintiff's branch should be distributed between him and his brothers, subject to a charge for the maintenance and marriage of their sisters.

(*d*) Mit. Chap. II. Sec. 1, p. 32 (Stokes, H. L B. 436); 2 Str. H. L. 383; Vyav. May. Chap. IV. Sec. 4, para. 18 (Stokes, H. L. B. 52); Sec. 10, p. 2, 7, 9 (*ibid.* 98, 100) Ellis, at 2 Str. H. L. 404, says:—"The daughter is heir of her father as well as the sons," but that is perhaps putting it rather too strongly. If the share allotted to a widow is to be regarded as an estate of the same character as that which she inherits, the recent decision of *Dhondo* v. *Balkrishna,* Bom. H. C. P. J. 1883, p. 42, is pertinent, which reiterates the rule that a widow is debarred from alienating the estate apart from any claims of her husband's relations, *see* above, pp. 100, 101 According to the caste usages generally, her disability to alienate fixed property is dependent on there being male relatives of her husband, Borr. Col. Lith. 46, 64, 92, 103, 230, 367. Some say relatives not more remote than nephew's

though some other commentaries regard it merely as a provision held for life, like property, as they insist, inherited or taken by gift from the husband. (*a*) Regarding the share allotted on a partition to a sister or widow however, as absolutely assigned, it may perhaps still be looked on, according to the analogy of the estate taken by a father in a division, as hereditary property for the purposes of further descent, and as, on that principle, going on the death of the widow to the heirs in the husband's family, who being nearest to him are, for this purpose, nearest to the widow. This may possibly have been the view of Nîlakaṇṭha, in the Vyav. May. Chap. IV. Sec. 10, paras. 26, 28, (*b*) and would make her position similar to that of a widow of a separated coparcener as thus conceived. (*c*) The Mitâksharâ makes the share simply Strîdhana, (*d*) inherited as described in Bk. I. Introd. pp. 146, 310; and in Bk. I. Chap. IV. pp. 501 ss, 517 ss. (*e*)

§ 7 A. 1. *c.*—*Partition between reunited coparceners.*—In the case of a partition between reunited coparceners, the shares are equal, notwithstanding that the portions brought

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sons, *ibid.* 325, comp. 349. Yet her daughter and daughter's son succeed to it, showing it is regarded as strîdhana, *ibid.* 103. Exceptionally she is allowed to dispose of what she inherited from her husband, *ibid.* 188, but not what she inherited from her father, *ibid.* 165. She may alienate to relieve her necessities, *ibid.* 248, or to pay debts and funeral expenses, &c., *ibid.* 281, though even in such cases the sanction of the kinsmen may be required, *ibid* 303.

In 78 Dekhan Castes it was found that a widow could give away property if her husband had died divided from his family but not otherwise; Steele, L C. 373. By some she is allowed to dispose even of immoveable property given by her parents, *ibid.* 236.

(*a*) *See* above, p. 777.

(*b*) Stokes, H. L. B. 105.

(*c*) Mit. Ch. II. Sec. 8, paras. 2, 7 ; Stokes, H. L. B. 85.

(*d*) *See* above, and 2 Str. H. L. 402.

(*e*) *See* also 2 Str. H. L. 411, 412; Steele, Law of Caste, 62, 63.

in on reunion were unequal. (*a*) Regarding the descent of shares in a reunited family, *see* Bk. I., Introd. pp. 140 sqq.

§ 7 A. 2.—*Partition of naturally indivisible property.*—Naturally indivisible property must be disposed of, so that the coparceners severally may derive from it the maximum of advantage, a principle readily deducible from the text of Bṛihaspati, May. Chap. IV. Sec. 7, para. 22. (*b*) Thus roads or ways, wells, tanks, and pasture-grounds ought to be used by all the coparceners.(*c*) The proceeds of an hereditary office are to be divided, or it may be enjoyed in turns. (*d*) Places of worship and sacrifice not being divisible, the coparceners after separation are entitled to their turns of worship. (*e*) Where such a mode of enjoyment is impracti-

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(*a*) May. Chap. IV. Sec. 9, para. 2; Stokes, H. L. B 92. The Smṛiti Chandrikâ, Chap. XII. para. 4, understands the prohibition against inequality to be directed only against the allotment of a quarter share to the eldest son, and allows an inequality in a new distribution proportionate to that of the shares brought in on reunion. This is expressly controverted by the Vyav. May., and is reconciled with Bṛihaspati's rule, "Brothers reunited share each other's wealth," only by a forced construction *See* Smṛiti Chandrikâ, Chap. XII. para 15; Chap. XIII. para 14. The Smṛiti Chandrikâ, Chap. XII. para. 6, also assigns to reunited coparceners shares in any separate acquisition equal, for each, to half what the acquirer retains. *See* p. 698, note (*b*), and above, § 7 A. 1 *b*, p. 778.

(*b*) Stokes, H. L. B. 78; Vîram. Tr. p 3; Coleb. Dig. Bk. V. T. 366, Comm.

(*c*) Steele, L. C. 60, 61.

(*d*) Steele, L. C. 216, 218, 229, from which it will be seen that local or family custom in many cases allows a greater or less advantage to seniority.

(*e*) *Anund Moyee et al* v. *Boykantnath Roy*, 8 C. W. R. 193 C. R. A refusal to deliver up an idol for the plaintiffs to perform worship was held by Pontifex, J., to constitute a cause of action, *Debendronath* v. *Odit Churn Mullick*, I. L. R. 3 Calc. 390. It is generally a privilege of the eldest to retain the household gods. Steele, L. C. 222, 417.

cable or inconvenient, the property may be sold, and its proceeds divided, or the rights of the coparceners otherwise equitably adjusted by agreement. Clothes in use, vehicles, ornaments, furniture, books and tools are to be kept by the coparceners who use them. (*a*) But *see* also above, § 5 B. *ad fin.*, page 730. As already pointed out (page 731) the family dwelling has by some been regarded as indivisible property. This doctrine has not been received by the Courts, except to the limited extent above indicated. A suit for the partition of a family dwelling may be brought by the purchaser at an execution sale of the rights of a coparcener, according to *Jhubboo Lall Sahoo* v. *Khoob Lall et al.* (*b*) But in Bombay a partial partition cannot be enforced. (*c*)

A division of the right to worship may be made by assignment of turns, *Mitta Kanth* v. *Niranjun et al*, 22 C W R 433, S C.; 14 Beng. L. R. 166 Property dedicated to the service of a family idol is disposable only by the assent of all the members, and this cannot put an end to a dedication to a public temple, according to a dictum of Sir M Smith, *Koonwur Doorganath Roy* v. *Ram Chunder Sen*, L. R. 4 I A. at p. 58 A religious fund or dedication is indivisible according to Viram. 249. *Narayan Sadanand* v *Chintaman*, I. L. R. 5 Bom. 393, agreeing with *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*, I. L R. 1 Mad. 235, pronounces a religious endowment inalienable It refers to *Khusálchand* v. *Máhádevgiri*, 12 Bom. H. C. R. 214, and many other cases; but *Mancharam* v. *Pranshankar* I. L. R. 6 Bom. 298 S. C Bom. H C. P. J. 1882, p 120, recognizing the general principle, allows an exception in favour of persons in the line of succession, referring to *Sitárámbhat* v. *Sitárám Ganesh*, 6 Bom. H. C. R. 250 A. C. J. Such a transaction does not defeat the intended succession; it only accelerates it. In the absence of a son, and with the consent of the heir, a holder of a temple grant may alienate it for the maintenance of the worship, Steele, L. C. 237. By custom the rights of a particular 'tirth-upâdya' to minister to pilgrims is divisible and alienable, *Ib.* 85.

The interest of a temple servant in land held by him as remuneration may be sold in execution, *Lotlikar* v. *Wágle*, I. L. R. 6 Bom. 596.

(*a*) Manu IX. 200, 219; Mit. Chap. I. Sec. 4, pl. 16, 19.

(*b*) 22 C. W. R. 294.

(*c*) *See* above, p. 699.

A division of rents and other profits of land or houses called Phalavibhâga, is permissible, and constitutes a valid partition, though distinguished from the ordinary distribution *in specie*. The rule extends to the division of the profits of a Vatandâri village. (*a*) But such a distribution cannot be taken as conclusive of partition. (*b*) With the recent case quoted on this point, however, compare also *Somangouda* v. *Bharmangouda*. (*c*) The Smṛiti Chandrikâ, Chap. XV., paras. 3, 4, says that a *phalavibhâga*, which has discriminated the rights of the co-sharers to the produce of the land, leaves them severally without a separate title to the land itself. (*d*) But this does not seem consistent with principle. (*e*)

§ 7 B. 1. *Debts.*—Debts due to the family may be distributed or assigned to a single member as part of his share. (*f*)

(*a*) *Ravee Bhudr* v. *Raj shunkur Shunkerjee et al*, 2 Borr. 730.

(*b*) *See* above, p. 693.

(*c*) 1 Bom H. C R. 43.

(*d*) So *Amritrao* v *Abaji*, above p. 703. *See* however above, p. 694, note (*d*), and *Vîrasvâmi* v *Ayyâsvâmi*, 1 M H C R 471.

(*e*) *See* above, pp 694, 703.

(*f*) Where there has been a dishonest or wanton expenditure of the family funds by one member, "a prodigal is to receive his share after deducting the amount he has dissipated on other than the necessary saṃskáras of the family," Steele, L. C. p. 62.

It may be noted that between Hindûs the rule of dâmdupat, or limitation of interest to the amount of the principal, applies even in the case of a mortgage where no account of the rents and profits has to be taken. The rule has not been abrogated by Act XXVIII. of 1855 or by the Limitation Acts, *Ganpat Pandurang* v. *Adarji Dadabhai*, I. L. R. 3 Bom. at p 333. *See* Steele, L. C 265, 266 The rule of dâmdupat is not applicable except where the defendant is a Hindû, *Nanchand Hansráj* v. *Bapusaheb Rustambhai*, I. L. R 3 Bom. 131. It is sometimes ignorantly supposed that the regular judicature of the British Courts has increased the oppression of agriculturist debtors and small proprietors. The incorrectness of this opinion is shown by Steele, L. C. 269, 271; M, Elphinstone's Report on the Deccan, Bom. Jud. Sel. vol. IV. p. 143, 193; Grant's Rep. *ibid.* p. 241, 242; Brigg's Rep. *ibid.* 249; Chaplin's Rep *ibid.* 260; Pottinger's Rep. *ibid.* 298, 326 ,328, 337; Chaplin's Rep. *ibid.* 489, 495; Robertson's Rep. *ibid.* 589.

An immediate payment of his share of such debts cannot be claimed by any member from his co-parcener. (*a*) The common debts due by the family are to be distributed in the same proportion as the shares of the common property, (*b*) and the debts incurred in carrying on a joint business override the rights of the co-sharers in the property acquired by means of it (*c*); but the common property and the other members of a joint family are not answerable for a member's separate debt. (*d*) From a passage in the Mayûkha, l. c., para. 2, it might appear that the discharge of the family debts is a necessary preliminary condition to a partition. The passage of Kâtyâyana, however, which is cited by Nîlakaṇṭha, is differently rendered by Colebrooke. (*e*) Nârada, as translated by Jolly, p. 15, directs the brothers only to pay according to the shares, if they separate, and Jîmûtavâhana (*f*) says of another passage

(*a*) *Lakshman Dada Naik* v *Ramchandra Dada Naik*, I. L. R. 1 Bom 561.

(*b*) May Chap. IV Sec 6; Stokes, H. L. B 72 When one of several co-sharers in an estate pays the whole revenue, his suit to recover contribution from the other co-sharers not resting on contract cannot be brought in the Small Cause Court. *Nobin Krishna Chakravarti* v. *Ram Kumar Chakravarti*, I. L. R. 7 Calc. 605. *See* Act IX. of 1872, Sec 69; *Ram Tahul Singh* v. *Bissessar Lall Sahoo*, L. R. 2 I A 131, 143; *Gadgeppa Desai* v. *Apaji Jivanrao*, I L R. 3 Bom. 237; for the circumstances under which contribution can and cannot be recovered.

(*c*) *Johurra Bibee* v. *Shreegopal Misser*, I. L. R. 1 Calc. 470

(*d*) *Narsinghbhat* v. *Chenapa bin Ningapa*, S. A No. 205 of 1877; Bom. H. C. P. J. F. for 1877, p. 329; and above Bk I. Chap. VI. Sec. 3 (*b*), Q. 2, p. 586; 2 Str. H. L. 335, *Mahableshvar* v. *Sheshgiri*, Bom. H C P. J. 1881, p. 183 A vatandar's mortgage of his vatan property is not valid against his heirs either under Reg. XVI. of 1827 or under Bom. Act III. of 1874, *Kalu Narayan* v. *Hanmápá*, I. L. R. 5 Bom 435.

(*e*) Dig. Bk V. T. 369.

(*f*) *See* Colebr. Dig Bk. V. Chap. II. T 111: Smṛiti Chandrikâ, Chap. II. Sec. 2, para. 20.

of Nârada, Pt. II., Chap. XIII., sl. 32, that it is intended to inculcate the obligation of paying the father's debts, (as that which says "when sisters are married" merely prescribes the duty,) not to regulate the time of partition. The Smriti Chandrikâ, Chap. II. Sec. 2, p. 23, says, that if there are assets, the debts should be paid before partition. But Yâjñavalkya (quoted para. 18) prescribes merely that the debts and the assets shall be equally distributed. In other passages (*a*) a distribution of the debts amongst the coparceners is recognised, and the Dâyakrama-Sangraha, Chap. VII., para. 28, (*b*) expressly declares that the debts may be discharged subsequently to partition.

If a distribution of the debts is made, the coparceners severally, who desire to secure themselves against further claims on the part of the creditors, should obtain the assent of the latter to that arrangement. (*c*) Without this the

(*a*) May. Chap. IV Sec. 4, para 17; Stokes, H. L B. 52; Mit. Chap. I Sec 3, para. 1, *ibid.* 381; Coleb Dig. Bk. I. Chap V. Text 149, 185; Bk. V. Chap III Text 111, and Jagannâtha's Comm. Chap. VI. Text 375.

(*b*) Stokes, H. L. B 516.

(*c*) *See* 1 Str. H. L. 191, and the authorities quoted there; and the case of *Bholanath Sirkar* v *Baharam Khan et al*, 10 C. W. R. 392 C. R. The sons of deceased members are answerable after partition only for their proper shares of a father's debt, according to Coleb. Dig. Bk. I. T. 182-5. *See* Nârada, Chap. I Sec III para 2, Tr. p. 15; Vishṇu, Tr. p. 45. The Sarasvati Vilâsa, Sec. 96 ff, understands this as relating to a separate paternal debt distinguished from a family debt binding all, but in *Doorga Persad* v *Kesho Persad*, I L R. 8 Calc. 656 S. C., L. R. 9 I. A. 27, the Judicial Committee say of sons of a member of a joint family (according to the statement at the beginning of the judgment: "But it appears to their Lordships that the plaintiffs were not liable for the whole debt for which their father and other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family who had separated and several bonds given for the several portions of the debt. It appears therefore to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of

assets may be followed in their hands, (*a*) though a separated son, it is said, is not answerable during the father's life for any debt contracted by his father. (*b*) In *Mahada* v. *Narain Mahadeo*, (*c*) the Bombay Sudder Court ruled that

the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt." This they were ordered to pay, though their ostensible guardian was not the legal guardian and had no right to defend the suit in their name. If several bonds for the several shares of the debts had been accepted by the creditors in discharge of the original joint debts, there could of course be no claim except upon the several obligors. But the Hindu Law seems apart from that to impose only a several obligation on the co-sharers except in virtue of any of them possessing himself of the whole estate or more than his share of it. *See* above, pp 80, 610

In an opinion given at 2 Str. H L. 283, Colebrooke says that the distribution of the debts in a partition is to be regarded merely as an adjustment amongst the parceners not affecting a creditor's right against all or any of them. The caste rules, as at Borradaile's Collection, Lith. 41, seem merely to contemplate a partition of the debts, but so far as property subject to a charge had been taken the taker would probably be liable for the common debt. *See* Steele, L. C 59, 219, 409.

(*a*) *See* Coleb. Dig. Bk. I Chap. V. T 167, note; T. 169, and Jagannâtha's Comm.; Coleb in 2 Str. H. L 283.

(*b*) Coleb. Dig *loc. cit.* and *Amrut Row Trimbuck* v *Trimbuck Row Amrutayshwur*, Bom Sel. Ca. 219. *See* 2 Str H. L 277. And that a minor cannot be called on during his minority, *ibid.* 279. In *Bagmal et al* v. *Sadashiw et al*, S. A. No. 70 of 1864, Arnould and Tucker, JJ, held that separated sons are liable after the father's death for debts incurred by him before the partition As to the personal liability for a father's debts *see* above, p 80; and below, Bk. II. Chap. I. Sec. 1, Q 5. As to the liability of the property, *see* *Jamiyatram* v. *Purbhudás*, 9 Bom. H C. R. 116, referred to in the Introduction to Bk. I. p 77; and also pp. 169, 642. In *Harreedass* v. *Ghirdurdass*, S. D. A Sel. Ca. 46, on attachment of a parcener's share it was made liable for its proportion of the funeral expenses of the parcener's mother. *See* Smṛiti Chandrikâ, Chap. XIII. paras. 12, 13.

(*c*) 3 Morris, 346.

the whole of the family property remains liable for a debt (properly) contracted by any member, although another may have obtained a decree for a partition. (*a*) For the separate debt of a single coparcener, the common property is not liable, but the creditor may, as we have seen, make the share available by enforcing a partition. (*b*) In the common case of a mortgage acquiesced in by the co-sharer seeking a partition he is liable generally in proportion to his share in the mortgaged property to the charges upon it. (*c*) This does not enable him to redeem his own share alone, the obligation being indivisible, but he may redeem the whole, (*d*) and as a condition of giving up their proper shares to the co-owners he may require payment to him of such sums by way of contribution as shall be found due according to the nature of the original transaction and on a general adjustment of the accounts amongst the co-sharers. (*e*) While the mortgagee is thus secured against any "fragmentation" of his security he must serve all co-sharers with notice of intended foreclosure under the Bengal Law, (*f*) and if he obtains a decree on the mortgage debt and executes it by sale against the mortgaged property must sell both his own and the mortgagor's interest therein. And even though the mortgagor's interest only is specified as the object of sale yet the mortgagee who has promoted the sale is bound by an estoppel against afterwards setting up his own right. (*g*)

(*a*) *See* Nârada, Pt. I. Chap III sl 16.

(*b*) See *supra*, § 6 B; also pages 163, 263, 576, 578.

(*c*) *Bhyrub Chunder Mudduck* v. *Nuddiarchand Paul*, 12 C W. R. 291; *Laljee Sahoy* v. *Fakeerchand*, I. L. R 6 Calc. 135.

(*d*) The practice has sometimes been otherwise, see *Mussl Phoolbash Koonwar* v. *Lalla Jogeshwar Sahoy*, L. R 3 I. A. at p 26. See *Norender Narain's* case, below.

(*e*) *Rama Gopal* v. *Pilo*, Bom. H. C. P. J. F. 1881, p 161.

(*f*) *Norender Narain Singh* v. *Dwarka Lal Mundun*, L. R. 5 I. A. at p. 27.

(*g*) See *Hari* v. *Lakshman*, I. L R. 5. Bom. 614, quoting *Syed Imam Momtazooddeen Mahomed* v. *Rajkumar Ghose*, 14 Beng. L. R. 408

In *Sabaji Savant* v. *Vithsavant* (a) a one-sixth share was awarded to two brothers by a decree for partition. They were dispossessed under a decree obtained by the mortgagee of an undivided one-sixth from the common ancestor. (b) It was held that they could not obtain a fresh partition in execution of their former decree, though it was suggested they might have a remedy against their former coparceners by an independent suit.

§ 7 B. 2. Other liabilities, that is provisions for the maintenance or portions of persons not entitled to shares, as described above, Section 6 B, (c) may be distributed by agreement amongst the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition, (d) and coparceners, who desire to limit their responsibility, must obtain the assent of the persons interested. At Calcutta it has been held (e) that the purchaser of part of an estate, subject to a charge, may be sued singly for the whole amount due, and the same principle would probably be applied in the case of a purchaser with notice of the lien or liability to a charge of the kind we are

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F. B.; *Narsidas Jitram* v. *Joglekar*, I. L R. 4 Bom. 57; Ind. Evid. Act, Sec. 115; *Chooramun Singh* v. *Shaik Mahomed Ali*, L. R. 9 I. A. 21, 25.

(a) Bom. H. C P. J. F 1881, p. 193.

(b) *Ramchandra Dikshit* v. *Savitribai*, 4 Bom H. C. R. 73 A. C. J. and per Lord Hardwicke in *Penn* v. *Lord Baltimore*, 2 W. & T., L. C. 814.

(c) *See* also pp. 77, 163, 164, 235, 776, 780; Bk II Chap. II. Sec. 1, Q. 9; *Narhar Singh* v. *Dugnath Kuer*, I. L. R. 2 All. 407; above, pp. 251, 252.

(d) *Ramachandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J., referred to above; *Adhiranee Narain* v. *Shona Malee et al*, I. L. R. 1 Calc. 365; Nârada, Part II. Chap. XIII. paras. 25-29; Manu V. 148.

(e) *Prosonno Coomar Sein* v. *The Rev. B. F. X. Barboza*, 6 C. W. R. 253 C. R.

now considering. (*a*) Lastly, if contrary to the knowledge and expectation of the co-parceners who made the partition, an absent co-parcener supposed to be dead should come forward to claim his share, or the widow of one deceased should give birth to a son, the proper share of this additional parcener must be made by proportionate deductions from the shares distributed. (*b*) The coparceners in existence however or begotten at the time of a partition, and those only, are entitled to shares. After-born members of the family share only with their father or those united with him. (*c*)

A son who has for money relinquished his share to his father stands thenceforth in the position of a separated son. (*d*) But as a separated son he succeeds in preference to the widow, though the father can dispose of the estate. (*e*)

After a partition has been made a son born to a coparcener (including a father in relation to sons separated from him in such partition) succeeds to the share and to the acquisitions of the separated coparcener to the exclusion of

(*a*) *S Bhagabati Dasi* v *Kanailal Mitter et al*, 8 B. L. R. 225; *B. Goluck Chunder Bose* v. *R. Ohilla Dayee*, 25 C W. R. 100 C. R.

(*b*) Mit. Chap I. Sec 6, paras. 1, 8; Stokes, H. L. B 393-5; May. Chap. IV. Sec. 4, para 35; Stokes, H. L. B. 56; Coleb. Dig. Bk. V. Chap. VII. Sec 2, T. 394.

(*c*) *Yekeyamian* v. *Agniswarian et al*, 4. M. H. C. R. 307; Mit. Chap. I. Sec. 6, pl. 4; Stokes, H. L. B. 394.

(*d*) Steele, L. C 56, 58, 61.

(*e*) See *Balkrishna Trimbak* v. *Savitribai*, I. L. R 3 Bom 54. The descendant who has taken a part of the property in discharge of his claims and left the family, (Steele, L. C 213), has thus forfeited his rights as a co-sharer in any further partition, but not as heir on failure of the members who remained united and their representative descendants. These rights are reciprocal. (Steele, L. C. 233, 422.) Amongst some castes this heirship of the brethren excludes the daughter except as to gifts from her father (Steele, L. C. 425) and even the widow (*ib.* 424, 423,) though in fewer cases.

his former co-sharers. (*a*) He stands on the same footing towards the paternal estate as a son who remained united with his father when a separation occurred between the latter and his other coparceners. (*b*) This does not, however, prevent a gift of a moderate amount to a separated son (*c*) as to one unseparated.

Partition does not finally close all claims of the father and sons on each other (*d*) or deprive a separated son of his right of inheritance in competition with another heir, as for instance a reunited coparcener not a son. (*e*) In case of absolute indigence, their claims on each other revive. (*f*) So too the claim of a mother or a wife to support is not extinguished by the allotment to her of a share. (*g*)

A suit on an alleged partition which the plaintiff fails to establish does not bar a subsequent suit by him as a coparcener for partition of the property set forth as undivided. (*h*)

(*a*) Gaut. Ad. 28, para 26; Nârada, Pt. II. Chap. XIII. para. 44; Steele, L. C. 59, 406 ; Note (*c*) above, p. 792.

(*b*) *See* Mit. Chap I. Sec 6, para. 2; Vyav. May. Chap IV. Sec. 4, paras. 33, 34

(*c*) Mit. Chap. I Sec. 6, paras 13, 14, 15. See *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561, 567, S. C., L. R. 7 I. A 181. Not by will against an unseparated son, *ib.*

(*d*) Vîram Tr. p. 54, 218. *See* 2 Macn 114, 148; Hirâta, quoted in Coleb. Dig. Bk V. T. 23.

(*e*) Vîram. Tr. p. 218; *Ramappa Naiken* v. *Sithammál*, I. L. R. 2 Mad. 182.

(*f*) Steele, L. C 40, 178, 179; Smriti Chandrika, Chap II Sec. 1, para. 31 ss; *Himatsing* v. *Ganpatsing*, 12 Bom. H. C R 94; *Ramchandra* v. *Sakharam Vagh*, I L R 2 Bom 346; *Savitribai* v. *Laxmibai*, I. L. R. 2 Bom. at p 590. See *Sree Cheytania Anunga Deo* v. *Pursuram Deo*, Morl. Dig p. 442, No. 38 So also a guru and a chela are bound to support each other in distress · Steele, L. C. 442.

(*g*) Coleb. Dig. Bk V. T. 88, Comm. *See* 1 Str. H L 67, 175; Smṛiti Chandrikâ, Chap. II. Sec 1, para. 3 ss. Steele, L. C. 40, states the duty generally.

(*h*) *Konerrav* v. *Gururav*, I. L. R. 5 Bom 589.

The execution of a decree for partition of an estate subject to payment of land revenue is to be made by the Collector. (*a*)

Repugnant conditions cannot be annexed to the separate estates taken under a partition. (*b*)

(*a*) Act X. of 1877, Sec. 265. Rules for the performance of the duty are provided by Bombay Act V. of 1879, Sec. 113.

Joint owners have, under English law, equal rights to custody of title deeds. On a partition they are usually assigned to the sole owner or the owner of the largest share of the portions to which they severally relate, but with a right in all interested to see and have copies of them. See *Lambert* v. *Rogers*, 1 Meriv. 489; *Jones* v. *Robinson*, 3 DeG. M. & G. 910. Hindu custom assigns the custody to the head of the family with liberty of inspection to all interested. Steele, L. C. 220.

(*b*) *K. Venkatrámanna* v. *K. Bramanna Sástralu*, 4 Mad. H. C. R. 345.

BOOK II.

PARTITION.

CHAPTER I.

BETWEEN THE HEAD OF A FAMILY AND HIS FIRST THREE DESCENDANTS.

SECTION 1.—OF ANCESTRAL PROPERTY.

Q. 1.—Can a son claim a share of the ancestral and undivided property from his father?

A.—A son has no right to demand a share of the ancestral and undivided property from his father against his wish, unless there are good reasons for the demand. These reasons may be stated thus:—(1) The father has relinquished his claim to his property. (2) He is dissipating his property. (3) He is in an unsound state of mind. (4) He is very old. (5) He is afflicted with an incurable disease. In all these cases a son can claim a share of the ancestral property from his father, though he may be unwilling to give it.—*Surat, January 3rd,* 1859.

AUTHORITIES.—(1) Vyav. May. Dâyabhâga, p. 91, l. 7; (2*) Mit. Vyav. f. 50, p. 1, l. 7:—

"For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels" (which belonged to him). (Mit. Chap. I. Sec. 5, para. 3; Stokes, H. L. B. 391.)

REMARKS.—1. The passage quoted by the Śâstri, as well as the rules derived therefrom, refers to the self-acquired property of the father. Regarding the fourth ground for which the son is said to be able to demand division—old age—it ought to be remarked that

it holds good only if the father is unable to manage his affairs on account of old age. (*a*)

2. According to the Mitâksharâ, l. c. and *ibid.* paras 5 and 8, the son has a right to demand a division of ancestral property. Nîlakaṇṭha states the same. (May. Chap. IV. Sec. 4, para. 13; Stokes, H. L. B. 51). *See* also *Duyashunker* v. *Brijvullubh*. (*b*)

Q. 2.—A man has a right to one-third of the property left by his deceased father. The man has two sons. The question is, how the man's share should be divided among the grandsons?

A.—The sons and the grandsons of the deceased have equal right to the share of the grandfather's property, but as the father of the two grandsons is alive and is in a good state of health, the share cannot be divided unless the father has no objection thereto. The Śâstra assigns many conditions to the subdivision of such share, and it is, therefore, impossible to say what shall be the share of each grandson in the share of the son.—*Surat, March,* 18*th* 1858. (*c*)

AUTHORITY.—* Mit. Vyav f. 50, p. 1, l. 7 (*see* the preceding Question)

REMARKS.—1. The sons can enforce the partition of the ancestral property, and it must be divided equally between the father and his sons if the father holds a separated share. If he is united with his brethren his intervening will may defeat the sons' desire or partition unless they can make out a case of unfair dealing. (*d*)

2 The Śâstri thinks of the partition of property acquired by the father himself, or of the grandfather's property during his life and that of the father.

Q. 3.—Can the sons of a man divide the ancestral property among themselves without his consent?

(*a*) *See* Steele, L C. 216.

(*b*) Bom Sel. Ca pp. 44, 45. *See* above, pp. 659 ss.

(*c*) Similar answers were received from *Ahmednuggur, February* 21*st*, 1851; *Broach, May* 22*nd*, 1857.

(*d*) *See* above, pp. 604, 657.

A.—A man's sons have a right to the ancestral property, but if such property, after having passed from the family, was regained by the father, it must be considered as his acquisition. This, as well as that property which may have been directly acquired by the father, cannot be divided without his consent.—*Tanna, March 2nd,* 1854. (*a*)

AUTHORITIES.—(1) Mit Vyav. f. 50, p. 1, l. 7 (*see* Q. 1 of this Sec.); (2) f. 47, p. 1, l. 7; (3) Vyav. May. p. 91, l. 2; (4) p. 91, l. 4.

REMARKS.—1. The sons have a right to demand from their father a division of the ancestral property, and can force him by law to make it. But they cannot divide it privately amongst themselves without reference to their father

2. As to the meaning of "recovered," when applied to a family estate, see *Bissessur Chuckerbutty et al* v *Seetul Chunder Chuckerbutty,* (*b*) and Introd. § 5 A. 2 *b*, p. 718.

3. Prof H. H. Wilson observes on this subject, in Vol. V. of his works, at p. 68:—"They leave no doubt that a man has neither temporally nor spiritually an absolute command over the whole of any description of his property: he may certainly make away with a great part of it, but there is a limit. That limit is an adequate provision for his family, and we can conceive no more difficulty as to the determination of this provision by the Court, than there is in the ascertainment of the sum a widow is entitled to for her maintenance. In the above texts also is to be understood the existence of no distinction between self-acquired and inherited property, and they all apply to a man's wealth generally, making it imperative upon him to secure provision for his family before he alienates even self-acquired wealth. With this reservation, he may dispose of property he has gained during his own life-time as he pleases, as according to Kâtyâyana 'except his whole estate and his dwelling house, what remains after the food and clothing of his family a man may give away.' (*c*) Food and clothing are, however, not to be understood in their literal acceptation only, but imply maintenance, as appears from other texts. With regard also to moveable ancestral property, there is authority for considering that to be at the father's

(*a*) Similar answers were received from *Surat, May 27th,* 1847; *Ahmednuggur, July 18th,* 1850; *Poona, October 18th,* 1854; *Dharwar, October 25th,* 1858.

(*b*) 9 C. W. R. 69 C. R.

(*c*) Vyav. May. Chap. IX. p. 4; Stokes, H. L. B. 134.

disposal, according to the text of Yâjñavalkya: 'of precious stones, pearls and corals, the father is master of the whole, but of the whole immoveable property neither father nor grandfather is master.' (a) The text of Vishṇu, however, goes further and declares that 'the father and son have equal ownership in the whole of the grandfather's wealth.' As however the control over moveable property, consisting at least of money or jewels, is a nullity. the distinction may be admitted, and the power, if not the right, of a father to dispose of such property at his pleasure is in general undisputed; at the same time it may be safely said that the alienation of this property, like that of self-acquired wealth, is only allowable after provision made for the family, and that the unequal partition of both amongst sons, which is authorized by special considerations, may be set aside, if the least favoured son can establish undeniably that he has been deprived of a due share of his father's wealth by that father's unjust anger towards himself, or undue partiality for another son." (b)

Q. 4.—A Yogí had four sons. Two of these, one a minor and another of full age, lived with their father. The other two, who had a quarrel with their father, divided the house, which was the ancestral property of the family, against the will of their father and in his absence. Can the two sons divide the property, or must such a division be cancelled?

A.—The division must be cancelled.

Khandesh, October 11th, 1852.

AUTHORITY.—Vyav May. p. 90, l. 2.

REMARKS.—1. The Śâstri's answer is right, because the division had been made, as it would seem, without due regard to the equal rights of the other brothers. But it must be understood, that, though this division must be cancelled, the sons may according to the Śâstras force their father to make a division of his ancestral property.

(a) Quoted from the Mitâksharâ in the Vyavahâra Mayûkha, Chap. IV. Sec. 1, p. 5; Stokes, H. L. B. 43; Dâyakrama-Sangraha, Chap. VI. p. 19 f; Stokes, H. L B. 511; and Dâyabhâga, p. 56 (Chap. II. Sec. 22; Stokes, H. L. B. 204).

(b) Comp. Steele, L. C. 213, 408; Coleb. Dig. Bk. V. T. 74, 75, 77, 78; and *see* above, pp. 209, 637, 641, 645.

2. The authority quoted by the Śâstri, which declares that "brothers shall divide the estate after their father's death" (a) refers to self-acquired property, and is, therefore, out of place.

Q 5.—A man has instituted a suit against his father for a moiety of the ancestral property as his share. The father has answered that he has contracted some debts on account of the maintenance of the family, and that his son cannot claim a share of the property until the debts have been paid. The question, therefore, is, whether a son can claim a share of the property without paying the debts?

A.—The obligation of liquidating the debts rests on the father. His son is not at all responsible for them as long as the father is alive. The father and the son have an equal share in the ancestral property of the family. The son, therefore, can claim a moiety of the property without being obliged to pay the debts.—*Surat, July 6th,* 1860.

AUTHORITIES.—(1) Mit. Vyav f 19, p. 2, 1 8; (2) f. 50, p. 1, l. 7, (*see* Chap I. Sec 1, Q 1); (3) f 46, p 2, l 11:—

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for a pious purpose."

"The meaning of that is this:—While the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." Mit. Chap. I. Sec 1, paras. 28, 29; Stokes, H. L. B. 376.) (b)

REMARKS.—1. "In respect of the grandfather's estate the sons are not dependent on the father, as they are in respect of the father's self-acquired property. Consequently the partition of the grand-

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(a) Borradaile, May. Chap. IV Sec. 4, para 1; Stokes, H. L. B. 47.

(b) *See* Nârada, Pt. I. Chap. III paras. 2, 3, 4, &c. above, and Introd. to Bk. II. pp. 609, 617, 641, 644.

father's estate may be made even against the father's will, and the rule regarding the father's two shares does not obtain." (*a*)

2. Though the Smritis do not provide for a son's paying the family debts while the father is alive and capable, that is because they contemplate the father as the sole manager. (*b*) The passage cited shows that the Śâstri's view was too narrow, for if an ordinary member may incumber the estate for the needs of the family, (*c*) much more may the father; yet his power of dealing with it would be crippled if a son could at any moment claim his share free from its proportional burden. The customary law imposes on sons an obligation to pay all debts reasonably incurred in the administration of the affairs of the family, (*d*) as on the father of paying those necessarily incurred by sons living with him unless he has expressly warned the creditor against lending to them. (*e*)

3. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself. (*f*) This would probably not be admitted in Bombay unless the property had been attached before the father's death in execution of the decree against him. *See* above, pp. 77, 161, 193. (*g*)

Q. 6.—A person had six sons, the eldest of whom is dead, the son of the deceased sues his grandfather for a share of the family property. Is the claim admissible ?

A.—The grandson cannot claim any share of the property which his grandfather may have himself acquired. He may, however, claim a share of that which may have descended from his ancestors.—*Dharwar*, 1846. (*h*)

(*a*) Vîram. Tr. p. 66. "The father may reserve to himself one extra share of all property acquired by his own exertions, and as respects that property he may even deprive his son of succession to it; but the son has an indefeasible right to inherit descended property," Steele, L. C. p. 58

(*b*) *See* above, pp. 644, 646; Steele, L C 405.

(*c*) Above, p. 632; Steele, L. C. 51, 398.

(*d*) Steele, L. C 40, 217. Above, p 164.

(*e*) Steele, L. C. 178

(*f*) *Gunga Narain* v *Umesh Chunder Bose et al*, C. W. R for 1864, p 277.

(*g*) For the Madras law, *see* above, pp. 162, 628.

(*h*) A similar answer was received from *Surat, September* 19*th*, 1864.

AUTHORITY.—* Mit. Vyav. f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1).

REMARKS.—1. The authority quoted refers only to the case of a father and a son.

2. The question, whether a grandson can force his grandfather to make a division of the property which he inherited from his ancestors, has not been touched directly in the Hindû Law-books. Still the correctness of the Śâstri's opinion may be shown by the following considerations:— The position of a son's son towards his grandfather, and his rights to the ancestral property, are exactly the same as those of a son failing the latter. Both have by and from their birth an ownership in the family property—a right which is indefeasible and unobstructible. (*a*) Moreover, on the death of his father, the grandson takes his place in regard to religious ceremonies and represents him; it is only consistent therefore that the grandson's right to demand a division of his grandfather's ancestral property should be the same as that of his father. (*b*)

Q. 7.—A man has two sons. He equally divided his property between them. He gave one share to his eldest son and the other to his grandson, because his younger son was abroad. The question for consideration in the case is, whether a father can, without the consent of his son, give his share to his grandson ?

A.—The father could not give his son's share to his grandson, unless his son is incompetent to receive it.

Ahmednuggur, September 12th, 1855.

AUTHORITIES.—(1) Mit. Vyav f. 47, p. 1, l. 7; (2) f. 60, p. 1, l. 13; (3) f. 60, p. 2, l. 8; (4) f. 46, p. 2, l. 14; (5) f. 50, p. 1, l. 7; (6) f. 12, p. 1, l. 16; (7) Vyav. May. p. 161, l. 8; (8) p. 94, l. 1; (9) p. 94, l. 3; (10*) Vîramit. f. 181, p. 2, l. 16:—

" Now both that partition which is made at the desire of sons during the lifetime (of their father), and that which is made after

(*a*) *See* Mit. Chap. I. Sec. 1, para. 3; Stokes, H. L. B. 365; and Bk. I. p. 67, 74; Steele, L. C. 58, 63, 40; Coleb. Dig. Bk. V. Chap. II. *ad init.*

(*b*) *See* also Introd. to Bk. II p. 658; and *Nágalinga Mudali* v. *Subbiramaniya Mudali et al,* 1 M. H. C. R. 77.

the father's death, are made even at the desire of one (co-parcener). Therefore, that also, which has been stated by Kâtyâyana, in his chapter on Partition, 'They shall deposit the wealth of minors and absentees, preserving it from expense, with (their) relations and friends,' can take effect. For, if a partition could not take place without the permission of such (minors or absentees), the statement that their wealth shall be deposited with relations or friends would be improper."

REMARK.—According to the above passage it would appear that an absent son must not be simply passed over in favour of his son. But there would be no objection to deposit his share with the latter, in case the son's son is of age and fit to take care of it. *See* also Introd. to Bk. II. p. 676.

Q. 8.—A man gave a portion of the property belonging to his father to his son who had separated from him. It remained in the possession of his son for ten years. The son afterwards sold it. By this time his half brothers born after the giving of the property, filed a suit and asserted that they had a right to a portion of the property given by their deceased father. The question is, whether or not sons, born after their father had given away his property, can claim a portion of it, even when it has been sold to another.

A.—When a father and his sons have divided their property and become separate, sons born after the partition can have no claim to the property which passed into the hands of their brothers. They cannot, therefore, sue those who have received a share of the property, nor those to whom it has been sold.—*Tanna, July* 12*th,* 1851.

AUTHORITY.—Mit. Vyav. f. 50, p. 2, l. 7:—

" A son born before partition has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother." (Mit. Chap. I. Sec. 6, para. 4; Stokes, H. L. B. 394.)

REMARKS.—1. Sons born after partition have, however, an exclusive right to their father's share, and to any property which he may have acquired after partition. (*a*)

(*a*) *See* above, pp. 68, 792.

2. In the case of *Baee Gunga* v. *Dhurumdass Nurseedas*, (a) the interest of a son still unborn was admitted as against a dissipation of property by the father; but in the case of *Buraik Chuttur Singh et al* v. *Greedharee Singh et al*, (b) it was held that a grandson unborn at the time cannot afterwards question an alienation of ancestral property made by his grandfather with his father's assent. It is only on the actual birth of the son that his co-ownership arises; it is not retrospective, as adoption to some extent is when made by a widow. Perhaps this principle may be applied to explain the case of *Giridhari* v. *Kanto*, (c) the debts there having apparently been contracted before the birth of a son. (d) A son cannot contest an alienation made by his father before he was begotten, (e) or adopted. (f)

SECTION 2.—OF SELF-ACQUIRED PROPERTY.

Q. 1.—Can a man and his son divide their property between them ?

A.—The property left by the grandfather may be equally shared by the son as well as his father. The property acquired by the father should be divided into three shares, two of which should be allotted to the acquirer and one to his son.—*Sholapoor, January 29th*, 1855.

AUTHORITIES.—(1) Vîram. f. 105, p. 2, l. 3; (2) Vyav. May. p. 183, l. 6; (3) p. 174, l. 3; (4) p. 180, l. 3; (5) p. 180, l. 4; (6*) Mit. Vyav. f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1); (7*) f. 50, p. 1, l. 11:—

"So does that which ordains a double share (relate to property acquired by the father himself). 'Let the father making partition reserve two shares for himself.'" (Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B. 392). But *see* also paras. 9, 10; Stokes, H. L. B. 393; Colebrooke, Dig. Bk. V. Sec. 96; Nârada, Pt .II. Chap. XIII. sl 12.

Q. 2.—A man has four or five sons, and it is probable that he may have more. For some reason known only to

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(a) Bom. S. A. R. for 1840, p. 16.

(b) 9 C. W. R. 337.

(c) L. R. 1 I. A. 320.

(d) *See* Chap. I. Sec. 2, Q. 8.

(e) *Jado Singh* v. *Musst. Ranee*, 5 N. W. P. R. 113.

(f) *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom. 630.

the man, he framed a memorandum, showing what each of his sons was to receive on account of his share. Can this memorandum be taken advantage of by the sons in claiming a share during the lifetime of the father?

A.—A father may give shares to his sons if he chooses, but sons have no right to demand shares of any property acquired by their father while he is alive. The memorandum does not seem to be authoritative, and cannot be taken advantage of by the sons.—*Dharwar, January* 11*th*, 1850.

AUTHORITY.—Mit. Vyav. f 47, p. 1, l. 12:—

"One period of partition is, when the father desires separation as expressed in the text [para. 1], 'When the father makes a partition.' Another period is while the father lives, but is indifferent to wealth, and disinclined to pleasure, and the mother is incapable of bearing more sons; at which time a partition is admissible, at the option of the sons, against the father's wish; as is shown by Nârada, who premises partition subsequent to the demise of both parents, 'Let sons regularly divide the wealth when the father is dead,' and adds, 'or when the mother is past child-bearing, and the sisters are married, or when the father's sensual passions are extinguished.' Here the words 'Let sons regularly divide the wealth' are understood. Gautama likewise having said 'after the demise of the father, let sons share his estates,' states a second period, 'Or when the mother is past child-bearing;' and a third, 'While the father lives, if he desire separation.' So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Śankha declares, 'Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased.'" Mit. Chap. I. Sec. 2, para. 7; Stokes, H. L. B. 378.

REMARK.—*See* Book II. Introd p. 656 ss; 1 Str. H. L. 193. The Mit. Chap. I. Sec. 5, para. 8, (*a*) assigns to the sons power to demand a partition of ancestral property at any time, while para. 10 gives to the father full power as against control by the sons, of dealing with property acquired by himself. At Madras it has been said, in *Nágalinga Mudali* v. *Subbiramaniya Mudali et al*, (*b*) that paras. 8 and 11 of Sec. 5 relate to a partition of ancestral property, while Sec. 2 relates to

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(*a*) Stokes, H. L. B. 393.
(*b*) 1 M. H. C. R. 77.

property acquired by the father himself. The Mit. Chap. I. Sec. 2 (*see* Q. 4) recognises unequal partition of self-acquired property by the father as still consistent with the Hindû Law, limited however so as not to allow more than a deduction of one-twentieth, one-fortieth, and one-eightieth for the first, second, and third sons respectively.(*a*) It applies the prohibition against any unequal division only to a partition by sons amongst themselves. *See* Q. 3, 4 below. Thus the power of disposition, generally affirmed in paragraph 10 of Sec. 5, and extended by the High Court of the N. W. P. to ancestral property,(*b*) does not imply that of a capriciously unequal distribution, that case being expressly provided against in Sec. 2, para. 13. (*c*) The passage in Sec. 5, para. 10, is further qualified by Sec. 1, para. 27, (*d*) followed in *Muttumaran* v. *Lakshmi*. (*e*)

The Vyav. May. Chap. IV. Sec. 6, para. 2, (*f*) extends the prohibition against inequality to a partition by a father. The Vîramitrodaya, cited *infra*, follows the Mitâksharâ. Nârada allows the father to give the eldest the best share or to distribute according to his inclination, Nârada, Pt. II. Chap. 13, para 4. This passage points to the special deductions, as Pt. I. Chap. III. paras, 36, 40, to the father's complete authority. The Mit. Chap. I. Sec. 5, pl. 7, (*g*) limits similar passages to the self-acquired property, and the father's independence as to such property in a partition

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(*a*) So Smriti Chandrikâ, Chap. II. Sec. I. paras. 3, 8, 22; Chap. VIII. para. 25; Mâdhavîya, paras. 5, 9; Varadrâja, pp. 5, 8. These deductions had reference very probably as originally instituted to the rank of the wives married in succession from amongst the different classes. Such a ground of difference in the rank of the sons is found in various parts of the world, as *ex gr.* amongst the Swâthis in the Himâlayas.

In Kangra it appears that the eldest son still takes either one-twentieth or else some particular field or chattel as an addition to his aliquot share in an inheritance. In return he has to pay a proportionally extra share of the paternal debts should there be any. Panj. Cust. Law, Vol. II. pp. 182–3, 225.

(*b*) *Baldeo Das* v. *Sham Lall*, I. L. R. 1 All. at pp. 78, 79.

(*c*) Stokes, H. L. B. 380.

(*d*) *Ibid.* 375.

(*e*) M. S. R. for 1860, p. 227.

(*f*) Stokes, H. L. B. 72.

(*g*) Stokes, H. L. B. 392.

seems to mean independence only of the sons, not freedom to depart from the rules prescribed by the Śâstras. (*a*)

In *Bahirji Tanaji* v. *Oodatsing et al*, (*b*) the High Court of Bombay ruled that a grantee of an Inâm village from the Râjâh of Satara might by will settle it on his two junior wives and their children to the exclusion of his eldest son. *See* the Remarks under Questions 4 and 5, and the Introduction to Book II. § 7, on the RIGHTS AND DUTIES ARISING ON PARTITION.

Q. 3.—A man has a son by each of his two wives. Should any larger share be given to the son of the elder wife?

A.—No.—*Dharwar,* 1846.

AUTHORITY.—* Mit. Vyav. f. 48, p, 1, l. 8 :—

"It is expressly declared, 'As the duty of an appointment (to raise up seed to another), and as the slaying of a cow for a victim, are disused, so is partition with deductions (in favour of elder brothers).'' (Mit. Chap. I. Sec. 3, para. 5; Stokes, H. L. B. 382).

REMARK.—The "partition with deductions" (uddhâra) includes the division between elder and younger sons, and between the sons of elder and younger wives. Regarding the latter, *see* Gautama, Adhyâya 28, paras. 11, 12, Transl. p. 300, 301.

Q. 4.—There are two uterine brothers whose father is alive. When they divided their property, one of them obtained a larger piece of ground. The other has sued him for it. The father wishes that the unequal division should remain as it is. Can the brother's claim to an equal division be allowed?

(*a*) Mit. Chap. I. Sec. 5, pl. 10 (Stokes, H. L. B. 393) compared with Sec. 2, pl. 1, 13, 14 (Stokes, H. L. B. 377, 380), and the Smṛiti Chandrikâ, Chap. II. Sec. 1, pl. 14, 20, compared with Chap. VIII. pl. 19, 25, 26; Vîram. Tr. pp. 54, 63 ss.

According to the early Common Law in England the inheritance if held in socage had to pass according to custom either to the eldest or youngest son or in equal parts to all the sons, saving the preferential right of the eldest to the family abode, for which allowance was made to the others. Glanv. VII. 3.

(*b*) R. A. 47 of 1871; Bom. H. C. P. J. F. for 1872, No. 33.

A.—In the Kali age, unequal division is forbidden. One brother can therefore sue the other. The father has no right to maintain an unequal division.

Ahmednuggur, July 30th, 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 47, p. 1, l. 7; (2) f. 48, p. 1, l. 8 (*see* the preceding question); (3) f. 52, p. 1, l. 13; (4) f. 50, p. 1, l. 7; (5) f. 47, p. 2, l. 7; (6) f. 51, p. 1, l. 3; (7*) f. 47, p. 1, l. 11 :—

"This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared." (Mit. Chap. I. Sec. 2, para. 6; Stokes, H. L. B. 378.)

(8*) Mit. Vyav. f. 48, p. 2, l. 10 :—

"The distribution of greater and less shares has been shown (§ 1). To forbid in such case an unequal partition made in any other mode than that which renders the distribution uneven by means of 'deductions,' such as are directed by the law, the author adds :—'A legal distribution, made by the father among sons separated with greater or less shares, is pronounced valid.'

"When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law, then that division, made by the father, is completely made, and cannot afterwards be set aside: as is declared by Manu and the rest. Else it fails, though made by the father."—(Mit. Chap. I. Sec. 2, paras. 13 and 14; Stokes, H. L B. 380.)

REMARKS.—1. Under the law of the Mitâksharâ the answer is correct, whether the land was ancestral (Auth. 7) or self-acquired property (Auth 8 and 9). The inequality of distribution contemplated by the latter is strictly limited to the specified deductions that may be made in favour of the eldest son or the eldest wife's son. *See* Q. 2, Remark. According to the principles laid down by the Courts an unequal division of self-acquired property by a father is perhaps admissible, but it is opposed to the Commentaries, (*a*) except as to a reasonable gift to a particular son. *See* above, pp. 206, 209, 211.

(*a*) "He may distribute his property, but he must do it according to law," Ellis, at 2 Str. H. L. 418. The Smṛiti Chandrikâ and Mâdhavîya, on examination by Coleb. yielded a similar result as to immoveables, 2 Str. H. L. 439, 441. So according to the Benares and Mithila law, according to Sutherland, *ibid.* 445; and in Bombay, *ibid.* 449, and Madras, *ibid.* 450.

2. The principle adopted by the Smṛiti Chandrikâ, of a complete ownership arising immediately on birth coupled with an exclusive power of administration in the father during his life is contested by Jîmûtavâhana and Raghunandana, who argue that the right arises only on the father's death. Mitramiśra refutes their contention, Vîram. p. 7–15. At p. 45 he insists on the distinction between ownership and independence in disposal of property.

Q. 5.—A man has two wives. Each of them has a son. The husband lived with the elder wife, and to her son he gave all his property in disregard of the claim of the younger wife's son. Has he a right by law to do so?

A.—A father cannot give the whole of his property to one of his sons.—*Dharwar, May 15th,* 1850.

AUTHORITIES.—(*1—3) *See* the preceding two cases; (*4) Vîramitrodaya, f. 172, p. 2, l. 13:—

"If (the father's) desire only were the reason for the allotment of the shares, then this passage of Kâtyâyana, 'But at a partition, made during his life-time, a father shall not give an (undue) preference to one son, nor shall he disinherit a son without a sufficient reason,' would have no object. 'He shall not give preference' means 'he shall not give him, at his pleasure, a preference other than the share of the eldest and the rest, which have been declared in the law books.'" (*See* the passage, on which this is a commentary, quoted in Bk. I Chap. II. Sec. 3, Q. 14; *supra*, p. 111).

REMARKS.—1. A father is not at liberty by way either of gift or of partition to give nearly all the ancestral moveable property to one son to the exclusion of another. (*a*)

According to the Jewish law "the father had no power of disinheriting his sons, the firstborn received by law two portions, the rest shared equally." Milman's Hist. of the Jews, Vol. I. p. 172.

As to the earlier English law *see* above, pp 214, 670. The Saxon law there noticed agreed with that of the other Teutonic tribes, developed into the German Landrecht, *see* Laboulaye, *op. cit.* 373, 394. The growth of the power of alienation of immoveable property in Europe is the subject of a learned note by Maynz to his System, § 177.

(*a*) *Bhujangrav et al* v. *Malojirav*, 5 Bom. H. C. R. 161 A. C. J.; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; Coleb. Dig, Bk. V. T. 27; 2 Str. H. L. 435.

2. A man cannot give his whole ancestral estate to his son excluding his grandsons by another son deceased. (*a*)

3. According to the Benares law he cannot give all his self-acquired property to one son or grandson excluding the others. Prof. H. H. Wilson observes on this subject, in Vol. V. of his Works, at p. 74—" We cannot admit either, that the owner has more than a contingent right to make a very unequal distribution of any description of his property, without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable, it would not of course be allowed to operate We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice for injustice as shall authorise its revisal. It should never be forgotten in this investigation, that wills, as we understand them, are foreign to Hindû law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid* p. 71—" It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found ? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jîmûtavâhana ; ' therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one ; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,' Dâyabhâga, p 60. (*b*) This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immoveable property if self-acquired, or a coparcener of his own share before partition ; but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. ' Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jîmûtavâhana's assertion of this doctrine, and the doubt cast upon it by its expounders, Raghunandana, Śri Kṛishna, Tarkâlankâra, and Jagannâtha is wholly gratuitous. In fact the latter is chiefly to blame for the distinction between illegal and invalid acts. "

(*a*) 2 Macn. H. L. 210.
(*b*) Stokes, H. L. B. 207.

Q. 6.— A man has an odd number of sons and an even number of sons by his "Lagna" and "Pâṭ" wives respectively. How should his property be divided among them? and have both the wives equal rights and position in the eye of the law?

A.—The property should be equally divided among the sons of the "Lagna" and "Pâṭ" wives. Both the wives have equal rights and position in the eye of the law. The ceremonies of "Lagna" and "Pâṭ" are however different.

Dharwar, 1858.

AUTHORITIES.—(1—4) *See* the three preceding cases.

REMARK.—Regarding the position of Pâṭ wives, *see* remark to Bk. I. Chap. II. Sec. 6A, Q 37, p 413.

Q. 7.—A shoemaker has four sons, three by his "Lagna" wife and one by his "Pâṭ" wife. Two of the Lagna wife's sons are minors. The father has divided his property in the proportion of one-half to the son of the "Pâṭ" wife and one-half to the sons of the "Lagna" wife. Is this a legal division?

A.—It is ordained in the law that, in the Kali age, (*a*) a father should divide his property, real and personal, equally among his sons. If any one should divide his property against this rule, it is not legal. A son has the right to prevent his father from making any irregular transfer of his ancestral property. (*b*) When a man transfers his own property it is necessary that his sons should acquiesce in the father's disposal of it. If a property has not been properly

(*a*) The Hindûs divide their History into four ages, the present (Kali) is the last. Certain laws are said to have been practicable in the former ages and not to be so now.

(*b*) This answer of the Sástri illustrates what is said above, pp. 598, 603, 608, 631, 639. In another case a Śástri said "A man who has adopted cannot alienate immoveable property without good reason. With good reason he may; especially what has been acquired by himself." MS. 1725.

divided in the first instance, it may be re-divided so as to allot proper shares to the sons.

Ahmednuggur, July 18th, 1848.

Authorities.—(1) Mit. Vyav. f. 48, p. 1, l. 8 (*see* Q. 3 of this Sec.); (2) f. 50, p. 1, l. 7 (*see* Chap. I. Sec. 1, Q. 1; (3 & 4) *see* Q. 4 and 5 of this Sec.

Remark —To give validity to an unequal distribution of the ancestral estate by a father it must be made during his life and with the assent of his sons, indicated by their taking possession of their shares (*a*) The father may probably have been moved by a tradition in his caste of a law of patnibhag. *See* above, p. 422, and below, Ch. II. Sec. 1, Q. 6.

Q. 8.—A Paradeśî (*b*) has two sons, to the younger of whom he passed a deed of gift, stating that, as his elder son did not support or obey him, he should not lay claim to the house purchased by him, which was granted to the younger, and that the elder son might build a house for his own use on the ground which had descended to him from his ancestors. The younger son was not, however, put in possession of the house, which was occupied by the elder son. The younger has therefore brought an action against him, and the question is, whether the elder son can claim a moiety of the house ?

A.—A special grant from a father to his son, as a mark of his affection for him, is legal. If the elder son is an ill-behaved man, he would forfeit his claim to the property of his father, and be entitled only to a maintenance. If the ground, which is the ancestral property of the family, was granted to the elder son with the consent of the younger, the grantee's title thereto must be admitted.

Ahmednuggur, September 23rd, 1857.

(*a*) *Muttervengadachellaswamy* v. *Tumbayaswamy Manigár,* M. S. D. A. R for 1849, p. 27.

(*b*) The term means a foreigner, but is usually applied to a Hindû native of Northern Hindustân.

AUTHORITIES.—(1) Vîramitrodaya, f. 50, p. 1, l. 7; (2) f. 50, p. 123, l. 8; (3) f. 175, p. 2, l. 6; (4) Vyav. May. p. 124, l. 1; (5) p. 161, l. 8; (6) Mit. Vyav. f. 51, p. 1, l. 3; (7*) f. 46, p. 2, l. 9 :—

"But he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor: since it is ordained, 'Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons.'" Mit. Chap. I. Sec. 1, para. 27 (Stokes, H. L. B. 375).

See also the authorities quoted under the preceding cases.

REMARKS.—1. The father may make a present, but he has, under the Mitâksharâ, no right to dispose of immoveable property, though acquired by himself, without the consent of all his sons (Auth 7). If, therefore, the eldest son's misconduct was not such that he might be called pitṛidvit, "hater of his father" (for the definition of the meaning, *see* Bk I. Chap. VI. Sec 3 *a*), and that he could be disinherited on this ground, he will share the father's property equally with his younger brother.

2. The Bombay High Court, however, allows the father to dispose, at his pleasure, of all self-acquired property. (*a*) This may be considered the settled doctrine of the Courts, (*b*) at least as to moveable property acquired without the use of the ancestral estate. (*c*)

3 By the Mithilâ law the owner of self-acquired property has complete power to dispose of it. (*d*) The same rule is implied in *B. Beer Pertab Sahee* v *Rajender Pertab Sahee*, (*e*) as operating

(*a*) *Gangâbâi* v. *Vâmanaji*, 2 Bom H. C R. 304.

(*b*) *Muddun Gopal Thakoor et al* v. *Ram Buksh Pandey et al*, 6 C. W. R. 71 C. R.

(*c*) *See* Bk. II. Introd. pp. 713, 721 ; Coleb. Dig Bk. V. T 25, 27.

(*d*) Vivâda Chintâmani, p 76; *R Bishen Perakh Narain Singh* v. *Bawa Misser et al*, 12 B. L. R. 430 P. C.

Expressions equally strong in other treatises are however explained as leaving the father still subject to the prohibitions against unequal partition, except according to the rules of deduction, by some recognised as still operative *See* Dâyakrama-Sangraha, Chap. VI paras 11-14 (Stokes, H. L. B. 510-11); Smṛiti Chandrikâ, Chap. II. Sec. 1, paras 19, 20, 24, compared with Nârada, Pt. I. Chap. III. Sl. 36, 40, and Pt. II. Chap. XIII. Sl. 14, 15, 16; and as to the Mithilâ doctrine itself, *see* the Vivâda Chintâmani, p. 309.

(*e*) 12 M. I. A. 1.

under the Mitâksharâ law with respect to moveable, bnt not as to immoveable property. (*a*)

4. As to unequal disposal by will, the law of wills follows the analogy of the law of gifts, (*b*) "and one leaving male descendants, may [by will] dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. In the *Bithoor* case, (*c*) the testator, having real as well as personal estate, made an unequal distribution of both amongst his sons, and his legal power to do so was affirmed by this Committee." (*d*)

5. The fact that a sale as to a small proportion was made for immoral purposes will not, even as to ancestral property, vitiate it as against the sons. (*e*) Sons unborn at the time of a sale have no *locus standi* afterwards to impeach it. (*f*)

(*a*) *See* Mit Chap. I. Sec. 1 paras. 21, 27; Vyav. May. Chap. IV. Sec. I. para. 5; Vîramit. Tr p. 74, 55, 68. A son's alienation without his father's consent was held invalid, *Sheo Ruttun Koonwar* v. *Gour Behairee Bhukut et al*, 7 C W. R. 449. And a son has a right during the lifetime of his father to set aside an alienation of ancestral property made without his consent, *Aghory Ram Sarag Singh* v. *J. Cochrane et al*, 5 Beng. L. R. 14 Appx

Alienation of property with assent of undivided, without assent of divided sons, was held valid. *Tirbhoguee Doobey et al* v. *Jutta Shunker et al*, Agra S. D. A. R. for 1862, p. 71.

So alienation by an uncle without assent of his nephew, *Gopall Dutt Pandey et al* v. *Gopallal Missir*, Calc. S. D. A. R. for 1859, p. 1314.

(*b*) *Jotindra Mohan Tagore* v *Ganendra Mohan Tagore*, 9 Beng. L. R. at p 398 C. R (P C.)

(*c*) *Nana Narain Rao* v *Haree Punth Bhao et al*, 9 M. I. A. 96

(*d*) P. C at 12 M. I. A p 38; *see* above. pp. 713, 721, 667 ss; *Lakshmibai* v. *Ganpat Moroba*, 5 Bom. H. C. R. 135 O. C J; Bk I. Chap. II. Sec. 14, I A. 4, Q. 9; 2 Str. H. L. 407 (as to a widow's will); *Narottam* v. *Narsandas*, 3 Bom. H. C. R 6 A. C J; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L R. 1 Bom. 561. In appeal the Privy Council decided that ancestral property could not be alienated as against a co-sharer (a son) by will, L R. 7 I. A. 181. *See* above, p 288; *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641, for a nuncupative will.

(*e*) Though their assent is generally requisite. Steele, L. C. 58, 68, 404, 210.

(*f*) S. A. No. 124 of 1876, *Kastur Bhavani* v. *Appa and Sitaram*, Bom. H. C. P. J. F. for 1876, p. 162. *See* Bk. II. Chap. I. Sec. 1, Q. 8.

SECTION 3.—THE MOTHER'S SHARE.

Q. 1.—A man had two sons. He proposed that his property should be divided into three shares, two to be assigned to the sons, and one to himself. The division was carried into effect to a certain extent. The sons, however, disagreed and prevented the division from being fully enforced. Their mother held with the elder son, and the father with the younger. The elder son has sued the younger for one-half of the father's property. The father states that he is at liberty to dispose of his property in any manner he pleases. Is there any legal objection to the claim ?

A.—The father divided his property into three shares, but it would have been more in accordance with the Sâstra had he divided it into four shares, three to be assigned as above, and one to his wife. The original acquirer is, however, at liberty to dispose of his property in any way he likes. The elder son, therefore, has no right to sue the younger for an equal share of the patrimony.

Ahmednuggur, April 28th, 1847.

AUTHORITIES.—(*1) Mit. Vyav. f. 48, p 2, l. 10 (*see* Bk. II Chap. I. Sec. 2, Q. 4); (2) Mit. Vyav. f. 47, p 2, l. 3 :—

" If he make the allotments equal, his wives, to whom no separate property has been given by the husband or father-in-law must be rendered partakers of like portions. (Mit Chap. I. Sec. 2, para. 8; Stokes, H. L. B. 379).

(3) Mit. Vyav. f, 50, p. 1, l. 11 :—

" The first text ' When the father makes a partition, &c.' (Sec II. § I.) refers to property acquired by the father himself. So does that which ordains a double share : ' Let the father, making a partition, reserve two shares for himself.' The dependence of sons, as affirmed in the following passage, ' While both parents live, the control remains, even though they have arrived at old age,' (*a*) must relate

(*a*) This passage is not translated quite correctly. It ought to stand thus :—" While both parents live, he (the son) is dependent, though he may have arrived at old age." Colebrooke says, " The power of giving is not restrained, unless, in the case of land, the

to effects acquired by the father and the mother. This other passage, 'They have not power over it (the paternal estate) while their parents live,' must also be referred to the same subject." (Mit. Chap. I. Sec. 5, para. 7; Stokes, H. L. B 392.)

REMARK.—The mother is entitled to a share (Auth. 1), and a division made by the father, without taking into account her rights, is liable to re-adjustment (Auth. 2). (*a*) Under the Hindû law the father cannot directly divide his property in any way he likes. Considerable restrictions are placed on his power even as to self-acquired property, by the Mit. Chap. I. Sec. 2. (*b*) The decisions of the English Courts, however, allow it as to self-acquired property, relying on a passage (*c*) which the Śâstri also in this answer appears to understand as conferring the power The eldest son cannot enforce a partition of his father's self-acquired property (Auth. 3).

CHAPTER II.

PARTITION BETWEEN OTHER COPARCENERS.

SECTION 1—BETWEEN BROTHERS.

Q. 1.—Would it be lawful for brothers to divide their property, when the son of a deceased brother is a minor ?

A —Yes.—*Tanna, December 21st,* 1858.

AUTHORITIES.— (1) Vîram. f. 170, p. 1, l. 1 ; (2) f. 182, p, 1, l. 1; (3) f. 181, p. 2, l. 16 (*see* Bk. II. Chap. I. Sec. 1, Q. 7); (4) Mit. Vyav. f. 46, p. 2, l. 14.

REMARKS.—1. *See* 2 Str. H L. 362.

2. In the absence of unfairness, infants are bound by a division in which they were represented by their mother as guardian. But a partition cannot ordinarily be demanded on their behalf. (*d*)

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owner having male issue living, or, in that of the whole property, leaving the family destitute." 2 Str. H. L. 6, 9, 10.

(*a*) *See* Introd. § 4 F, and below, Chap. II. Sec. 2, Q. 3.

(*b*) *See* also Colebrooke, Dig. Bk. V. Chap. I. T. 27.

(*c*) Mit. Chap. I. Sec. 5, para. 10; Stokes, H. L. B. 393.

(*d*) See *Lakshmibai* v. *Ganpat Moroba et al*, 4 B. H. C. R. 153 O. C. J.; 2 Str. H. L. 310. *See* also Introd. to Bk. II. § 4 C. 3, p. 672.

Q. 2.—Of four brothers the existence of two cannot be ascertained. Can the remaining two divide their property equally between them ?

A.—They cannot do so. The absent brothers will be entitled to their shares, whenever they may claim them.

Dharwar, March 31*st*, 1857.

AUTHORITIES.—(1) Mit. Vyav. f. 49, p. 1, l. 10; (2) Vîramitrodaya, f. 181, p. 2, l. 16 (*see* Bk. II Chap I. Sec. 1, Q 7).

REMARK.—The absence of the two brothers is no bar to the division of the estate. Their shares should, however, be set apart and kept intact. See *Nanaji* v. *Tukaram*, (*a*) the decision in which, however, was based on the plaintiff's having been turned adrift within the statutable period. (*b*)

Q. 3.—There are three brothers. One of them is absent in a distant part of the country. The two are in possession of the property. One of them claims one-half of it. Can he have so much ? Can the fact of the absentee being a bachelor or married have any effect on the division ?

A.—If a brother is not married, the expenses of his marriage should be defrayed from the common stock. (*c*) The remainder will be divided; one brother has no right to demand one-half of the property, merely because another is absent.—*Ahmednuggur, July* 25*th*, 1848.

AUTHORITY —*See* the preceding case, and also the remark on it.

Q. 4.—A deceased man has left two sons, one of them has one son and the other has two. How should the property be divided among them ?

A.—The father of the two sons should take one-half of the property and equally divide it between his two sons. The father of the one should take the other half.

Dharwar, January 8*th*, 1852.

(*a*) R. A. No. 46 of 1871, Bom. H. C. P. J. F. for 1871.

(*b*) *See* also 2 Str. H. L. 396, 327; Colebrooke, Dig. Bk. V. T. 394; Vyav. May. Chap IV. Sec. 4, para. 24; Stokes, H. L. B. 54; Introd. to Bk. II. § 4 c. 4, p. 676.

(*c*) *See* Steele, L. C. 404.

AUTHORITY.—*Mit. Vyav. f. 47, p. 2, l. 14 :—

"Let sons divide equally both the effects and the debts after [the demise of] their two parents.

"[After their two parents]. After the demise of the father and mother: here the period of the distribution is shown [The sons.] The persons, who make the distribution, are thus indicated. [Equally.] A rule respecting the mode is declared: in equal shares only should they divide the effects and debts" Mit. Chap I. Sec. 3, paras. 1 and 2 (Stokes, H. L. B 381).

REMARK.—If the sons of the second brother demand a division of their father's ancestral estate, his portion must be divided into three shares, one for the father and one for each son.

Q. 5.—A man was granted a piece of land as a charity. The grantee is now dead, and the land is in the possession of one of his sons. The other son has instituted a suit against his brother for the recovery of one-half of the land as his share of the property. The question is whether land granted as a charity is divisible?

A.—If the land was the property of the father and if it has not been alienated by him, his sons will be entitled to equal shares of the property.—*Surat, August 21st*, 1845.

AUTHORITY.—* Mit Vyav. f 47, p. 2, l. 14 (*see* the preceding question).

REMARKS.—The answer is right only under the supposition that the land was not given for some particular purpose, *e g.* the continual performance of an Agnihotra. If such a condition had been attached to the gift, the eldest son, who alone would be entitled to perform the ceremonies, would also alone inherit the land. This rule follows from the maxim, that "whatever has been given for religious purposes must be used for the stated purposes only" (*a*) Places of worship and sacrifice are not divisible. The parties are entitled only to their turns of worship. (*b*) The Courts have recognized

(*a*) Vyav. May. Chap. IV. Sec. 7, para. 23 ; Stokes, II L. B. 79. Quod divini juris est id nullius in bonis est. Sec. De Divis. Rer. Di. Li. I. Ti. VIII. Fr. VI. § 2.

(*b*) *Anund Moyee Chowdhrain et al* v. *Boykantnath Roy,* 8 C. W. R. 193, C. R.; *Mitta Kunth* v. *Neerunjun,* 14 Beng. L. R. 166, and see

the illegality of a dealing with religious endowments, which by introducing strangers would make the worship impracticable or otherwise defeat the purpose of the founder, but this objection does not generally apply to alienations within the family designated as to furnish worshippers. (*a*)

Q. 6.—A man died, leaving two widows, who live separately. The one has one son and the other has two. How shall the property of the deceased be apportioned between the two widows on account of their respective sons.

A.—The property should be divided into as many equal shares as the number of the sons, and each mother should, in her capacity of guardian, take as many of them as the number of her sons.—*Khandesh, December 16th,* 1858.

AUTHORITY.—* Vyav. May. p. 97, l. 7 :—

"Bṛihaspati gives this apposite example, "Among brothers, who are equal in class, but vary in regard to the number [of sons produced by each mother], the shares of the heritage are allotted to the males [not to their mothers"]. (Mayûkha, Chap. IV. Sec. 4, para. 26; Stokes, H. L. B. 54).

REMARKS —1. Widows have no right to their husband's estate during the life-time of their sons, and it is, therefore, impossible that the partition should be made through them. But if a man leave two or three wives, who have an equal number of sons who are minors, circumstances may arise, which make a division into two or three shares more advantageous than one into many, and in that case the Hindû law is not opposed to a "division according to mothers." Even if the sons be unequal in number, a proportional allotment might be made. (*b*) This appears to be the sense in which Nîlakan-

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also the case of *Nobkissen Mitter* v. *Hurrischunder Mitter,* East's Notes of Cases, 2 Morley's Digest, p. 146.

(*a*) *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty,* I. L. R. 1 Mad. 235 ; *Manchárám* v. *Pránshankar,* I. L. R. 6 Bom. 298; *Ganesh Moreshwar* v. *Prabhakar Sakharam,* Bom. H. C. P. J. F. 1882, p. 181 ; *Anuntha Tîrtha Chariar* v. *Nágamuthu Ambalagaren,* I. L. R. 4 Mad. 200; *Śitarambhaṭ* v. *Śitaram Ganesh,* 6 Bom. H. C. R. 250 A. C. J.

(*b*) According to Ellis, 2 Str. H. L. 176, 355, 357, 425, a true *patnîbhága* prevails among some classes in Madras, an equal share being allotted to the family by each wife. Colebrooke approves this where

ṭha took the passage of Bṛihaspati and Vyása, quoted by him.(a) In any other sense Patnîbhâga would probably not be recognized.(b)

2. The widows are, however, entitled to a share each. A claim for partition must on this account be scrutinized, not granted as of course while the children are minors, as by delay their portions may improve. A kind of patnîbhâga would arise in the way suggested by Jagannâtha, (c) by equal division according to the number of all wives, and then a subdivision of the portions falling to all born of the same mother, by their number plus one, so as to afford her a share equal to each of her own sons. (d) In this way each son's share would be larger in proportion as he had more uterine brothers (e) This seems to agree with the Śâstri's opinion and with the Vyav. May. The passages determining the shares of wives having sons, when their husband distributes the property, seem to admit of a corresponding construction. (f) The rule had reference originally, it would seem, to sons by mothers of different castes, but this cause of difference no longer operates. (g)

In the case (a Bombay case) at 2 Str. H. L. 404, there would seem to have been a partition, whereby one of two widows was allotted her own share only, she being the mother of a daughter but not of

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it is supported by custom. *See* Coleb. Dig. Bk. V. T. 59, 62. But *see* also T. 63, which prescribes equal shares for all sons of equal class.

A similar custom in the Panjab is noted; Tupper, Panj Cust. Law, Vol. I. pp 72, 78. The tribes, however, appear to be Mahomedans by faith, though they follow some Hindû usages.

(a) May. Chap. IV. Sec. 4, para. 25; Stokes, H. L. B. 54. *See* also Colebrooke, Dig Bk. V. T. 62, 63.

(b) *Moottoovengadachellasawmy* v. *Toombayasawmy et al*, M. S. D. A. R. for 1849, p. 27.

(c) *Vide* Coleb. Dig. Bk. V. T. 89.

(d) Mothers take shares according to the shares of their sons, Vîram. Tr. pp. 79, 80. Vishṇu, cited by Varadrâja (by Burnell), p. 19; so also Dâyakrama-Sangraha, Chap. VII. p 2, quoting Bṛihaspati; Stokes, H. L. B. 513.

(e) *See* Coleb. Dig. Bk V. T. 89, Comm.

(f) Mit. Chap. I. Sec. 2, para. 9; Stokes, H. L. B. 379; Vyav, May. Chap. IV. Sec. 4, para. 18; *ibid.* 52.

(g) Coleb. Dig. Bk. V. T. 86, Comm.

a son, while the remainder was given to her co-widow and the two sons by her. In an ordinary partition step-mothers, though sonless, are entitled to equal shares. (*a*)

Q. 7.—A person of the goldsmith caste had two wives, one of whom has three sons and the other one. How should the ancestral property be divided among them?

A.—A larger share being alloted to the eldest, the rest should be equally divided among the other three.

Sholapore, January 17th, 1846.

AUTHORITIES.—(1) Vyav. May. p. 97, l. 7 (*see* the preceding question); (*2) Mit. Vyav. f. 48, p. 1, l. 8 (Bk. II. Chap. I. Sec. 2, Q. 3); (*3) f 47, p 2, l. 14 (Bk II. Chap. II. Sec. 1, Q. 4)

REMARKS.—1. The eldest does not receive any larger share than the others. (Auth. 2.)

2. The estate must be divided into six equal shares, as the mothers receive shares as well as the sons (Auth. 3.) According to some authors quoted by Jagannâtha, the passage of Yâjñavalkya relates only to sonless wives, (*b*) but this does not seem to be the accepted theory, now that unequal partition is abolished.

Q. 8.—There are three brothers, of whom one is unmarried. A house belonging to their father is to be divided among them. The question is, whether it should be equally divided among the three, or whether the whole or a large part of it should be given to the unmarried brother? Another question in connection with this case is, whether an elder son can mortgage his house during the lifetime of his mother?

A.—If a brother is unmarried, a sum sufficient to defray the expenses of his marriage should be first set aside from

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(*a*) Mit. Chap. I. 397, Sec. 7, para 1 (Stokes, H. L. B. 397); Vyav. May. Chap IV. Sec. 4, pl. 19 (*Ib.* 52); Coleb. Dig Bk. V. T. 83, 84, 85, Comm., where the string of arguments and distinctions, that Jagannâtha at last rejects, must not be mistaken for his own.

(*b*) Coleb. Dig. Bk. V. T. 83, 84, Comm.

the common property, and then the rest equally divided among them. If the property is just sufficient for the expenses of the marriage, the whole may be set aside for the purpose. (*a*) The house cannot be mortgaged without the consent of all the brothers having a share in it. The consent of the mother is not required. If, however, some of the brothers are absent, and the money is required for an urgent necessity of the family, one of them can mortgage the house. (*b*)

Poona, August 10th, 1851.

AUTHORITIES.—(1) Mit. Vyav f. 69, p 1, l. 8; (2) f. 47, p. 2, l. 10; (3) f 46, p 2, l. 11; (*4) f. 51, p. 1, l. 7 (*see* Bk. II. Chap. II. Sec. 2, Q. 1); (5) f. 46, p. 2, l. 11 :—

" If any of the brethren be uninitiated when the father dies, who is competent to complete their initiation ? The author replies: 'Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed.'

" By the brethren, who make a partition after the decease of their father, the uninitiated brothers should be inititated at the charge of the whole estate." Mit Chap. I. Sec. 7, paras. 3 and 4 (Stokes, H. L. B. 398).

REMARKS —1. Compare also the rules of Nârada Dâyavibhâga, Chap. XIII. vs. 33 and 34. (*c*)

2. As to the concurrence of all the coparceners being necessary, *see* the Introd. to this Book, pp 600, 603. (*d*)

Q. 9.—(1). Three daughters of one and one of another brother were married when the family was undivided. Afterwards, when they separated, the brother, whose one daughter only was married, objected to his brother's taking an equal share of the family property on the ground of a large expense

(*a*) Steele, L. C. pp. 57, 404.

(*b*) *See* Steele, L. C. pp. 399, 400.

(*c*) The joint property must provide for the weddings of the unmarried brothers and sisters amongst Śûdras, 2 Str. H. L. 354.

(*d*) In the Panjab the consent of all the co-sharers is generally essential to a gift of even less than the donor's share, Panj. Cust. Law, Vol. II. p. 167.

having been thrown upon the resources of the family by the marriages of his three daughters. Is this a proper objection? Should the brother, whose three daughters were married, have a smaller share of the property?

(2) Suppose the case stands as follows :—Three daughters of one brother were married. After this, the other brother became separate and got his daughter married. When the brothers subsequently came to actually divide the property, the father of one daughter proposed that the expense which he had incurred on account of the marriage of his daughter should be paid to him from the property, and that it should then be equally divided between them. Is this a just proposal?

A.—(1) The brother, whose three daughters were married during the union of the family, is entitled to a half of his father's property.

(2) In the other case, the proposal made by the father of one daughter is proper.—*Sadr Adálat, June 22nd,* 1825.

Authority not quoted.

REMARKS.—1. The correctness of para. 1 of the Śâstri's answer follows from the fact that the duty of marrying a girl lies with her father.

2. The second part of the answer is based on the maxim that all expenses of united brothers must be defrayed out of the family estate. For the two brothers, though one 'became separate,' still were members of a united family, because a partition of the estate had not taken place (*a*)

Q. 10.—A lunatic has a son and a wife. Can his brother, who is not separated from him, claim the share of a certain property, to which the lunatic is entitled?

A.—A man, who is blind, lame, mad, &c., forfeits his right to a share of the family property, but a son of such a person, if not labouring under a similar disqualification, can claim the share due to his father.—*Tanna, February 24th,* 1853.

(*a*) *See* Colebrooke, Dig. Bk. V. T. 136, 373; and Jagannâtha's Commentary, 2 Str. H. L. 394.

AUTHORITIES.—(1) Mit. f. 60, p. 1, l. 13; (2) f. 60, p. 2, l. 8:—

"But their (the lame, blind, &c., man's sons,) whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Mit. Chap. II. Sec. 10, para 9; Stokes, H. L. B. 457.)

REMARK.—*See* Introd. to Bk I, "PERSONS DISQUALIFIED, &c." In the case of *Koer Sheopershad Narain* v. *The Collector of Monghyr et al,* (a) it is said that an idiot, though excluded from inheritance, may take by conveyance. The source of the disabled member's title therefore is of importance.

Q. 11.—Is an elder brother entitled to the right side of a house whether it be of a more or less value, or should he receive a share which is equal in point of value on whatever side it might be?

A.—It is a custom to assign the right side of a house to the elder brother. It will rest with the Court to decide how far the custom should be respected.

Ahmednuggur, July 29th, 1848. (b)

Q. 12.—A deceased man has left two sons. They are engaged in a dispute regarding the division of a house. Their father has not left any writing as to the side of the house on which each of his sons should take his share of it. The question is, whether the share of the elder son should be on the right side of the house?

A.—The usage allows the elder son to have his share on the right side, but in the book called "Sântiratnâkara," it is stated that the elder brother should have his residence on the western side of a house. The western part of the house therefore should be assigned to the elder brother.

Poona, August 22nd, 1853.

(a) 7 C. W. R. 5 C. R.

(b) Similar answers were received from *Rutnagherry, December 17th,* 1859; *Poona, December 15th,* 1859; *Tanna, March 9th,* 1860.

Q. 13.—There are four shares in a house, three belong to the sons and the fourth to their mother. On what side of the house should the second son have his share?

A.—There are no provisions in the Śâstras on the subject.—*Rutnagherry, November 23rd,* 1846.

SECTION 2.—THE MOTHER AND SON.

Q. 1.—If a mother and her son do not wish to live together as an undivided family, can the mother claim a share?

A.—If the property is ancestral or acquired conjointly by the mother and her son, it should be equally divided between them. The mother should support herself from the proceeds of her share, but cannot dispose of it by gift or sale. On her death her son will inherit it.

Rutnagherry, October 27th, 1851.

AUTHORITY.—Mit. Vyav. 1 51, p. 1, 1 7:—

"Of heirs dividing after the death of the father, let the mother also take an equal share." (Colebrooke, Mit. Chap. I. Sec. 7, para. 1; Stokes, H. L. B. 397.)

REMARKS.—1. The text shows only *the right of the mother to a share,* in case a partition is made, but not her right to *demand a partition.* The latter right does not exist, and it would therefore seem that in the case in question, where there is only one son, she cannot ask for a division. (*a*) So too, though sons acquire a right in their mother's property by birth, they cannot exact a partition of it during her life (*b*) If a partition should be made the mother takes a share equal to her son's. (*c*)

2. As to the nature of the mother's estate in the portion allotted to her, *see* 2 Str. H. L. 294, 383, where Colebrooke shows that, according to the Mitâksharâ, there is an absolute assignment of a share, not a mere setting apart of a maintenance, though maintenance be the

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(*a*) *See* also Introd. to Bk. II. § 3 A. Rem. 2; and § 4 C. Rem. 5.

(*b*) Viram. Tr. p. 228.

(*c*) So too does a grandmother. The same rule applies in the case of an adopted son. See *Thukoo Baee* v. *Ruma Baee Bhide,* 2 Borr. R. 488.

object of the assignment. (a) In the case at 2 Str. H. L. 404, the Śâstri's opinion has not been preserved. The English scholars, consulted by Sir T. Strange, seem not to have been able to make up their minds as to the law of the Mitâksharâ on the point submitted to them. The allotment to the mother, however, is by Mit. Chap. I. Sec. 7, pl. 2 ss, (b) put on the same footing precisely as that assigned to a daughter, in which it has never in Bombay been contended that a full ownership does not subsist; and Chap. II. Sec. 1, pl. 31, 32, (c) use the analogy of the complete ownership arising to the mother, on a partition, as an argument for the widow's sole succession, when no son is left to share the property with her. (d)

Q. 2.—Can a son and his mother divide the family property between themselves?

A.—The Śâstra declares that if sons, after the death of their father, should divide their property, a share of it, equal to that which is taken by each of the sons, should be allotted to their mother.

Ahmednuggur, November 29th, 1855.

AUTHORITIES.—(1) Mit. Vyav. f. 47, p 2. l. 13; (2) f. 26, p. 2, l. 9; (3) f. 46, p. 1, l. 9; (4) f 46, p. 2, l 14; (5) f. 51, p. 1, l. 7 (*see* the preceding question); (6) Mit. Âchâra, f. 12, p. 1, l. 4; (7) Vyav. May. p. 175, l. 8.

Q. 3.—Three sons of a man became separate and received their shares of the common property. They did not, however, set apart a share for their mother. Can the deed of division framed by the sons be considered valid?

A.—The deed of division may be considered valid, but the sons should be obliged to give a share to their mother.

Rutnagherry, June 12th, 1851.

AUTHORITIES.—(1) Mit Vyav. l. 47, p. 2, l. 13; (2) f. 51, p. 1, l. 7 (*see* the first question of this Section); (3) Vyav. May. p. 90, l. 2, 3.

REMARK.—*See* Introd. to Bk. II. § 4 E, and also pp. 303, 777, 780.

(a) *See* also Coleb. Dig. Bk. V. T. 87, Comm.

(b) Stokes, H. L. B. 397.

(c) Stokes, H. L. B. 436.

(d) *See* the Introd. to Bk. II. "RIGHTS AND DUTIES ARISING ON PARTITION," and Bk. I. Chap. II. Sec. 6A, Q. 6.

Q. 4.—In order to recover the amount of a decree passed in his favour, a man has attached a house of his debtor. The house was once the property of the debtor's father. The debtor's mother claims the removal of the attachment from a half of the house. She alleges that the house was once her husband's property, and that she therefore has a right to one-half of it. The question is, whether the widow of the owner of the house has a claim to any part of the house while her sons are still living? and if so, to what extent?

A.—A son after the death of his father acquires a perfect right to his property, and while sons are alive, the widow has no claim to his property. She cannot, therefore, claim any share of the house.—*Surat, December* 19*th*, 1850.

AUTHORITIES.—Vyav. May. Dâyabhâga, p. 83, l. 7 (Stokes, H. L. B. 42); Vyav. May. Ṛiṇâdâna, p. 179, l 6 (Stokes, H. L. B. 121).

REMARK.—Though the mother cannot claim a partition of the house, still she has a claim to maintenance out of the family property, (*a*) extending in amount to a son's share (*b*) It seems necessary, therefore, that her rights should be protected against the creditors of her son to this extent, just as those of a separated brother would be. In *Ruttunchund* v. *Gholamun Khân* (*c*) it was held that a widow of one of three undivided brothers has no such right to a share of a house, the joint property of the family, as to prevent an effective sale by the surviving brothers, and *Jivan* v. *Kasi Ambiadas* (*d*) was decided on the same principle (*e*); but the Sholâpoor Śâstri pronounced against the validity of the sale, which moreover was by one brother of his share in the ancestral family house to

(*a*) *See* Introd. to Bk. II. Sec. 7 A 1 *b*.

(*b*) Step-mothers also have a claim to maintenance against their step-sons, taking the paternal or ancestral estate, 2 Str. H. L. 315.

(*c*) N. W. P. Rep. for 1860, p. 447.

(*d*) 8 Harr. 172.

(*e*) A widow having sued a mortgagee from her son for a declaration of her right as against the mortgaged property to maintenance and recoupment of her daughter's marriage expenses, it was held that she might, under her general prayer for relief, be awarded the amount to which on these accounts she should be found entitled, *S. Nistarini Dossee* v. *Mokhun Lall Dutt et al*, 17 C. W. R. 432.

another brother. (a) Subject perhaps to the right of widows to residence, partition of the dwelling may, it seems, be claimed and enforced. (b)

SECTION 3.—BETWEEN REMOTER RELATIONS.

Q. 1.—One of two brothers left the country and died 40 years ago. His son, who grew up in the house of his maternal uncle, claims from his paternal uncle a share of his moveable property.

A.—He cannot claim a share of whatever his uncle may have acquired by his own labour, without using the claimant's father's means for its acquisition.—*Poona, October* 18*th*, 1845.

AUTHORITY.—* Vîramitrodaya, f. 177, p. 1, l. 6. *See* Introd. to Bk. II. § 3 A. *supra*, p. 654.

Q. 2.—A paternal uncle and a nephew, who were united in interests, agreed to an unequal division of property between them. Can they do so?

A.—If the nephew has taken a small share of the property from his uncle and given him a deed of acquittance, he is at liberty to do so. Ordinarily he is entitled to an equal share with his uncle.—*Ahmednuggur, December* 30*th*, 1846.

AUTHORITY.—* Vîramitrodaya, f. 177, p. 1, l. 6. *See* Introd. to Bk. II. § 3 A, *supra*, pp. 653, 654, 663.

Q. 3.—Two brothers separated, but did not divide their moveable and immoveable property. Can the son of one of them file a suit for a share of the common property?

A.—Yes, he can. The property, acquired during the time when the family was united in interest, must be divided into as many shares as the number of brothers owning it. If one of them is dead, his share can be claimed by his son and grandson.—*Ratnagherry, January* 20*th*, 1846.

(a) *See* the cases cited in the Introduction to Bk. I. page 252.

(b) *Hullodhur* v. *Ramnath*, 1 Marsh. 35. The occupation of a house by a widow is equivalent to notice of her right to residence. *Dalsukhram* v. *Lallubhai*, Bo. H. C. P. J. 1883, p. 106.

AUTHORITY.—* Viramitrodaya, f. 177, p. 1, l. 7. See Introd. to Bk. II. § 3 A. *supra*, p. 653, 654.

REMARK.—Cesser of commensality is a strong but not conclusive evidence of partition. (*a*) A question of limitation or prescription would now in some cases arise under Reg. V. of 1827, and the successive Limitation Acts down to Act XV. of 1877. (*b*) *See* Introd. to Bk. II. SEPARATION.

Q. 4.—A deceased person left seven sons, of these three are alive and four dead. Of those that died, three have left one son each and the fourth no son. The deceased father's property consists of one house only. How should each of these sons be allowed to share in the patrimony? Can the share of the brother who died without leaving a son be claimed by all the brothers? Can the sons of the brothers previously deceased claim the share of the brother who has now died? If so, how should each be allowed to share in it?

A.—It appears that the father died leaving seven sons, and that one of them died and has left no sons. His share should be equally divided by the surviving brothers and the three sons of the deceased brothers. The house should be considered divided into six shares, and one share should be assigned to each member of the family.

Broach, September 7th, 1848.

AUTHORITIES.—(*1) Mit Vyav. f. 50, p 1, l. 7 (*see* Bk. II. Chap. I. Sec. 1, Q. 1); (*2) Viramitrodaya, f. 177, p. 1, l. 6 (*see* Introd to Bk. II. § 3 A)

REMARK.—The son of each of the predeceased brothers succeeds to his father's share. (*c*)

(*a*) *Musst. Anundee Koonwar* v. *Khedoo Lal,* 14 M. I. A. 412.

(*b*) According to the Hindû Law, the right to demand a partition of property solely possessed continues through four generations of persons present, and seven of absentees, *Moro Vishvanath et al* v. *Ganesh Vithal et al,* 10 Bom. H. C. R. 444; 2 Str. H. L. 396; *see* Steele, L. C. 219.

(*c*) See *Gungoo Mull* v. *Bunseedhur,* 1 N. W. P. R. 79; *Duljeetsing* v. *Sheomunook Sing,* 1 Calc. Sel. R. 59; *Debi Parshâd et al* v. *Thâkur*

Q. 5.—Two brothers paid money in equal proportions, and received a house in mortgage. They subsequently died, one leaving a son and the other a grandson. Unequal portions of the house had however passed into their possession, and the question is whether or not each party has a right to an equal share?

A.—Each has a right to an equal share, and the heirs of the mortgagees may divide it so.—*Ahmednuggur, May 8th,* 1851.

AUTHORITIES.—(1) Vîramitrodaya, f. 177, p. 1, l. 6 (*see* Introd. to Bk. II. § 3 A. Rem. 1); (2) Vyav. May. p. 89, l. 2; (3) p. 169, l. 6; (4) p. 171, l. 6; (5) p. 96, l. 2.

CHAPTER III.

MANNER AND LEGALITY OF PARTITION.

SECTION 1.—DISPOSAL OF NATURALLY INDIVISIBLE PROPERTY.

Q. 1.—Can a village held on Inâm tenure be divided?

A.—Any property, which, if divided, would not yield equal profit, may be enjoyed by each of the co-sharers in rotation for a certain fixed period.—*Dharwar, September 14th,* 1852.

AUTHORITY.—Vivâdabhangârṇava, in the Chapter called Indivisible Property.

REMARKS.—1. The question is too general to admit of an exact answer. For it is not clear of what nature the Inâm grant was. Usually Inâms, which are merely tax-free property, or which consist in the Government share of the produce of the land, are divisible either by an actual apportioning of the land or by a division of the produce. (*a*)

Dial et al, I. L. R. 1 All. 105; *Bhimul Doss* v. *Choonee Lall,* I. L. R. 2 Calc. 379, referring to *Katama Natchiar* v. *The Rajah of Shivagunga,* 9 M. I. A. at p. 611.

(*a*) See *Ruvee Bhudr* v. *Roopshunkur et al,* 2 Borr. 730; *Shib Narain Bose* v. *Ram Nidhee Bose et al,* 9 C. W. R. 87 C. R.; *see* Bk. I. Chap. II. Sec. 6 A, Q. 8, p. 397. Steele, L. C. 215, 218, 229, 230, show how estates held free or for service are dealt with.

2. In one case the Sadar Court of the N. W. Provinces ruled that a partition might be refused where it would be obviously detrimental to the interests of the sharers resisting it, (*a*) but this is not supported by the Hindû authorities; and when a partition legally claimed is objected to on the ground of inconvenience, some more convenient method of distribution must be shown by the objector. (*b*) Partition of a Court-yard, advisedly reserved for common enjoyment, was refused in *Gopala Achyarya* v. *Keshav Daje*. (*c*)

Q. 2.—One of three brothers, who lived as members of an undivided family, died. Can his widow sue on behalf of her son, who is a minor under her protection, for a share of the family property? and can the idols be divided?

A.—The woman cannot claim a share of the property, unless it be shown that her brothers-in-law are likely to defraud her. The idols may be divided as any other property.

Poona, August 5th, 1852.

AUTHORITIES.—(1) Vyav. May. p. 127, l. 7; (2) Vivâdabhangârṇava; (3) Vîramitrodaya, f. 181, p. 2, l. 16 (*see* Bk. II. Chap. I. Sec. 1, Q. 7).

REMARKS.—1. The mother can sue for a division, under the conditions stated, if she is the guardian of her son. (*d*)

2. The custom regarding family 'idols' is stated to be as follows:—

(*a*) If there is only one image it is given to the eldest son. (*e*)

(*b*) If there are several images, the eldest son receives the principal idol, and the rest are divided. (*f*)

If property has been dedicated to a family idol, the members are entitled to worship and take the emoluments in rotation. (*g*)

(*a*) *Durbaree Singh et al* v. *Saligram et al*, N. W. P. Sel. Dec. 1852, p. 271.

(*b*) *Summun Jha et al* v. *Bhooput Jha et al*, 18 C. W. R. 498.

(*c*) S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

(*d*) *See* Introd. to Bk. II. p. 672.

(*e*) Comp. Steele, L. C. p. 179.

(*f*) The eldest sometimes retains all the images, as in the case at Steele, L. C. p. 222.

(*g*) *See* Introd. to Bk. II. p. 730.

Q. 3.—Two brothers possess a proprietary right to a well and use the water to irrigate their respective fields by turns. Can the right of one brother to a half of the well be sold in payment of his debts?

A.—The well cannot be sold, the debtor having a right only to use it in his turn. A well or door, which is the common property of a family, and which cannot be divided, can only be used by those who have the limited enjoyment of it.—*Ahmednuggur, December* 19*th*, 1854.

AUTHORITIES.—(1) Vyav. May. p. 125, l. 5 :—

Other things exempt from partition have been enumerated by Manu :—

"Clothes, vehicles, ornaments, prepared food, water, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution." (Borradaile, May. Chap. IV. Sec. 7, para. 15 (Stokes, H. L. B. 77).

(2) Vyav. May. p. 127, l. 1 :—

" Bṛihaspati : They by whom it is affirmed that clothes and the like are indivisible have not proved that the collected wealth of opulent men, their vehicles and ornaments, shall not be divided (*a*) ; property, held in common, (would be) unemployed, for it cannot be given to one (in exclusion of another); therefore it must be divided by (some mode deduced from) reasoning (*b*); else it would be useless. By the sale of clothes and ornaments, on the recovery of a written debt, by compensating the dressed food with (an equal allotment of) undressed grain; an (equitable) partition is made. Water drawn from a (single) well or pool shall be taken by turns . . . . . . A bridge and a field shall be shared (by co-heirs) in due proportion." Borradaile, May. Chap. IV. Sec. 7, para. 22 (Stokes, H. L. B. 78).

REMARK.—When it is said that the water of a well cannot be divided the meaning is that it cannot be distributed like land or

(*a*) The translation of the second line ought to run thus :—

" They . . . . . have not considered, that the property of opulent men may consist of clothes and ornaments and such property."

(*b*) Yuktyâ, " by (some mode deduced from) reasoning," may be better translated, " according to (the rules of) equity."

money. But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns, and if the terms of the partition in this case were that each brother should take the water by turn for the irrigation of particular fields, each acquired a distinct property transferrible along with that in the fields to be irrigated (as thus only could it be made available), and saleable in execution of a decree along with the fields themselves. As to the needlessness of a partition in specie to constitute separate property, &c , *see* the Introduction, pp. 683 ss.

Q. 4.—Certain brothers divided all their property excepting a well, a privy, and a compound. It appears that no partition can be made in regard to the former two, but that the latter may be divided, though not without inconvenience, by building up a wall in the middle. The question is, whether or not it should be divided ?

A.—It is not necessary to divide a well, a privy, and a compound. There are rules which forbid the division of such property.—*Poona, July 18th,* 1851.

AUTHORITIES.—*See* the preceding Question and Q. 1; Vyav. May. p. 125, l. 5; Stokes, H. L. B. 87.

REMARKS.—1. A compound may be divided under ordinary circumstances. If, however, in this case, the 'inconvenience' arising from its division would be of such a nature as to diminish or impair the rights of one of the co-heirs, *i. e.* prevent his using the compound for its intended purposes, then it must be used by all in common.

2. This, as all similar cases, must be decided according to the rules of equity.

SECTION 2.—DISPOSAL OF PROPERTY DISCOVERED AFTER PARTITION.

Q. 1.—A hoard of treasure was discovered in an ancestral house which was pulled down. The treasure was not divided between the cousins twice removed. The cousins had become separate 40 years ago, when the house was assigned to one of them as a part of his share. The hoard was

found in this house, and the question is whether the other cousin should have a share of it?

A.—Whenever any ancestral property is discovered, it should be divided. The treasure should therefore be divided.

Poona, July 14th, 1855.

AUTHORITY.—Vyav. May. p. 129, l. 1:—

" Manu: When any common property whatever is brought to light after partition has been effected, that is not considered a (fair) partition; it must even be made again " (Borradaile, May. Chap. IV. Sec. 7, para. 26; Stokes, H. L. B. 79.)

REMARKS.—1. The answer is right, *supposing it can be proved* that the treasure was concealed by an ancestor of the now divided claimants. As to the disposal of treasure trove in general, *see* Vyav. May. Chap. VII. para 10 (*a*); Yâjñavalkya, I. 34, 35; Nârada, Pt II. Chap. VI. paras. 6-8. Buried or sunk property belongs to the Government, which should allot one-sixth to the finder. Property found in the road is to be returned to the owner, less one-sixth for the Government, of which one-fourth should be given to the finder. Omission to inform is punishable by fine.(*b*)

2. For the present law *see* the Treasure Trove Act, VI. of 1878.

Q. 2.—There are three brothers. One of them claims a share of certain immoveable property on the ground that it was not divided along with the rest. The other brothers do not prove that the property was divided. How should the question be decided?

A.—If the fact of the division be in dispute, the whole of the property may be redivided. If the fact of the division of a part of the property is agreed to, the undivided portion only may be divided.—*Rutnagherry, March 6th,* 1856.

AUTHORITIES.—(1) Vyav. May. p. 129, l. 1; (2) p. 128, l. 2; (3) p. 133, l. 1.

REMARK.—*See* the preceding question and the Introduction, p. 695 ss. The first proposition in the Śâstri's answer is laid down much

(*a*) Stokes, H. L B. 131. *See* Steele, L. C. p. 60.

(*b*) Q. 64 MS, *Surat, June 15th,* 1845.

too broadly. A mere dispute will not entitle any separated member to claim a repartition. (a)

Q. 3.—Each of the members of a family received his share of a Vṛitti, (*b*) which was divided amongst them. The actual extent of the land, however, was subsequently found to be in excess of that taken as the basis of the partition. Should the excess be divided among the sharers?

A.—Any new property discovered after the partition of the known property of a family should be divided among the sharers.—*Dharwar, February* 16*th*, 1852.

AUTHORITIES.—(1) Vyav. May. p. 90, l. 2; (2) p 90, l 6; (3) p. 128, l. 2; (4) p. 129, l. 1 (*see* Bk. II. Chap. III. Sec. 2, Q. 1).

Q. 4.—A man had three sons. The eldest of them gave a writing to his father, engaging that he would not commit any fraud in regard to the money and jewels given by him to his mother. The property was estimated at Rs. 3,000. The father is now dead and the eldest son has run away. Property valued at 1,200 Rupees only has been discovered. The second son is in league with the eldest. The third son is a minor. Their mother claims the whole of the property which has been discovered on the ground that her husband gave it to her. The question is, how should the property now discovered and that which may hereafter be discovered be divided?

A.—It is illegal for a man to give his whole property to his wife in disregard of the claims of his sons. (*c*) The property should therefore be divided into four shares, of which one should be allotted to the mother and three to the three sons.—*Poona, September* 10*th*, 1853. (*d*)

(*a*) *See* Colebrooke, Dig. Bk. V. Chap. VI. Text 378.

(*b*) Land, or hereditary property, or office, which is the means of subsistence of a family. *See* above, p. 741.

(*c*) *See* above, pp. 207, 208.

(*d*) A similar answer was received from *Rutnagherry, October 27th*, 1851.

AUTHORITIES.—(1) Mit. Vyav. f. 69, p. 1, l. 4; (2) f. 51, p. 1, l. 7.

REMARKS.—1. If the property had been acquired by the father himself, he would, according to the ruling of *Gangabai* v. *Vamnaji*, (*a*) be at liberty to dispose of it at his pleasure, and, in this case, the donation to the widow would be legal, if it could be proved.

2. The Śâstri's opinion, that each of the sons is to have a share, even the eldest, who ran away, is not quite correct. For though, according to the Mitâksharâ and the Vîramitrodaya, fraud practised by one of the co-sharers does not disqualify him from receiving a share, (*b*) still, it would seem that he ought to be held liable for any ascertained portion of the share which he might have made away with. Hence the absconded son ought not to receive a share of the Rs. 1,200, since the Rs. 1,800 which he must be supposed to have made away with, amounts to more than his own share.

3. The liability of the fraudulent coparcener to make good any ascertained portion of fraudulently concealed property is laid down explicitly.(*c*) The rule extends to fraudulent or unjustifiably extravagant expenditure during the state of union. (*d*)

4. In regard to the last point, it ought, however, to be borne in mind that a proportionately large expenditure on the part of one brother ought to be proved to have been clearly 'dishonest.' Otherwise it cannot be deducted from his share. The Vîramitrodaya, f. 220, p. 2, l 5, says on this point:—

" In order to show that (one brother) ought not to say of the (other) ' He has consumed (too) much, whilst we were undivided,' and that the king ought not to allow (the others) to take (back) that which may have been consumed (in excess of his portion by one of them), the same (author Kâtyâyana) says : ' He shall certainly not cause to be paid back property, which the brothers consumed, while living in union.' The bearing (of this text is) that enjoyment (of the common property) in unequal proportions cannot be forbidden, because it is unavoidable."

The same remark applies to the second son, if it can be proved that he really participated in the fraud.

(*a*) 2 Bom. H. C. R. 304.

(*b*) *See* Introd. pp. 679, 680.

(*c*) Mit. Chap. I. Sec. 9, paras. 1—3; Stokes, H. L. B. 404; Mayûkha, Chap. IV. Sec. 7, para. 24 ; Stokes, H. L. B. 79.

(*d*) *See* Colebrooke, Dig. Bk. V. Chap. VI. Text 373; Steele, L. C. 60, 217, 223.

The proper division of the recovered Rs. 1,200, therefore, seems to be one in equal shares between the mother and the minor son.

5. In regard to property in excess of the Rs. 1,200 that might be discovered afterwards, such property ought in the first instance to be used to make up the full shares of Rs. 750, to which the mother and the minor were originally entitled. Afterwards only, the rights of the two fraudulent coparceners can be taken into account. Members of an undivided Hindû family, making partition, are entitled as a rule not to an account of past transactions, but to a division of the family property actually existing (a) In *Davlatrav* v. *Narayanrav* (b) it is ruled that the principle applies generally to a managing member. He is not in the absence of fraud or wanton extravagance to be made answerable for every item of expenditure, nor on the other hand to receive credit for family debts paid by him as an addition to his own share on a partition. *See* the Introduction, 'RIGHTS AND DUTIES ARISING ON PARTITION.'

6. The several members may, however, enter into agreements with each other for the expenditure on joint purposes of their separate property. (c) Such expenditure must of course be allowed for in a subsequent partition. (d)

SECTION 3.—LEGALITY OF PARTITION.

Q. 1.—A father divided his property between his two sons. They then executed a deed of separation which continued to be respected for about 8 years. Afterwards the father executed a document in favour of one of his sons in the absence of the other, modifying the terms of the deed. Has the father authority to do so?

A.—It appears that certain property was first set apart for the maintenance of the father and mother, and the rest divided between the sons. The father cannot therefore modify the terms of the deed of separation without the consent of both his sons.—*Poona, September 15th*, 1845.

(a) *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; above, p. 763.

(b) R. A. No. 5 of 1875; Bom. H. C. P. J. F. for 1877, p. 175.

(c) See *Muttusvami Gaundan et al* v. *Subbiramaniya et al*, 1 M. H. C. R. 311.

(d) *See* Steele, L. C. 217, 219.

AUTHORITIES.—(*1) Manu IX. 47 :—

"Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say 'I give': these three are, by good men, done once for all (and invariably)."

"Kullûka's gloss.:—'A partition of the wealth belonging to the father and others, which has been *made by brothers according to law*, is made once only, and cannot again be changed.'"

(*2) Vîramitrodaya, f. 223, p 2, l. 8 :—

"But what has been said by Manu, 'Once is the partition of an inheritance made,' &c., that (applies to cases) where there is no ground for annulling that (partition)."

REMARKS.—1. The answer is right, if the first partition had been made in accordance with the law, that is, in due proportions, or by mutual assent. (*a*)

2. A fresh partition cannot be claimed, when, though the original division was equal, supervening circumstances have made the shares unequal in value. But if one of the divided coparceners has lost part of his share, through the wrongful act of another, he may recover damages. (*b*)

Q. 2.—A man possesses some houses and shops. Of these, all the shops and one house were given by him to his three sons, who live separate from him. The father has filed a suit for the recovery of the property in the possession of his sons. The property was acquired by the father himself. Can he claim it?

A.—No sooner is a son born than he acquires a right to his father's property, (*c*) but if he wishes to have a share in his father's property, he cannot have it unless his father is willing to give it to him. (*d*) If the father is very old or of

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(*a*) *See* the Smṛiti Chandrikâ, Chap. XIV. para. 7; Chap. XV. para. 4; *Mootoovengadachellasamy* v. *Toombayasamy et al*, M. S. D. A. R. for 1849, p. 27; and *Govind Wisvanath* v. *Mahadajee Narayan*, 1 Bom. S. D. A. R. 167.

(*b*) *Rango Mairal* v. *Chinto Ganesh et al*, S. A. No. 297 of 1874; Bom. H. C. P. J. F. for 1876, p. 74.

(*c*) *See* above, p. 648.

(*d*) *See* above, pp. 657, 659.

a bad character, his son has a right to insist upon a division of his property, even though the father is unwilling.

Dharwar, December 15th, 1853.

AUTHORITIES.—(1) Vyav. May. p. 91, l. 2; (2) p. 91, l. 7; *see* the preceding case.

REMARK.—The Śâstri's answer is not to the point. If the father had really made a division, and if the division had been made according to the law, *i. e.* under the observance of the rules detailed above, or, with the consent of all parties, even against those rules, it stands good. As to the relation of the passage in the Mitâksharâ corresponding to that (*a*) quoted by the Śâstri (*b*) and Sec. 5, paras. 8, 11, (*c*) reference may be made to *Nâgalinga Mudali* v. *Subbiramaniya et al,* (*d*) and to Bk. II. Chap. I. Sec. 2, Q. 2—8, *supra,* p. 825 ss.

Q. 3.—The common property of two brothers amounted to Rs. 30,000. One of them obtained a Fârikhat from the younger brother by offering him about Rs. 7,000 in full payment of his share. A part of it was paid, but in consequence of the non-payment of the rest, the younger brother filed a suit against his brother to oblige him to pay a moiety of the whole property. Is this in accordance with the Śâstras?

A.—When a person thinks himself able to acquire property or is otherwise unwilling to take his share, it is directed that a small portion should be given to him at the time of his separation. (*e*) It is also enjoined that the Sirkar should prevent the person whose claim has been thus compounded from making a further demand afterwards. The younger brother therefore can only claim what he agreed

(*a*) Borradaile, Vyav. May. Chap. IV. Sec. 4, para. 7; Stokes, H. L. B. 49.

(*b*) Coleb. Mit. Chap. I. Sec. 2, para. 7; Stokes, H. L. B. 378.

(*c*) Stokes, H. L. B. 60, 62.

(*d*) 1 M. H. C. R. 77.

(*e*) *See* Steele, L. C. 58, 214.

to receive at the time of writing the Fârikhat. His claim to a moiety is not proper.—*Tanna, July 28th,* 1849. (*a*)

AUTHORITIES.—(1) Vyav. May. p. 134, l. 1 :—

" The same author, with reference to one separated by his own wish, and afterwards disputing, says : If he subsequently dispute a distribution, which was made with his own consent, he shall be compelled by the king to abide by his share, or be amerced if he persist in contention." (Borradaile, May. Chap. IV. Sec. 7, para. 38 ; Stokes, H. L. B. 83.)

(*2) Mit. Vyav. f. 52, p. 1, l. 13 :—

" Something is here added respecting the residue of a general distribution of the estate. (*b*)

" Effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares : this is a settled rule." (Colebrooke, Mit. Chap. I. Sec. 9, para. 1 ; Stokes, H. L. B. 404.)

REMARK —The Śâstri's answer is not quite to the point. If the younger brother agreed, knowing or having the means of knowing the facts, to an unequal division, then it holds good (Auth. 1). If he was induced to consent to it by fraudulent representations, then he is not bound by his agreement (Auth. 2.) (*c*)

Q. 4.—Four brothers divided their interests. The share of a certain piece of land which one of them received was attached by Government. He therefore claims a new share of the land in possession of his brothers. Can he do so ?

A.—No.—*Dharwar, April 11th,* 1849.

AUTHORITY.—Manu IX. 47 (*see* Bk. II. Chap. III. Sec. 3, Q. 1).

REMARK.—The Śâstri's answer is right only on the supposition that no fraud was committed in making the division, and that the claim for which the land was attached, was not an old unsettled claim against the family estate. For, as regards the first point, ' fraud in

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(*a*) A similar answer was received from Khandesh, *February 17th,* 1854.

(*b*) The translation of the first sentence ought to run as follows :—

" Now something is declared which is a supplementary (rule to be observed) at all Partitions."

(*c*) *See* also Introd. § 4 F, pp. 702, ss.

Hindû Law vitiates every transaction.' (a) As to the second point, if there was an old claim against the family estate which, on partition, had not been taken into account, and for which the portion of one brother was afterwards attached, it would seem that the latter would have a right to claim compensation from the others. For '*a partition made according to the law*,' to which alone the authority quoted by the Śastri refers, presupposes an equal division of the family debts. (b) It seems not improbable that by "attached" is meant 'resumed,' that is reduced from 'Inâm' or rent-free land to 'khâlsât,' 'paying revenue,' to the entire exclusion of the former Inâmdâr if the land was held by an hereditary cultivator. In this case the same rule would apply.

Q. 5.—Certain brothers wrote a memorandum regarding their separation. Afterwards they remained together for a year and then divided their property. The question, therefore, is whether the separation should be considered to have taken place from the date of the memorandum, or from the date of the actual separation? and should expense incurred during the year be set to the account of the family, or should each man's expenses be laid upon him individually?

A.—The brothers should be considered united in interests so long as they take their meals together. The expense during the year should therefore be set to the account of the family. If any one should have expended any money on his own private account, it should be charged to him alone. The separation should be considered to have taken place from the date on which they actually divided the property and began to perform "Naivedya" (food-offering to gods) and "Vaiśvadeva" (the burnt-offering to fire) ceremonies separately.—*Sadr Adâlat, May* 21*st*, 1833.

AUTHORITY.—Vyav. May. p 89, l 8:—'Even when there is a total failure of common property, a partition may also be made by the mere declaration, "I am separate from thee." A partition may even be a mere mental distinction. This exposition clearly distinguishes

(a) Introd. § 4 F, Remark.

(b) *See* Introd. § 7 B. 1.

the various qualities of this [term]. (*a*) Borradaile, May. Chap. IV. Sec. 3, para. 2; Stokes, H. L. B. 47.

REMARKS.—1. The Śâstri's view seems to be, that the memorandum has no value, because it was not carried out.

2. But partition is primarily a mental act. If the brothers therefore agreed on a partition and drew up a document setting forth the division of their estate, this act constitutes a partition, and it is unnecessary to carry it out by a physical distribution of the property. They must be considered divided from the time at which the writing was signed. If afterwards, a year elapsed before the intentions declared in the writing were carried out, the expenses must be divided in due proportion, and be paid by each brother out of his share. (*b*) In many of the older cases separate possession was held essential to constitute a binding partition. (*c*) At Bombay it was held that a deed of partition must have been acted on (*d*) These cases show that the Śâstri's view has been extensively held, but *see* now *Appovier* v. *Rama Subba Aiyan et al.* (*e*) A partnership in receipts and expenditure sometimes follows a dissolution of the status of a united family. Steele, L. C. 214.

Q. 6.—One brother passed a Fârikhat to another, but it was not carried out for a long time. One of the brothers and his son died. The question is whether the widow of the deceased can get her husband's share as specified in the Fârikhat?

A.—Yes, she can.—*Tanna, October* 15*th*, 1858.

(*a*) The translation of the last lines ought to run thus :—'For partition is merely a particular kind of intention. The declaration "I am separate from thee" indicates this.'

(*b*) See Introd. § 4 D. 1, p. 681.

In England when two tenants in common agreed to a partition and acted on the agreement, but did not execute a deed, the devisees of one of them were held answerable for the costs of carrying out the partition under which the devise to them took effect. *In re Tann*, L. R. 7 Eq. Ca. 434.

(*c*) *Naggappa Nynair* v. *Mudundee Swora Nyair*, M. S. D. A. R. for 1853, p. 125; *Subba Naiken* v. *Tangaparoomal*, *ibid.* for 1859, p. 11; *Kuppammal* v. *Panchanadaiyan*, *ibid.* for 1859, p. 260.

(*d*) *Gokuldas* v. *Hurgovindas*, 3 S. D. A. R. 236.

(*e*) 11 M. I. A. 75. See above, p. 685.

AUTHORITIES.—(1) Vyav. May. p. 134, l. 4; (2) p. 136, l. 4.

REMARKS.—1. The Śâstri's authorities refer only to the right of a widow to inherit her '*separated*' husband's property.

2. For authorities *see* the preceding Question and Introd. § 4 D, pp. 680 ss. A suit for partition, however, conveys no right to the coparcener's widow, (*a*) and at Madras it has been ruled that even a decree, if not executed, will not have this effect. (*b*) Compare the Vyavasthâ at p. 175 of the report with the rule enunciated in *Rany Pudmavati* v. *B. Doolar Singh et al*, (*c*) and *Rewun Persad* v. *Musst. Radha Beeby*. (*d*)

Q. 7.—Three persons drew up a memorandum regarding the division of their family property. Each received his share of everything except the Vṛitti, which was left under the management of one person acting on behalf of all the co-sharers. Afterwards when the adopted grandson of a deceased co-sharer was on the point of death, the sharers framed a memorandum in triplicate, setting forth the division of the Vṛitti. The original memorandum was duly signed, and attested by the sharers, but before the duplicate and triplicate could be signed, the man on the point of death expired. Can his widow under such circumstances claim a share of the Vṛitti ?

A.—If a share of the Vṛitti has been assigned to the adopted grandson, his widow, who has no son, can claim it. If a share has not been assigned to the husband, the widow cannot claim it. It is for the Court to determine whether the incompleteness of the duplicate and triplicate of the memo-

(*a*) *Bhuggaji* v. *Bhaggawoo et al*, Sp. App. 691 of 1865.

(*b*) *Govinda Oodian* v. *Alamaloo*, M. S. D. A. R. for 1855, p. 157; *Babaji Parsharam* v. *Rámchandra Anant*, I. L. R. 4 Bom. 157, and as to a decree under appeal, *Sakharam Mahadev* v. *Hari Krishna*, I. L. R. 6 Bom. 113.

(*c*) 4 M. I. A. 259.

(*d*) 4 M. I. A. 137, and *see* the cases referred to above, and *Suraj Bunsee Koer* v. *Sheo Prasad*, L. R. 6 I. A. at p. 103, and *Chidambaram Chettiar* v. *Gauri Nachiar*, I. L. R. 2 Mad. 83, S. C., L. R. 6 I. A. 177.

A.—The Sâstra allows sons to take equal shares of their father's property, but there is nothing to prevent one of them from demanding the share of any particular portion of such property.—*Dharwar, January 28th*, 1848. (*a*)

AUTHORITY.—Mit. Vyav. f. 47, p. 2, l. 13.

REMARK.—The partial division may take place by consent, but the brother cannot insist on it. (*b*) The same principle was subsequently affirmed in *Ragvindrapa* v. *Soobapa.* (*c*)

Q. 2.—Certain members of a divided family of the Kuṇabî caste lived together again as a family united in interest, and held their ancestral estate in common. They afterwards separated leaving some property undivided in possession of one of them. After some time, the other members claimed a share of the undivided property. Can the exclusive enjoyment of the property by one member of the family be a bar to the claims of the other members?

A.—If the members of a divided family become united in interests and again separate themselves from each other, they are still entitled to a share of the common property; (*d*) even though it may, on their second separation, have remained in possession of one of them.

Ahmednuggur, July 19th, 1847.

AUTHORITIES.—(1) Mit. Vyav. f. 45, p. 1, l. 5; (2) f. 40, p. 1, l. 4; (3) f. 49, p. 1, l. 10; (4) Vyav. May. p. 143, l. 2; (5) p. 128, l. 1; (6) p. 128, l. 3; (7) p. 128, l. 5; (8) Manu, Chap. X. verse 105.

(*a*) A similar answer was received from *Sholapoor, September 28th*, 1849.

(*b*) See *Dadjee Deorao* v. *Wittul Deorao*, Bom. Sel. Ca. p. 175. A partial partition is obviously only an accommodation not strictly consistent with the principle by which members of a family must be either united or severed in their sacra, and the estate that accompanies them.

(*c*) S. A. No. 3948, 27th Sept. 1858. *See* also Introd. § 4 E, p. 698.

(*d*) *See* above, pp. 141, 143; Steele, L. C. 214.

REMARK.—As there are no particular provisions in the law-books regarding a partial division, it is impossible to prove the correctness of the Śâstri's view by any explicit passages. Still it appears to be founded on the reason of the law. (a)

Q. 3.—There are two claimants to a Vatan. One of them has had the management of it for a long time. Can the one who has not the management claim a share in the emoluments?

A.—All the descendants of the person who acquired the Vatan have a right to a share of it. There is nothing in the Śâstras which prevents a descendant from claiming his share, because he does not manage the affairs of the Vatan.

Ahmednuggur, March 1st, 1851.

AUTHORITIES.—(1) Vîramit. f. 175, p. 2, l. 6; (2) Mit. Vyav. f. 50; p. 1, l. 7; (3) Vyav. May. p 94, l. 3.

REMARK.—*See* Bom. Act III. of 1874, and the note below. (b)

(a) *See* Introd. § 4 E, pp 698 ss.

(b) The Śâstri regards the Vatan (service holding) merely as a private estate with a certain obligation attached to it as a whole, not affecting the rights of the coparceners *inter se.* For the Regulation law on the subject, *see* Reg. XVI. of 1827, Section 20, and the cases quoted under it in the Bombay Acts and Regulations. Different views have been held at different times as to the nature of this kind of property. The opinion of the Hon. Mountstuart Elphinstone appears, from some MS. notes collected by one of the Editors, to have been very nearly that of the Śâstri, and the estate is not resumable on a mere discontinuance of the service, see *Jagjivandas Javerdas* v. *Imdad Ali,* I. L. R. 6 Bom. 211, and the cases there referred to. The late Sadr Court of Bombay at one time held that the mortgage prior to 1827 of a Vatan was valid, but only for the life-time of the Vatandâr mortgagor, *Baee Rutton* v. *Mansooram,* Bom. S. D. A. R. for 1818, p. 93. By subsequent decisions it was ruled that mortgages prior to the passing of Reg. XVI. were not to be subjected to the rule there laid down, *Sukaram Govind et al* v. *Shreeneewas Row et al,* 2 Bom. S. D. A. R. 26; *Hureebhaee Soonderjee,* 2 *ibid.* 29; *Rachapa* v. *Amingaoda,* S. A. No. 307 of 1874, Bom. H. C. P. J. F. for 1875, p. 269; *Narayan Govind* v. *Sarjiapa,* R. A. No. 4 of 1874, *ibid.* for 1875, p. 99, wherein it was held that alienation prior to Reg. XVI. of 1827, coupled with long acquiesence, was good. After *Sukaram*

Q. 4.—A woman has brought an action against her brother-in-law for the recovery of her son's share of property. She urges that during the lifetime of her son, some of the family property was divided, but that it is for a share of the remainder that she now sues.

A.—She cannot claim any share, unless on the ground of some special agreement entered into by the parties when the division first took place.—*Dharwar, March 1st*, 1849.

AUTHORITY.—Vyav. May. p. 89, l. 6.

REMARK.—*See* Introd. § 4 E, Remark. The Śâstri, probably, means to say that the mother can claim her son's property only if an agreement to divide had been made during his life-time.

Govind et al, v. *Shrenecwas Row et al,* quoted above, it was held that a Vatan was permanently alienable, *Sobharam* v. *Sumbhooram*, 3 Bom. S. D. A. R. 242; *Jesing Bhace et al* v. *Baee Jeetawowoo, 2 ibid.* 131, except as regards the portion set aside under Act XI. Sec. 13, of 1843, for the office-holder, *Yeshwantraw* v. *Mulharrao, ibid.* 244. But in the end the doctrine adopted was that a sale was invalid even as to the vendor's life-interest, *Ramachander Nursew* v. *Krishnaji*, S. A. No. 2830, decided in 1852.

The Courts will distribute the surplus produce of a Vatan, though it cannot leave the family, *Jewajee* v. *Shamrow*, Morris, Part II. p. 110; *Mulkojee* v. *Balojee*, Morris, Part III p. 111. *See* now Bk. I. Chap. I. Sec. 2, Q. 5 note (*a*), p. 342, and the following cases :—*The Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A. 438; *Krishnarav* v. *Rang Rav et al*, 4 Bom. H. C. R. 1 A. C. J.; *The Government of Bombay* v. *Dámodhur Parmanandás et al*, 5 *ibid.* 203 A. C. J. The limitation of a Vatandâr's estate by Reg. XVI. of 1827, Sec. 20, is not extended by Bom. Act III. of 1874, see *Jagjivandás Javerdás* v. *Imdad Ali*, I. L. R. 6 Bom. 211. For the analogous case of Ghatvali estates in Bengal see *Raja Nilmony Sing* v. *Bakranath Sing*, L. R. 9 I. A. 104, and the cases there referred to.

A Vatan may be compared with a fief under the feudal law to a man and his heirs which " the ancestor and his heirs equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct or absolute dominion of the property," Co. Lit. 191 *a*, Butler's note, which absolute dominion however as opposed to the *dominium utile* belonged in England only to the Sovereign, Bl. Com. Vol. II. Chap. IV.

Q. 5.—*A*, a man of the Śûdra caste, separated himself from his brother *B*, but left the family Vatan undivided. A few years afterwards *A* died, leaving his widow *C* pregnant. Should *C* be considered as the heir of *A*, from the date of *A's* death until her delivery, and is she during this period competent to recover from her brother-in-law *B* her husband *A's* share of the Vatan? If *C* be delivered of a son, will *C* and her son be entitled to separate shares of the Vatan?

A.—On the death of a man who has separated himself from his family, his son or adopted son is his heir and is entitled to inherit his property. If he leave no son, his widow, daughter, and other relatives in the order of precedence laid down in the Sâstras, inherit his property. If a brother who has not separated from the family die, leaving a pregnant widow, the division of the family property should be deferred till she be delivered. If a son be born, though his father is dead, he should be allowed the share to which his father would have been entitled. Though a grandson be supported from the proceeds of his grandfather's property, his claim to recover a share from his uncle, or his uncle's son, is in no way prejudiced. If at the time of the division of the family any property may have been concealed, it should be divided whenever it is discovered. In the case stated in the question, *C*, while pregnant, is *A's* heir. If she bring forth a son he becomes his father's heir, and as such is entitled to recover his father's share of all the moveable and immoveable property of the family. From the date of her son's birth, *C* is no longer entitled to claim *A's* share of the property.—*Tanna, June 26th,* 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 51, p. 1, l. 1; (3) f. 50, p. 1, l. 1; (4) f. 52, p. 1, l. 13; (5) Vyav. May. p. 96, l. 3.

REMARK.—*See* the preceding cases, and Introd. § 4 B. Regarding the rule of deferring a partition until the delivery of a coparcener's pregnant widow, *see* Introd. § 4 B. 1, p. 657.

CHAPTER IV.

EVIDENCE OF PARTITION.

Q. 1.—Can the separation of a family be held to have taken place when there is no documentary evidence to prove it?

A.—A Fârikhat or written instrument attested by the members of the family is the necessary proof of separation.

Ahmednuggur, 1845.

AUTHORITY.—Vyav. May. p. 132, l. 8:—

"Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence." (Borradaile, Mayûkha, Chap. IV. Sec. 7, para. 34; Stokes, H. L. B. 82.

REMARK.—A 'Fârikhat' is not necessary in order to prove a division. (*a*) The doctrine enunciated by the Śâstri was adopted by the Sadr Court in some of the older cases, as in *Oomedchund* v. *Gungadhur.* (*b*) But in *Sukaram* v. *Ramdas,* (*c*) and *Kaseeshet et al* v. *Nagshet,* (*d*) this rule was abandoned, and now it is clear that partition may be proved like any other fact. (*e*)

Q. 2.—A man had two wives. The elder has one son, and the younger has four sons. The man divided his property into five shares, assigning one to each of his sons. The son of the elder wife executed a writing to the other four to the effect that he would never interfere in any

(*a*) According to the customary law a farikhat or deed of partition is thought indispensable in a few castes. In others it is not used. But in a vast majority it is general though its place may be supplied by the testimony of eye-witnesses of an actual physical distribution of the property. Steele, L. C. p. 402. *See* above, Bk. II. Introd. Sec. 4 D, p. 681. As to the common form of a deed of partition, *see* 2 Str. H. L. 389.

(*b*) 3 S. D. A. R. 108.

(*c*) 1 *ibid.* 22.

(*d*) 4 *ibid.* 100.

(*e*) *See* Coleb. Dig. Bk. V. Chap. VI. T. 381, 384; Bk. II. Introd. § 4 D. 1, p. 681; and Bk. I. Chap. II. Sec. 6A, Q. 31, p. 409.

matter concerning them, and that they were at liberty to settle among themselves any questions respecting their affairs. After this one of the four brothers died without issue. Subsequently the son of the elder widow, having received some produce of a field, offered three-fifths to the three surviving brothers. They assert their right to four-fifths. How is this question to be decided ?

A.—The three full brothers of the deceased are his heirs. The half-brother cannot claim to be his heir. It will rest with the Court to consider the weight and effect of the writing passed by the half-brother.

Dharwar, April 24th, 1854.

AUTHORITY.—Vyav. May. p. 134, l. 4.

REMARK —The facts of the case seem to be these :—The father of the five brothers had effected a division, which, in part at least, was a so-called 'phalavibhâga' or division of produce The eldest brother, who appears to have been the manager of the estate, left undivided *in specie,* had given to his younger brothers a document confirming the division. Afterwards, on the death of one of the younger brothers, he seems to have disputed the division, and appropriated that share of the produce of the undivided property which would have gone to the deceased half-brother. Under these circumstances the division would be proved by the document and by the receipt of separate shares by the brothers. As the brothers were divided, the full brothers inherit before the half-brother, however the case might have been had there been no division. *See* Bk. I. Introd. 'COPARCENERS,' p 73.

If the brothers are to be considered as reunited, still the share of the one deceased would descend to his brother of the full blood. In no case could the eldest be entitled to two-fifths without a special agreement. *See* above, pp. 141, 763 ss; Steele, L. C. 56.

Q. 3.—Two uterine brothers prepare and take their meals separately. Is this practice a sufficient evidence of the separation ?

A.—When two brothers perform the śrâddha of their father separately, and when they have separate trade and

separate means of maintenance, they may be considered separated, and in this case no documentary evidence is necessary. (*a*) A verbal declaration of separation is also sufficient evidence in case the brothers have no property which they can divide.—*Surat, September 4th,* 1845.

AUTHORITY.—* Vyav. May. p. 133, l. 2 :—

" Nârada declares also other signs of partition : Separated, but not unseparated, brethren, may reciprocally bear testimony, become sureties, bestow gifts, and accept presents. Gift and acceptance, cattle and grain, houses, land, and attendants, must be considered as distinct among separated brethren, as also the rules of gift, income, and expenditure. Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence." (Borradaile, May Chap IV. Sec. 7, para 34; Stokes, H. L. B. 82.)

REMARK.—*See* also Introd. § 4 D. 2, p 688.

Q. 4—What are the signs of the separation of a father and a son? A father and a son of his younger wife live in one and the same house. The son of the elder wife has been living in a separate house for about 20 years. The property of the father has not been divided, nor has the elder wife's son received any share. He was in the habit of performing the sacrifice called 'Vaiśvadeva' (*b*) on his own account. Should he be considered a separated member of the family? and can any man whose food is cooked separately perform the ceremony, or is it a sign of separation. Since the death of the father the elder son has joined the family, and assuming the guardianship of his half-brothers, has got them married. Can the half-brothers claim a share of the property acquired by the elder brother during the time he was away from the family. Can the elder brother claim a share of the ancestral property?

(*a*) *See* 2 Str. H. L. 346; Steele, L. C. 56, 213.

(*b*) This ceremony is performed for the sanctification of food before dinner. *See* Steele, L. C. 56.

A.—Those members of a family, who individually perform the ceremonies of 'Vaiśvadeva' and 'Kuladharma,' (*a*) and have signed a Fârikhat, may be considered separated. It does not appear from the Śâstras that the elder son of a person is obliged to perform the 'Vaiśvadeva' on his own account, although his father and half-brother are united in interests, and he himself lives and cooks his food separately in the same town without receiving the share of his ancestral property. A person may, however, perform the ceremony by the permission of his father. The Śâstra authorises the elder son of a man to take possession of the ancestral property, and protect his younger brother and mother. A son, who has not made use of his father's means and who has declared himself separate and has acquired property through his learning, enterprize, &c., is not under the obligation of allowing shares of his property to his brothers. They can claim shares of the ancestral property only.

Ahmednuggur, April 13th, 1847.

AUTHORITIES.—(1) Vyav. May p. 129, l 2; (2) p 129, l. 4; (3) p. 133, l. 2; (4) Mit. Vyav. f. 25, p. 1, l. 9; (5) Mit Vyav f 48, p. 2, l. 5:—

"That which had been acquired by the coparcener himself without any detriment to the goods of his father or mother; or which has been received by him from a friend or obtained by marriage, shall not appertain to the co-heirs of brethren" (Colebrooke, Mit. Chap. I. Sec. 4, para. 2; Stokes, H L. B. 384.)

REMARKS—1. For a full enumeration of the signs of a partition, *see* Introd. § 4 D. 2, pp. 687, &c.

2. The Śâstri is right in not considering the separate performance of the 'Vaiśvadeva' as a certain sign of 'partition,' though it is enumerated in the Smṛitis among these signs. The general custom is in the present day, that even undivided coparceners, who take their meals separately, perform this ceremony, at least once every day, each for himself, because it is considered to purify the food. We subjoin a passage on this point from the Dharmasindhu, f. 90, p. 2, l. 3 and 6 (Bombay lith. ed):—

(*a*) The ceremonial worship of the tutelary deity. Steele, L. C. *loc. cit.*

'Rice mixed with clarified butter should be offered in the sacred domestic fire, or in a common fire. The oblation (at the Vaiśvadeva) should be made in that fire, with which the food is cooked. . . . . Bhaṭṭojidîkshita declares that, if members of an undivided family prepare their food separately, the Vaiśvadeva-offering may be performed separately (in each household) or not.' (*a*)

Q. 5.—A man had three sons. They used to live and take their meals separately in a house which was their ancestral property. They all subsequently died. A son of one of them claims a moiety of the house from the son of the other. The defendant in this case takes no objection to the equal division of the house. The widow of the third brother has joined the plaintiff. The house, which is the ancestral acquisition of the family, appears to be undivided property. Should the above-mentioned claimants be allowed under these circumstances equal or different shares in it?

A.—Preparing food and taking meals separately by brothers is considered by the Śâstras to be a mark of separation. According to this rule the three brothers are duly separated. Each of them has an equal share in the property. The widow of one of them should be allowed one-third of the house as the share of her husband.

Surat, November 29th, 1853.

AUTHORITY.—Vîramit Dâyabhâga, f. 223, p. 1, l. 12.

REMARKS.—1. 'Preparing food and taking meals separately' is by itself not a sufficient proof of separation. (*b*)

(*a*) *See* the remarks of Prof. Goldstücker (On the Deficiencies, &c., p. 34 ss) which are instructive, though captious. In the passage "amongst members of a united family, when they cook their food in common, a separate performance of the *Vaiśvadeva* is not allowed," read, "is not necessary." The passages at pages 39 and 42 show the correctness of the view presented in the text.

(*b*) It is an indication when the relatives occupy the same house, 2 Str. H. L. 397. Joint performance of ceremonies implies union of interests, 2 Str. H. L. 393. *See* Bk. II. Introd. § 4 D. 2 *a*, p. 687.

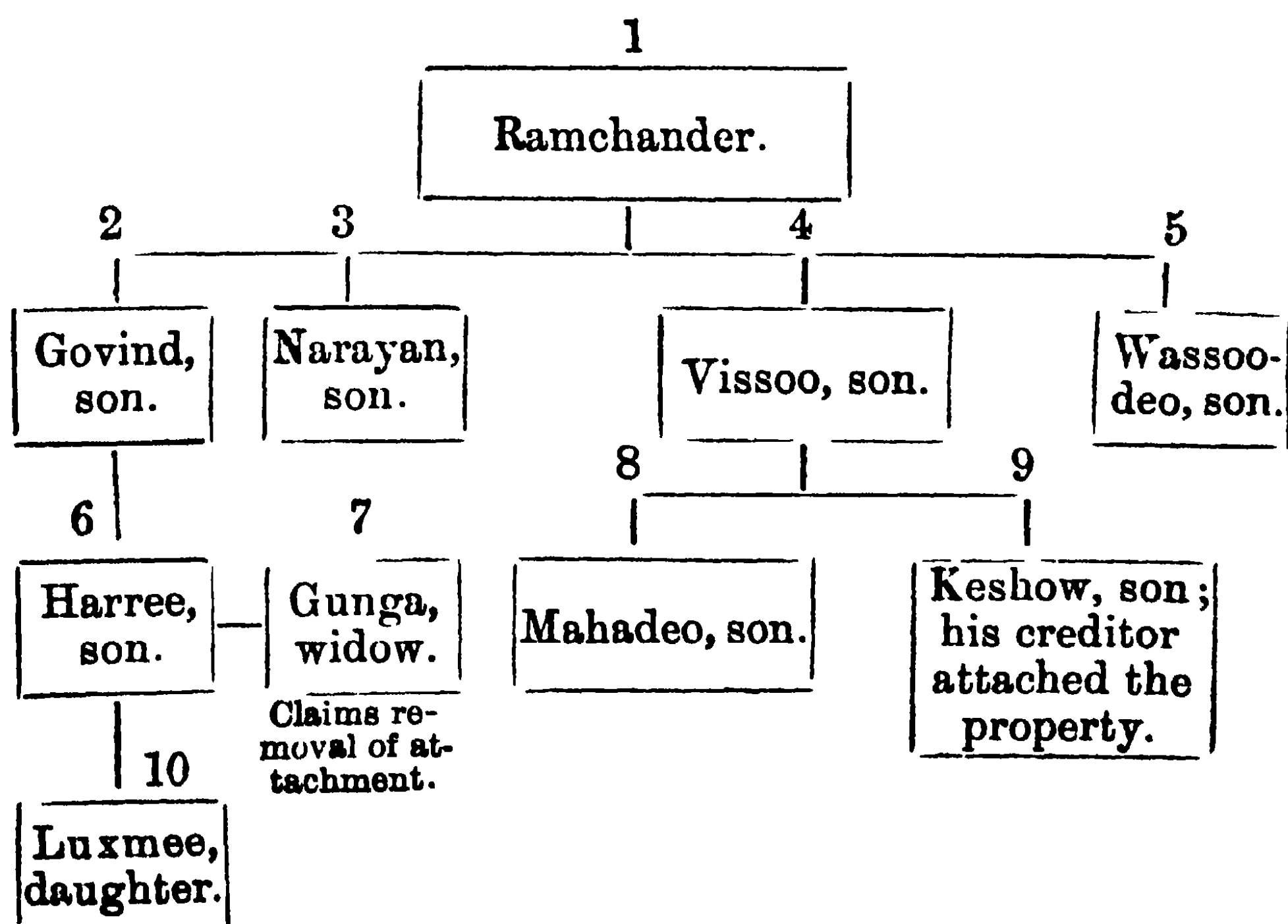
2. If the ancestral house was undivided, as stated in the question, the widow must be allowed the use of it and may establish a lien on it for her maintenance, but can in no case inherit it. (*a*)

Q. 6.—Four uterine brothers lived separately in a house belonging to their father. They had neither divided their property nor passed deeds of separation to each other. They, however, used to take their meals separately. Afterwards all of them died. The eldest of them has left a widowed daughter-in-law. She has a maiden daughter. Two sons of her father-in-law's brother are alive. (*b*) A creditor of one of them has attached the whole house. The widowed daughter-in-law has applied for the removal of the attachment from that portion of the house which constitutes her husband's share. The question therefore is, whether, according to the Śâstras, and by reason of the four brothers having lived separately, their property, excepting the house in dispute, should be considered as divided, and whether the daughter-in-law can claim a share of it?

(*a*) *See* above, p. 259; Bk. II. Introd, § 4 E. p. 698, and pp. 252, 753; Chap. II. Sec. 2, Q. 4, p. 826.

(*b*) The following genealogical table will be found to illustrate the question:—

1 Ramchander.

- 2 Govind, son.
  - 6 Harree, son. — 7 Gunga, widow. Claims removal of attachment.
    - 10 Luxmee, daughter.
- 3 Narayan, son.
- 4 Vissoo, son.
  - 8 Mahadeo, son.
  - 9 Keshow, son; his creditor attached the property.
- 5 Wassoodeo, son.

A.—Although there is no documentary evidence to show that the brothers were separate, yet, as their places of living, meals, and business, were separate, they should be considered separated. Their property, including the house in which they lived, must also be considered divided. When any one, after the division of the property in which he has a share, is dead, his widow has a right to that share.

Surat, December 16th, 1847.

AUTHORITIES.—(1) Vyav. May. p. 129, l. 3; (2) p. 134, l. 8; (3) Vyav. May. p. 129, l. 2:—

"Yâjñavalkya states the modes of decision in case of denial of partition made by any one: 'When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof or by house or field' (separately possessed)." Borradaile, May. Chap. IV. Sec. 7, para. 27; Stokes, H. L. B. 80. (*a*)

(4) Vyav. May. p. 132, l. 4:—

"Bṛihaspati:—They, who have their income, expenditure, and wealth distinct, and have mutual transactions of money-lending and traffic, are undoubtedly separate." May Chap. IV. Sec. 7, p 34; Stokes, H. L. B. 82.

(5) Vyav. May. p. 134, l. 4:—

"Yâjñavalkya thus relates the order of succession to the wealth of one (dying) separated and not reunited: The wife and the daughters also; both parents; brothers likewise and their sons; gentiles, cognates, a pupil and a fellow-student; on failure of the first among these, the next in order is indeed heir." (Borradaile, May. Chap. IV. Sec. 8, para. 1; Stokes, H. L B. 83).

REMARK.—The question states nothing about the brothers having carried on business separately. If the Śâstri is right as to this fact, his conclusions also would stand. (*b*) But the dining separately does not alone prove that the brothers were divided. If they were undivided the widow is entitled to residence and maintenance as a charge on the property. (*c*)

(*a*) Nârada, Pt. II. Chap. XIII. Sl. 36, to the same effect, is quoted by the Mit. Chap. II. Sec. 12, para. 3; Stokes, H. L. B. 467.

(*b*) Bk. I. Chap. II. § 6A, Q. 31, *supra*, p. 409; 2 Str. H. L. 387, 397.

(*c*) *Râmchandra Dikshit* v. *Sâvitribâi*, 4 Bom. H. C. R. 73 A. C. J.

When the house of one member of the family was burnt down, and he then went to live in the same house with another, this was, it was held, to be referred rather to an exercise of a common right than an acceptance of mere hospitality, and the prior separate residence was not deemed sufficient proof of partition between the two. (*g*) But *see* also Introd. § 4 D. 2, p. 687 ss.

Q. 7.—Two brothers have been separate for the last 15 years, but they did not pass a formal deed of separation. One of them has now filed a suit for a share of the land held on Mirâs tenure. The other has answered that there is some debt, and that the property should be divided along with the debt. How should this be decided?

A.—When a formal deed of separation is passed in the presence of the kinsmen of the parties concerned, and when each member is put in possession of his share of houses, lands, and other property, the family should be considered as separated. When the members merely live and take their dinner in separate places in the same village, they cannot be considered separated. The property as well as the debt should therefore be equally divided in the case referred to in the question.—*Ahmednuggur, April 28th,* 1856.

AUTHORITY.—Vyav. May p 129, l. 2 (*see* the preceding Question, Auth. 1).

Q. 8.—The parties are not able to produce a deed of separation. It is, however, proved that the parties separated about 35 years ago, and that the deed of separation was then executed. Can the separation be considered established on other grounds than the production of the deed?

A.—As the evidence has proved that the separation took place, and that the parties concerned are in possession of their proper shares, the separation may be considered established. The production of the deed would have only strengthened the proof.—*Ahmednuggur, July 2nd,* 1847.

(*g*) *Sheshapa et al* v *Igapa et al*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1877, p. 37.

AUTHORITIES.—(1) Vyav. May. p, 129, l. 2. *see* Bk. II. Chap. IV. Q. 6, Auth. 3; (2) Vyav. May. p. 133, l. 2 (see *ibid.* Q. 3).

REMARKS.—*See* particularly Introd. § 4 D. 1, p. 680. In the case of *Bulakee Lall et al* v. *Musst. Indurputtee Kowur et al,* (*a*) it is laid down that any act or declaration showing an unequivocal intention on the part of a shareholder to hold and enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes, when accepted, a complete severance or partition.

(*a*) 3 C. W. R. 41 C. R.

BOOK III.

ADOPTION.

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SECTION I.—SOURCES OF THE LAW.

In their opinions on the cases laid before them the Śâstris have in many instances referred to Adoption " made with the ceremonies of the Vedas and the Smṛitis." No precepts as to such ceremonies are to be found in the Vedic literature, and even in the Smṛitis the recognition of the 'son by gift' is but a part of a scheme in which he holds only a comparatively low place amongst the dozen varieties of substitutionary sons approved by those writings. They present few or no traces of the developed and elaborate system which has come down to our generation enriched and complicated by the inventive suggestions and the subtle controversies of a long series of lawyers, who were at the same time scholastics having unbounded confidence in the methods of a highly technical philosophy. (*a*) The fundamental notion indeed on which the institution was afterwards reared is found already in full possession of the Brâhmanical mind in the Vedic period. The manes were to be worshipped; the family was to be continued; the householder was to esteem his own being complete only when his home was furnished with a wife and son. (*b*) But other means than adoption supply the defects of nature: some further stages on the way to refinement have still to be passed before those means become discredited. In the meantime Adoption is but slightly glanced at. Its fitness for the needs of a people of the peculiar mental and spiritual character of the Hindûs was not at first perceived. Here therefore, even more than in other departments of the law, the Veda has, for the practical lawyer of the present day, but little importance as a direct source of the law. (*c*) For a complete history of the 'origins' of the

(*a*) For the methods of interpretation and development brought to bear on the Vedas, *see* Whitney's Essays, 1st Series, pp. 108 ss.

(*b*) *See* Whitney's Essays, 1st Ser. pp. 50, 59 ; comp. Manu IX. 45.

(*c*) *See* above, p. 56.

subject the requisite researches have still to be made, the needful competence has still perhaps to be perfected. The modern edifice, though bearing every where the impress of the primitive religion and its early modifications, is planned in the main on ideas of a later time, the growth and variances of which can be gathered from the existing literature with at least an approach to confidence. (*a*)

In the long interval between the Veda and the Smṛitis more had been done towards systematizing than towards refining the theory of paternal and filial relations. The importance of maintaining the family is at the close of this period as strongly recognized as ever; the relations of the living to the dead had, through long meditation, become more vividly conceived than before. But the grossness of a barbarous time is not as yet cast off, nor have the ideas of the people settled down to any final appreciation of the several recognized modes of replenishing the family. Gautama, Baudhâyana and Vasishṭha, Manu and Yâjñavalkya, Hârîta, Vishṇu and Nârada present their several lists. The order in which they rank the different substitutionary sons (*b*) will be discussed hereafter. That a substituted son is indispensable, failing one begotten, the ṛishis agree, with the exception of Âpastamba. (*c*) In him we have an echo perhaps of the then already ancient objection to the gift or acceptance of a child, an objection which later commentators found no great difficulty by means of distinctions and particular applications in explaining away. (*d*)

Another long break in the record follows the period of the Smṛitis. That a considerable development of the Hindû mind and character took place in the interval is manifest from the works in other departments which have come down to us. Poetry and philosophy awakened higher moral

(*a*) Comp. Whitney, *op. cit.* pp. 62, 70.

(*b*) *See* Coleb. Dig. Bk. V. Chap. IV.

(*c*) Transl. p. 131.

(*d*) Comp. Datt. Mim. Sec. I. 36—47.

sensibilities, and the myths of the earlier times became enveloped in a mist of sacred association which softened their repulsive features and prevented their exercising an injurious influence. (*a*) The uncertain strivings of the nobler minds towards refinement and delicacy in the relations of the sexes and the constitution of the family were gradually in some measure realized by the Brâhmanical class, and those in close communication with them, while neither at any time quite lost such a hold of the primitive beliefs and conceptions of duty as served to bind the slow changes of their institutions together in historical continuity. When we come into clear light again we find a marked advance in purity of sentiment. Adoption has in a great measure supplanted the grosser institutions that once competed with it on more than equal terms. The archaic formulas are still preserved, but they have been subtly emptied of their former contents, or have become themes for mere academic disquisitions, which show the learning of the commentators and their tenderness for the sacred writings, but stand apart in a great measure from actual practice and the living law. The far-fetched explanations of the hard sayings which could not be set aside (*b*) show at once the reverential spirit of the commentators, and their resolution to mould even intractable materials to the uses and cravings of a society always in movement, and for centuries in a general movement forward, though not always on lines which led to the best conceivable results, or which entirely commend themselves to European sympathies formed under wholly different influences.

(*a*) Comp. for the earlier period Gough's Phil. of the Upanishads, p. 17.

(*b*) On the reconciliation of discrepancies in the sacred witings and the application of reason to establish harmony, reference may be made to *Bhau Nanaji* v. *Sundrábdi*, 11 Bom. H. C. R. at pp. 265 ss. *See* too the Datt. Mim. Sec. II. 102, where reasoning, it is said, is to be applied to draw out an obvious inferential sense rather than separate revelations assumed for rules resting on one and the same principle.

From the time that Adoption comes upon the scene as an established section of the Hindû jural system, many authors have dealt with it either as the subject of separate treatises or along with the other leading topics of the law. (*a*) Besides the Vyav. May., which is the most frequently quoted, the Bombay Śâstris have referred to the Vîramitrodaya, the Saṁskâra Gaṇapati, to the "Saṁskâr" and "Datta" Kaustubha, to the Nirṇayasindhu and Dharmasindhu, the Daṭṭaka Darpaṇa and the Dvaita Nirṇaya. (*b*) The doctrines drawn from these authorities are supported by citations from Manu and the other Smṛitis, as well as from the Mitâksharâ, and the Dâya Bhâga of Jîmûta Vâhana. These last are but infrequent. The Daṭṭaka Mîmâṅsâ and Daṭṭaka Chandrikâ are hardly referred to at all. The opinions enunciated agree for the most part with the rules laid down in these treatises, but the remark of Rao Saheb V. N. Mandlik (*c*) seems to be substantially correct, that till quite recent years they were but little known and relied on in Western India. (*d*) It does not follow however that they are not valuable guides to the law. Though the law of Adoption has, in historical fact, grown up by a process of gradual adaptation, yet the Hindû commentators do not, any more than the English judges, ever set themselves up as makers of the law. They claim to be expositors, and if one of them developes principles in a way more consonant to the general ethical and jural system than another he naturally obtains the preference. (*e*) The congruousness of his doctrines with the whole mass of received notions is recognized, and they are re-

(*a*) Many of these works are preserved amongst the learned in MS.

(*b*) The one intended is that of Shankara Bhaṭṭa, father of Nilkaṇṭha, author of the Mayûkha.

(*c*) Vyav. May. Introd. lxxii.

(*d*) That the Rao Saheb is a little too sweeping in his assertion may be seen by a reference to the opinions of the Poona Śâstris in *Haebutrao's* case, 2 Borr. R. at pp. 104, 105.

(*e*) *See* Coleb. Dig. Bk. II. Chap. IV. T. 15 Com.; T. 17; Bk. V. T. 57, 424 Com.

ceived into the legal consciousness of the people as rules which, from their fitness, must be followed. (*a*) This fitness implies a due agreement with the traditions that have descended in slowly modified interpretations from the Vedic era, and forms a proper ground on Hindû principles for the acceptance into the common law of the particular phases of doctrine which come thus recommended. (*b*) This is more especially so if they are set forth with a clearness and point which makes them readily intelligible. It may seem that the Daṭṭaka Mîmâñsâ and Daṭṭaka Chandrikâ have not any very strong claims on these grounds, but excellence is essentially comparative, and very high authorities have agreed in assigning to the Daṭṭaka Mîmâñsâ the first place amongst the treatises on Adoption. Colebrooke says (*c*) that "the Daṭṭaka Mîmâñsâ is no doubt the best treatise on Hindu Adoption." By this Sutherland was led to translate it: "The Daṭṭaka Mîmâñsâ," he says (*d*) "is the most celebrated work extant on the Hindû law of Adoption." Of the Daṭṭaka Chandrikâ he says, "it is a work of authority." (*e*) In assigning it to Devâṇḍa Bhaṭṭa as its author he may probably have been mistaken, (*f*) but this does not affect his judgment as to its popular reception as a guide to the law. Sir M. Westropp, C. J., says of the Daṭṭaka Mîmâñsâ that "though not quite invariably followed [it] is generally of high authority in this Presidency" (Bombay). (*g*) In Bengal the authority of both works stands still higher. It was said by Mitter, J., that "The Daṭṭaka Chandrikâ and the Daṭṭaka Mîmâñsâ are undoubtedly entitled to be considered, and have always been considered, the highest authorities on the

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(*a*) Comp. Meyer, Inst Jud. Tom. V. p 7.

(*b*) See *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 267.

(*c*) 2 Str. H. L. 133.

(*d*) Preface.

(*e*) *Ib.*

(*f*) *See* Rao Saheb V. N. Mandlik, *loc. cit.*

(*g*) In *Gopal N. Safray* v. *Hanmant G. Safray*, I. L. R. 3 Bom. at p. 277.

subject of Adoption." (a) But that their influence is not thus confined is plain from the description given by Sir W. Macnaghten, cited by the Privy Council in *The Collector of Madura's* case: (b) "Again of the Daṭṭaka Mîmâñsâ of Naṇḍa Paṇḍita, and the Daṭṭaka Chandrikâ of Devâṇḍa Bhaṭṭa, two treatises on the particular subject of Adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares."

As supplementary to the Mitâksharâ and the Mayûkha, then, these may fairly be regarded as the principal authorities. The others referred to, though in some instances of importance, are not only less accessible, but on the whole less valuable when got at, and less suited to bringing about a general harmony of doctrines and decisions on a subject on which it is specially desirable that the law should be uniform and widely known. Still usage, the ultimate test, has in some instances decisively rejected the doctrines of these two works, as for instance in allowing adoption by a widow without express authority from her husband, (c) while Naṇḍa Paṇḍita insists that Vasishṭha's text requiring the husband's assent prevents any adoption at all after his death. The Saṃskâra Kaustubha (d) says that the assent of kinsmen cannot properly be withheld, and therefore the widow, who is competent and bound to perform this service for her husband, may act without their concurrence. The Sâstris in *Thukoo Baee Bhide* v. *Rama Baee Bhide* (e) deduced a like competence from the injunction of the Mitâksharâ, "a woman must be restrained only from unnecessary or useless acts," and declared that the widow could adopt even against

(a) In *Rajendro Narain Lahoree* v. *Saroda Soondaree Dabee*, 15 C. W. R. 548.

(b) 12 M. I. A. at p. 437.

(c) See *Haebutrao Mankur's* case, 2 Bom. at pp. 104, 105.

(d) As to the authority of this work, *see* 2 Borr. R. *loc. cit.*

(e) 2 Borr. R. 488, 499.

the wishes of her husband's kinsmen. In a previous case(*a*) the Śâstris had quoted the Mayûkha to prove that the widow might indeed adopt without an express authority from her husband, but after "obtaining the sanction of the kinsmen and informing the ruling authorities." This they said "corresponds with the custom of the country." Yet should the widow have actually adopted a son with due ceremonies, such an adoption conformable to the Vedas could not "be set aside should the person opposing it be ever so near of kin." The Courts, as will be seen, have steered a middle course amongst the conflicting authorities. That they should have had to do so implies that none can be received as absolutely supreme.

In the present day it does not seem likely that the fountain heads of the law will be much drawn on for new principles in the Law of Adoption. They are indeed too meagre to afford such principles save through an elaborate process of constructive inference. To this they have been subjected by the Hindû writers for many centuries, and the rules deduced by these writers have in their turn been tried and sifted by express or tacit reference to the usages and the peculiarities of Hindû society, until those best suited to its needs have been ascertained and appropriated. The Smṛitis come nearer than the Veda to modern practice, but the most important authorities are the writers, such as have been referred to, whose expositions have partly embodied and partly fashioned the customary law. In the great case of *The Collector of Madura* (*b*) the chief authorities on the law touching a widow's power to adopt had been collected under the four heads of (1) Original Sanskrit texts, (2) Responses of Śâstris, (3) Opinions of European writers, and (4) Decisions of the Courts. The judgments, both in the first instance and in appeal, proceeded almost entirely on the third and the fourth

(*a*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*. 1 Borr. R. 202, 214.

(*b*) 12 M. I. A. 397, 411.

classes of authorities, and of the first the Judicial Committee speak as "a catena of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the judges of the High Court in declining to allow any weight to these," while accepting those recognized by the chief European writers on Hindû law as of unquestionable authority in the South of India, where the case under appeal had arisen.

To the opinions of the Śâstris, which the High Court had denounced as having "polluted the administration of Hindû law," (*a*) their Lordships, as already observed, (*b*) attach considerable importance. Those opinions, they say, "which are consistent with [translated works of authority] should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country." (*c*)

In dealing with authorities the analogy of the rules accepted by kindred schools may greatly strengthen one of two or more inconsistent doctrines propounded by rival authors. (*d*) All rely on the same ancient texts, and the waves of philosophical or moral influence which have mould-

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(*a*) In *Collector of Madura* v. *Anandayi*, 2 Mad. H. C. R. at p. 223.

(*b*) Above, p. 2.

(*c*) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. at p. 438, 439. The Śâstris vacillated occasionally in the opinions they delivered. On points of difficulty they naturally differed. When one considers the cobweb structure of the Hindû law laboriously spun out of a primitive theology by means of a philosophy having but little respect for mere practice, it was impossible that there should not be variances of opinion. One view was in itself as reasonable in many cases as the other. In some instances the Śâstris seem to have gone wholly wrong. The same may be said of jurists and judges everywhere. A reading of the Śâstris' responses, as wide as that on which the present work is founded, would convince any unprejudiced student that as Law Officers of the Courts these learned men performed their duties, save in very rare instances, with integrity as well as intelligence.

(*d*) *Ibid.*

ed the derived notions in one part of India have almost of necessity extended their effect to the neighbouring regions, aided in the case of the learned by their possession of a common language. Through the medium of Saṃskṛit, ideas having in themselves a fitness for wide reception have been capable at all times of diffusion with something like the same striking celerity which obtained through the use of Latin in the Europe of four and five centuries ago.

The tendency of usage to conform to the received scripture standards has been noticed in the first part of this work. (*a*) Hindû theory justifies variances from the normal rule of conduct only by a supposition of some lost revelation (*b*) to which they may be referred, except in cases purposely left to individual discretion, (*c*) and the Śâstris assert the superiorty of the Vedas to mere custom, (*d*) but when the precept is not decisive they allow custom to replace it. (*e*) The Charters of the High Courts and the Regulations of the Legislature give the next place in authority after the Statute law to usage, and however in learned speculation the sacred texts may be exalted above mere human practice there can be no doubt that the Hindû lawyers had arrived substantially at the same conclusion that the British Government has defined. The general force of custom as law is repeatedly asserted by Manu, (*f*) as by Kâtyâyana, Yâjña-

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(*a*) *See* above, pp. 9, 425, 426 As to the determination of caste rules, *see* Sec. II. below.

(*b*) *See* 2 Muir's Sanskṛit Texts, 165, and references below.

(*c*) Manu II. 12, 18; Gaut. XI. 20.

(*d*) 2 Borr. 488; *see* M. Müller, H. A. S. Lit. p. 53; Muir's Sanskṛit Texts, Vol. III. pp. 179, 181; Coleb. Dig. Bk. I. T. 50 Comm.; Datt. Mîm. Sec. I. paras. 10, 11.

(*e*) Âpastamba, Transl. pp. 15, 55. At p. 47 is a caution against inferring the former existence of a Vedic passage from a usage which can be accounted for on merely utilitarian grounds, and a caution against following a usage with no higher justification.

(*f*) I. 108, 110; II. 12; IV. 178; VII. 203; VIII. 41, 42.

valkya, and the other great Ṛishis. (*a*) The Mitâksharâ allows that custom has abolished Manu's rules for specific deductions and unequal shares in partition. (*b*) The Vyavahâra Mayûkha declares that the very practice given by Gautama as an example of one that usage could not establish, the marriage of a maternal uncle's daughter, is sanctioned by custom in the Dekhan. (*c*) Macnaghten instances the Kshetraja as a legal subsidiary son still recognized by the local law of Orissa. (*d*) Mitramiśra, following the Mitâksharâ, says the conflicting texts respecting subsidiary sons are to be reconciled by referring them to different local customs. (*e*) On this principle the Sâstri, in a case amongst the Bhatele caste, declared that by the caste custom an adoption could not be allowed while male kinsmen survived to continue the family. (*f*) This agrees with the answers preserved in Borradaile's collection, and shows that custom well established is practically supreme. In the particular instance, which is not a solitary one, it may well be that the custom embodies a rule against adoption, which once existed in some sacred writings as Âpastamba indicates, but has faded away in the transcriptions of later centuries.

The importance of custom as a source and standard of the law is specially great in the case of adoption, because this being of comparatively modern development the Vedic texts, written without respect to it, admit of manipulation very much according to the desires of the interpreters. The Smṛitis even are far from regarding adoption in the light in which it is now viewed. Thus, though the Śruti and Smṛiti

(*a*) *See* the quotations in *Rawut Urjun* v. *Sing Rawut Ghunsiam Sing*, 5 M. I. A. 180.

(*b*) Mit. Chap. I. Sec. 3, para. 4.

(*c*) Vyav. May. Chap. I. Sec. 1, para 13.

(*d*) Macn. H. L. 102.

(*e*) Vîram. Transl. p. 127; Macn. H. L. 188.

(*f*) MS. 405, Surat, 14th June 1847.

are to the pious Hindû above all reasoning, (*a*) and a rationalist ranks as an atheist, (*b*) yet Vijñâneśvara, who raises the sacred code above all rules of ethics, has still to admit an adjustment by reference to the general and particular and other modes of interpretation, (*c*) and custom and approved usage (*d*) govern the received construction of the texts in proportion as these are in themselves indecisive and incapable of direct application. (*e*) This does not exclude a comparison of the relative weight of those who pronounce on the customary law. Superior knowledge is to be recognized in some men, of local usages and of tradition (*f*); they in fact are the depositaries of custom, as it is gradually organized, (*g*) and reproduce it in its living forms. (*h*) It was a consciousness of this which moved the Bombay Government of the early part of the present century to set on foot the inquiries

(*a*) Manu II. 10; comp. *ib.* XII. 105.

(*b*) Manu II. 11; *see* Smṛiti Chandr. Chap. III. para. 21; Manu XII. 106.

(*c*) *See* Yajñ II. 21; Vyav. May. Chap. I. pl. 112; Coleb. Dig. Bk. II. Chap. IV. T. 15 Com.; Bk. V. T. 332 Com; Comp. Goldstücker, *op. cit.* p. 2; 2 Muir's Sanskṛit Texts, 169, 177, 200.

(*d*) Judicial Committee in *Bhya Ram Singh* v. *Bhaya Ugur Singh*, 13 M. I. A. 390.

(*e*) Vijñ. in Roer and Montriou's Yâjñ. p. 8; Manu I. 110; IV. 155. He goes so far as to say that precepts are not to be followed in a practice that has become repulsive to the community, as for instance, by raising up seed to a man deceased, and by sacrificing a cow, though these are commended by the Hindû scriptures; Mit. Ch. I. Sec. III. para. 4. But Devâṇḍha Bhaṭṭa censures this looseness of doctrine, and quotes Vasishṭha (I. 17) to prove that usage is of authority only where it is not opposed to the Vedas and Śâstras, Smri. Chand. Ch. III. p. 21 ss. *See* Gaut. XI. 20; Baudh. Pr. Adh. 1, Kaṇḍ. 2, paras. 1-7; Manu VIII. 41; VII. 203.

(*f*) 2 Muir's S. Texts, 173.

(*g*) *See* Savigny, System, Vol. I. § 12; Goudsm. Pand. Bk. I, § 15, and notes.

(*h*) Comp. Savigny, System, Vol. I. §§ 7, 8, 29, 30; Puchta Gewohnheitsrecht, Vol. I. p. 162 ss.

conducted by Steele, and Borradaile. The information gathered by the former on adoption is embodied in his Law of Caste. The answers collected by the latter have not been all preserved, but in English and Gujarâti a considerable body remain. (*a*) These were obtained from the representative members of the several castes. They were given, it is evident, with care and conscientiousness as well as knowledge. They have for other purposes been frequently referred to in the foregoing pages of this work, and they must be used as additional and valuable authorities on the Law of Adoption. (*b*)

It may be necessary to add that a particular custom which is relied on in any case as derogating from the common law, based itself on a more general custom, must be clearly proved (*c*) in this as in other departments of the law. (*d*) Of a general custom the Courts take notice without its being proved and without their attention being called to it. Works like the present may make the performance of this duty somewhat easier.

For the application of the law as ascertained from its various sources the Judicial Committee have laid down principles which must always constitute a great part of the science of the Courts. Thus in dealing with the Hindû law "Nothing from any foreign source should be introduced

(*a*) The Gujarâti collection is now in course of publication by Sir Mangaldas Nathubhai.

(*b*) As to the force of custom *see* further *Rama Lakshmi* v. *Shivanantha,* 14 M. I. A. 576; *Surendra Nath Roy* v. *Hiramani Barmani,* 1 Beng. L. R. 26 Pr. Co.; *Lala Joti Lal* v. *Mussamat Durani Kuar,* Beng. L. R. F. B. R. 67; *Court of Wards* v. *Pirthee Singh,* 21 C. W. R. 89 C. R.; *Bai Amrit* v. *Bai Manek,* 12 Bom. H. C. R. 79; *Damodhur Abaji* v. *Martand Apaji,* Bom. H. C. P. J. 1875, p. 293.

(*c*) *See* Coleb. in 2 Str. H. L. 181.

(*d*) See *Neelkisto Deb Burmono* v. *Beerchunder Thakoor,* 12 M. I. A. 523; 14 M. I. A. 576; supra, note (*b*).

into it; nor should the Courts interpret the texts by the application to their language of strained analogies." (a) As to the weight to be given to decisions, "It is entirely opposed to the spirit of the Hindû customs to allow the words of the law to control its long received interpretation as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country," (b) and "a new construction ought not to be placed on a text of Hindû law contrary to the current of modern authority." (c)

(a) *Bhya Ram Singh* v. *Bhaya Ugur Singh*, 13 M. I. A. 390.

(b) *Kooer Goolab Singh* v. *Rao Kurum Singh*, 14 M. I. A. at p. 196.

(c) *Thakoorain Sahibu* v. *Mohan Lal*, 11 M. I. A. at p. 403.

SECTION II.

NATURE OF ADOPTION AND ITS PLACE IN THE HINDU SYSTEM.

Though Adoption now holds amongst the Hindû jural institutions a place second in importance only to Marriage, it has won this place only by slow degrees. A craving for a real, and failing that, for a fictitious, perpetuation of the family seems to have prevailed amongst the Hindûs from the earliest ages. (*a*) This craving has sprung less from a desire to satisfy the capacity for affection and protection,—though this has not been absent,—than from a sense of the need of a son to save the Brâhman from endless discomfort in the other world. (*b*) The connexion of putra (= son) with "put" (= hell) even if not well founded etymologically is ancient, (*c*) and corresponds to thoughts that have possessed the Hindû's mind in all ages. (*d*) "Heaven," says the Veda, "awaits not one destitute of a son," (*e*) and "a Brâhman is born under three obligations; to the saints for religious duties, to the gods for sacrifices, to his forefathers for offspring. (*f*) He is absolved who has a son, performs religious duties, and has offered

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(*a*) *See* Ait. Brâhm. VII. 3, 9; Vasishṭha, Chap. XVII. para. 2; Manu IX. 8, 9, 45, 106; III. 37, 262, 277; IV. 184.

(*b*) *See* Âpast. Pr. II. Khaṇḍ. 24, paras. 1, 3, 4; Vasish. XVII. 1—4; Baudh. Pr. II. Kaṇḍ. 11, para. 34; Coleb. Dig. Bk. V. T. 270.

(*c*) Coleb. Dig. Bk. V. T. 302, 303.

(*d*) *See* Vishṇu XV. 43 ss.

(*e*) Coleb. Dig. Bk. V. T. 311; Vîram. Transl. p. 115; *Huradhun Mookurjia* v. *Musst. Mookurjia*, 4 M. I. A. 414. Yet in the absence of a son the widow may perform the krîya and śrâddhs of her deceased husband. Steele, L. C. 34; above, p. 93.

(*f*) *See* Phil. of the Upanishads, p. 264. Comp. Manu III; 70, 81. Thus it is that "on viewing the face of his begotten son a father is released from his debt to his ancestors," 2 Str. H. L. 198.

sacrifices." (*a*) When the Brâhman dies a son is indispensable "for the funeral cake, the libation, and the solemn rites."(*b*) These obligations of the son are persistently dwelt on in the sacred books, and when we see how the sacerdotal class were interested in the multiplication of ceremonies (*c*) it is easy to understand why the duty of paternity (*d*) was one which they never failed to magnify. The more sacrifices the more vicarious feasting and the more distributions to learned Brâhmans; (*e*) the more prominent the position assigned to them. (*f*)

(*a*) Datt. Mîm. Sec. I 5; so Baudh. Pr. II. Kaṇḍ. 11, para. 33; Kaṇḍ. 16, paras. 2—7.

(*b*) Datt Mîm. Sec. I. 3; Vishṇu XV. 43; Coleb. Dig. Bk. IV. Ch 1. T 8. If unworthy, however, the son could be replaced. Coleb. Dig. Bk. V. T. 263, 264, 278, Comm. "Perpetuated offspring and a heavenly abode are obtained through a son, a grandson, and a great-grandson," Yâjñ. quoted Coleb. Dig. Bk. IV. Ch. I. T 36.

(*c*) *See* Manu III. 117, 146.

(*d*) Paternity, not Maternity. "Males only need sons to relieve them from the debt due to ancestors," Coleb. Dig. Bk. V. T. 273, Comm. Nor is adoption of a daughter warranted by any Smṛiti; *ib.* T. 334 Comm., though it is supported by Purânic legends. Manu V. 160, 161, in recommending continence to a childless widow, does not suggest adoption, but promises salvation as the reward of austerity. Comp. Steele, L. C. 34.

Nîlkaṇṭha gathers from Manu IX. 168 that, according to his precept, only a son, not a daughter, can be given in adoption. Vyav. May. Chap. IV. Sec. V. para. 6.

(*e*) *See* Gaut. Chap. XV. 5—15; Âpast Pr. II, Khaṇḍ. 16, paras. 3 ss; Manu I. 95; III. 97, 138, 145, 146, 187, 189, 207, 208, 236, 237. Individual moderation however is prescribed; Manu, IV. 186, 190, 195.

(*f*) Marriage is a samskâra that is strongly enjoined, *see* Coleb. Dig. Bk. V. T. 252, Comm; *see* Manu II. 67; III. 2, 4; Coleb. Dig. Bk. IV. Chap. I. T. 17.

The Brâhman should marry and light the domestic hearth as soon as possible after leaving his guru or teacher. A girl, it is prescribed, is to be married at from six to eight years of age, Steele, L. C. 26, though the validity of the marriage is not affected if she be under the age of maturity. Coleb. Dig. Bk. V. T. 338 Comm. The injunctions

It is strange to modern feelings how much amongst the ancients sacrifices and religious celebrations were conceived as a bargain (*a*) in which, for a consideration of oblations duly offered, (*b*) with formulas duly uttered, (*c*) protection and prosperity might be justly claimed. (*d*) There was but little bowing down before the sublime conception of Almighty benevolence, less dwelling on a single supreme Creator and controller of events than on partial deifications of persons and

laid on the parents and on the husband by Manu show the main purpose of the union (*see* also Coleb. Dig. Bk. V. T. 198, 199; Datt. Mîm. Sec. I. 5), but in consequence of the legal severance of a girl from her family of birth in some instances for years before her husband's unfitness can be discovered, and of her having in the meantime become disqualified by attaining maturity for another marriage, she remains a member of her quasi-husband's family, to which the marriage rites have transferred her. *See* above, p. 418; Manu III. 11, 37, 45; IX. 4, 26, 77, 81; Coleb. Dig. Bk. IV. Chap. I. T. 15, 16, 18, 19, 62, 64, 65, 66, 84. The sacred writings readily lent themselves to this, as they generally contemplated the replacement of a husband where necessary by a substitute. *See* ex. gr. Coleb. Dig. Bk. V. T. 231. In the case of a marriage ceremony performed between relatives or between persons of different castes whose marriage is forbidden no conjugal connection is recognized, the woman is put away and her children are illegitimate; but she is entitled to maintenance. Steele, L. C. 29, 30 On the other hand a mere defect in reciting the formulas (mantras) at the wedding is rectified by reciting them again correctly, *Ib.*

(*a*) *See* Ihne, Hist. of Rome, Bk. VI. Chap. XIII.; Soury, Études Historiques, p. 280; Phil. of the Upanishads, p. 262; Manu III. 63, 67; IV. 155 ss.

(*b*) Manu III. 279.

(*c*) *See* Baudh. Pr. II. Kaṇḍ. 11, para. 32; Kaṇḍ. 14, paras. 4, 5, 11, 12; Manu III. 217, 277 ss; IV. 99, 100; Âpast. Pr. II. Khaṇḍ. 16, paras. 7 ss; Phil. of the Upanishads, p. 102.

(*d*) For the purposes sought to be attained by the due utterance of the "mantras" or spells, and their coercive force over the gods, reference may be made to Whitney's Essays, 1st Series, p. 20; *see* Manu IV. 234.

of qualities within the reach of a limited intelligence. (*a*) In the adoption of a son the Hindû aimed and still aims at satisfying an exacting group of manes greedy in the other world for recognition and offerings in this. (*b*) He looks too for appreciable benefits which he is himself to derive from the future ceremonies, (*c*) the fruit of which will reach him in the realm of shades. (*d*) He shrinks with horror from being left destitute beyond the pyre to suffer the mysterious anguish which awaits the man for whom no son can perform the Śrâddhas. (*e*) The stronger and more materialistic may resist this tendency, (*f*) in some few active faith is lost

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(*a*) "The innumerable gods of Hinduism are deified ghosts or famous personages, invested with all sorts of attributes in order to account for the caprices of nature. This is the state of the vulgar pagan mind; by the more reflective intelligence the gods are recognized . . . . as beings capable of making themselves very troublesome; whom it is therefore good to propitiate, like men in office." Sir A. C. Lyall, Asiatic Studies, p. 51.

(*b*) Manu Chap. III. passim; Vasish. XI. 40—44; Gaut. XV. 15 ss. A higher range is attained in such passages as those quoted by M. Müller, Lect. on the Sc. of Religion, pp. 233, 265; comp. *ib.* 153; Tiele, Anc. Religions, pp. 114, 143. The manes were on particular occasions to be honoured with animal sacrifices. Manu V. 41; comp. v. 35.

(*c*) *See* Manu IX. 180; Coleb. Dig. Bk. V. T. 306; Baudh. Pr. II. Kaṇḍ. 14.

(*d*) *See* Manu III. 274, 275. As to the sin of the son who omits to satisfy his obligations, *see* Vishṇu XXXVII. 29; LXXVI. 2; Phil. of the Upanishads, p. 264. The enumeration of the right seasons for oblations to the manes in Yâjñ. I. 217, may remind one of the famous five reasons for drinking amongst the Western nations. So too Vishṇu, LXXVI—LXXVIII.

(*e*) Vishṇu, XX. 33—37; Coleb. Dig. Bk. V. T. 312, 313.

(*f*) Individual Hindûs have no hesitation (*see* the Sarva-Darśana-Sangraha, p. 10) in expressing their contempt for the whole system, but they are rare exceptions. Others think that their duty may be fulfilled and their salvation secured under the Hindû law by other means than procuring a lineage. They rely on such texts as Yajñ. I. 40, 50; III. 190, 204, 205; Manu V. 159.

in metaphysical subtilties, (a) some are too obtuse to realize the future at which others shudder; but for the most the pressure of a social opinion pervaded everywhere with these ideas, moulds their desires (b) and defines their spiritual outlook and their hopes and fears. In somehow acquiring a son the Hindû thinks generally that he is making the best of all possible bargains for himself in this world and the one to come. (c)

Various means for supplying a natural deficiency of male offspring were devised, or still adhered to the family in its gradual consolidation on a permanent type from the looser and grosser associations that preceded the dawn of civilization. Amongst these expedients Adoption, when first admitted, seems to have been received with but doubtful favour. (d) The levirate and the appointment of a daughter in one or other of the forms of these institutions must for generations and even centuries have been the approved modes of obtaining a substitutionary son. (e) Other methods, still less commendable, according to modern ideas, must have had a certain vogue, seeing that they are recognized in the sacred Smṛitis. (f) The final survival of adoption while the rival institutions

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(a) *See* Phil. of the Upanishads, Chaps. IV. V. p. 263.

(b) For the ceremonies and the mantras or spells to be recited *see* Vishṇu, LXXIII—LXXVI.

(c) *See* Manu III. 81, 82, 122, 127; Coleb. Dig. Bk. V. T. 270.

(d) Âpast. Pr. II. Pat. VI. Khaṇḍ. 13, para. 11, positively forbids the gift equally with the sale of a child. He does not recognize the substitutionary sons. He condemns vicarious procreation, *loc. cit.* para. 7, at the same time indicating that it was common. Medhâtithi, much later, contends that there can be no real substitute for the son, from whose production, not his replacement, the proposed spiritual benefit is to be derived. *See* Datt. Mîm. Sec. I. 36, and comp. the alternative rendering of Gaut. IX. 53, quoted under Vasish. XII. 8. This would forbid leaving the family of birth to join another by adoption.

(e) *See* Coleb. Dig. Bk. V. Chap. IV. Sec. III. Arts. I. and II.

(f) *See* ex. gr. the quotations in Coleb. Dig. loc. cit. Sec. IV.

perished is a mark of its greater suitableness to the moral sensibilities and needs of a society gradually advancing in refinement, yet clinging always to the traditions of the past. The field is here still encumbered with the remains of fallen structures which have engaged a good deal of the attention of the native authors. These have only a partial and occasional influence on the law of to-day, but some observations may be necessary in order to place Adoption in its proper historical relation to the rival, and no doubt older, institutions, which in the end it has supplanted and extinguished.

It is possible to trace in the Vedic literature (*a*) some indications of the appointment of a daughter to produce a son, not for her husband but for her own father. (*b*) This and the levirate (*c*) may be regarded as having in the Vedic period almost completely filled the space now occupied by adoption. (*d*) It is impossible to suppose that a subject of such importance as adoption, so stirring to the feelings of the religious, and so calling for ceremonies and sacred ministrations, should not have been frequently mentioned if in fact the institution was generally recognized when the

(*a*) It is necessary to go back so far to find the root of this as of nearly all existing Hindû institutions. *See* Whitney, Or. and Ling. Studies, 1st Series, pp. 101 ss.

(*b*) Muller, Ṛigveda, vol. I. p. 232; Transl. Tag. Lect. 1880, p. 249.

(*c*) A passage quoted in Muir's Sansk. Texts, vol. V. p. 459, makes it plain that the young widow of the Vedic period sought the society of her brother-in-law just as amongst the Jews. (*See* above, p. 420.) The frequent references to the same custom in the Smṛitis have already been noticed. (*See* above, p. 417 ss.)

(*d*) Above, p. 417; Ṛig Veda, X. 40, referred to above, p. 289. The Vedic passage apparently insisting on a really paternal relation as the condition of celebrating certain sacrifices has to be explained away in the Daṭṭ. Mîm. Sec. I. 44.

hymns were composed. (*a*) Yet that it was creeping into existence may be inferred even from the exhortation against it as incapable of supplying a deficiency of begotten offspring. (*b*)

The levirate, as a means of raising up issue, became in the course of time disreputable amongst the Brâhmans (*c*) or at any rate somewhat discredited. It is by Manu made one of the reproaches of king Veṇa, who appears to have strongly resisted the pretensions of the Brâhmans, that he made this practice "fit only for cattle" a law for men. (*d*) Yet a few verses later the institution in a modified form is

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(*a*) The myth of Sunahśepa's giving himself to Viśvâmitra, who already had a hundred sons, is referred to in the Ṛig Veda, but it is evidently not recognized as a part of the social system. Nor is it connected by any chain of natural development or deduction with adoption. A mere casual and partial similarity does not under such circumstances indicate derivation. Sunahśepa it appears must have already uttered mantras and must therefore have been initiated. Hence it is said arises an authority for the adoption of a son whose saṃskâras have been completed in another family. When history admits the legend, logic may accept the inference.

In the comparatively late Yajur Veda there is an instance in the story of Atri of a man's giving away all his children and in place of them adopting a religious ceremony. Such myths sprang merely from the unchecked play of invention. Taken seriously as examples for imitation they would warrant what the law strongly condemns, needless adoption and parting with all sons. The story of Manu's appointment of a daughter though he had sons, Coleb Dig. Bk. V. T. 216, is not by any one held to validate a similar appointment now, nor is Pandu's liberal acceptance of his wife's children a pattern for a less meritorious generation. *See* Coleb. Dig. Bk. V. T. 301 Comm., T. 273 Comm. A further pitch of imaginative license is reached in the story of Daksha's appointing his fifty daughters and giving twenty-seven to one husband. *See* Coleb. Dig. Bk V. T. 222.

(*b*) *See* the passages cited by Zimmer, Altindisches Leben, p. 318; and comp. Ṛig Ved. I. 124, 125.

(*c*) Above, p. 418; Manu V. 161, 162.

(*d*) *See* Muir, Sansk. Texts, Vol. I. p. 297; Manu IX. 66.

fully recognized, (*a*) and a sonless woman it is admitted might be legally authorized to take a substitute for her husband. (*b*) Thus the ruder arrangements of a half-savage time (*c*) stand recorded side by side with higher conceptions still struggling for admittance. The higher cause prevailed, but its supremacy is even now not completely established amongst the primitive tribes. (*d*) Amongst the higher castes the older notions are virtually obsolete, yet in the law books we find rules still based on them with more or less of artificiality. (*e*) These instances of adjustment must be taken rather perhaps as proofs of the strong conservative

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(*a*) Manu IX. 69, 70; comp. Gaut. Ad. 28, para. 19; Vasish. Chap. XVII. para. 11; Vishṇu Chap. XV. para. 3.

(*b*) Manu IX. 147, 159, 161; Baudh. Pr. II. Kaṇḍ. 2, para. 12. Not only could a wife be borrowed, but a Brâhman might be hired, as well as a relative called in, to supply a suspected defect on the part of the husband desirous of offspring. *See* the passage quoted Datt. Mîm § V. 16. Various bargains could be made between the father and the quâsi father; *see* the texts, Coleb. Dig. Bk. V. T. 213, 214, 217, 235, 238, 240, 241, 244, 252.

In the passage quoted Datt. Chand. Sec. III. 9, it is provided that a son begotten on the widow by a brother of the deceased husband is to be regarded as a son of the latter only. He is to take precedence as heir over sons begotten by the deceased on other men's wives. As to these *see* Gautama, quoted Coleb. Dig. Bk. V. T. 265. The Brahma Purâṇa, quoted *ib* T 217, would, taken without the gloss, reverse the order of succession.

(*c*) Polygamy, though the indications of it in the Vedic hymns are not frequent, is yet referred to, *see* Muir's Sansk. Texts, Vol. V. p. 458; Zimmer, Altin. Leb. 324. The seclusion of women seems from other Vedic passages not to have been practised. It is probable that under such circumstances a considerable license of manners prevailed, and of this there are several indications. Wilson, Ṛig Veda, 2, xvii.; Zimm. *op. cit.* 332, 334.

(*d*) *See* above, p. 375.

(*e*) Doctor Burnell, Introd. to the Mâdhavîya, says: "Indian jurists never attempted to record such merely human details" as those of local custom, but the perusal of such a work as the Vyav. Mayûkha

tendency of learned men building on sacred foundations, than as the real grounds of customs which had an obvions recommendation in their fitness; but they give a peculiar turn to the reasonings on some points of the chief authorities which has had a palpable influence on the development of the practical law.

As an example of this, reference may be made to the rule that the place as heir of a member of a family disqualified by some personal defect may be taken by a son begotten either by the man himself or by a kinsman on his behalf. (*a*) The specific mention of these substitutes is held by the Mitâksharâ (*b*) to exclude a son adopted by a man himself disqualified for inheritance, and the Smṛiti has probably come down from a time when the family might refuse to accept any one not actually born in it under arrangements which provided that a child thus born shared the common ancestral blood. (*c*)

Another instance is the reference by some authors of the right of a widow to adopt a son without express authoriza-

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can leave no doubt that the commentators were no more independent than other human beings of the moral medium in which they lived. An ingenious and laboured interpretation not infrequently leads merely to a corroboration of what custom had already made law.

(*a*) Mit. Chap. II. Sec. 10, para. 9.

(*b*) *Ib.* para. 11.

(*c*) There was no such thing as a repeal of a Smṛiti law. *See* above, pp. 54–56. As the sacred writings were inspired all had authority, and when they clashed had in some way to be reconciled by interpretation (*see* Manu II. 12–15). Here the precise rule prescribed for the particular case is declared by Vijñâneśvara to override the more general law of replenishment of the family, and the rule has been preserved, though its effect now is to prevent disqualified persons from supplying their own places at all, comp. pp. 54, 55, above; *The Collector of Madura* v. *Muttu Ramalinga Sathupathy*, 12 M. I. A. at p. 435, and S. C. 2 M. H. C. R. at p. 231. It is a canon of construction that when there is a general rule a special one of possible narrower scope is to be interpreted so as not to deprive the wider rule of

tion to the duty in former ages of raising up seed to her deceased husband by an appointed relative. (*a*) And as this function was assigned to the brother or other near kinsman, so he, it was said, was the person to concur in an adoption by the widow, without which such an adoption could not be valid. (*b*) The Privy Council refused to admit the analogy as affording more than "an explanatory argument for an actual practice," (*c*) and placed the necessity for kinsmen's assent upon the ground of "the presumed incapacity of women for independence," but the logical method pursued by the native writers referred to and adopted by the High Court of Madras in this case is extensively applied in the Hindû law. (*d*)

It is only necessary to read the Smṛitis with a little care to perceive that something like a Spartan indifference to

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its general operation. *See* Datt. Chand. Sec. V. 27. This is equally a rule of the English law; *see* Co. Litt. 299 *a*, and *Ebbs* v. *Boulnois*, L. R. 10 Ch. A. at p. 484. The apparent contradiction is got rid of by a limitation of the one or the other rule as to persons, time, or place of operation.

(*a*) See *Collector of Madura* v. *Srimatee Muttu Ramalinga Sathupathy*, 2 M. H. C. R. at pp. 213, 221, 222, 224, 226, 230.

(*b*) *Ib.*

(*c*) S. C. 12 M. I. A. at p. 441. The Saṃskâra Kaustubha argues that a woman's necessary dependence does not disqualify her for adopting, but it does not decisively dispense with the assent of kinsmen, though these may incur damnation by wrongly withholding it. The construction given by the Śâstris (above, p. 864) is subject to this qualification.

(*d*) The principle of development on which, as a formulated scheme, the whole law of adoption rests, is strongly insisted on at 2 M. H. C. R. 227. The Judicial Committee at 12 M. I. A. 441, say that "as a ground for judicial decision these speculations are inadmissible": the force of any doctrine depends on its reception. (*Ib.* p. 436.) But the character of the doctrine is sometimes virtually conclusive for or against its admissibleness, and the view expressed by the High Court may derive some support from the dicta of Lord Wensleydale in *Morehouse* v. *Rennell*, 1 Cl. & Fin. 516, adopted by Willes, J. in the

mere sexual purity (*a*) prevailed amongst the Hindûs whose habits and ideas are recorded in these ancient compositions. (*b*) In discussing the punarbhû (twice-married woman) and the svairiṇî (faithless wife) Nârada shows that irregular relations were common. The chief

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Tagore case, L. R. Suppl. I. A. at p. 68. On the other hand in *Reg.* v. *Bertrand*, L R. 1 P. C. at p. 520, it is said that the Courts cannot make that law which the Legislature or usage has not made so. This is quoted and approved in *Reg.* v. *Duncan*, L. R. 7 Q. B. D. at p. 200. In *Dalton* v. *Angus*, L. R 6. A. C. at p. 812, Lord Blackburne recognizes fictions as a beneficent usurpation, departure from which would be as great a usurpation by the Courts. That even principles quite foreign to the Hindû law may thus obtain reception and react on the whole system appears from the discussion above, p. 620 ss. See *Suraj Bunsee Koer's* case, L. R. 6 I. A. at p. 102.

(*a*) Vishṇu, Transl. XV. 27, and Note. *See* McLennan, Studies in Anc. Hist. p. 178. For the legend of Vasishṭha, called in to his aid by King Saudasa, *see* Coleb. Dig. Bk. V. T. 229, Comm. The controversy pointed at in Vasishṭha, Chap. XVII. paras. 6 ss. shows very clearly that in his time it was still an open question, whether additions to a family might not allowably be obtained by the aid of an outsider. Vasishṭha expresses no decided view. The puritan Âpastamba (Pr. II. Paṭ. 6, Khaṇḍ. 13, paras. 6. 7) ascribes the son thus obtained to the real father, but the Vedic Gâthâ quoted by him necessarily implies that procreation by deputy was very common. Manu, IX. 51, ascribes the offspring to the woman's husband, comp. V. 162. He recognizes, IX. 162, that a man may have two heirs, one only of whom was begotten by himself, and takes it as of course that a child of an unknown father belongs to the master of the house in which he is born, V. 170; *see* above, p. 879 note (*b*). An indication of the same ancient usage is to be found in the Buddhist law, published by Mr. Jardine, Judicial Commissioner of British Burmah. In Chap. II. Sec. 89, it is said that where a daughter disapproving of the husband chosen for her by her parents gets a son procreated by another man, such a one is recognized as a Khettadza (*i.e.* Kshetraja) son. This part of the Burmese law has obviously been introduced from India, and probably reproduces more archaic rules in many instances than those that have been preserved in India itself.

(*b*) The capture of brides by force or pretended force was common. It is noted of a blind daughter that any wooer may carry her off, and

care manifested is as to the ownership of the children, which is said to belong to him who has begotten them, if the husband has sold his wife's embraces, (*a*)

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no one hurl a javelin at him. Muir's Sansk. Texts, vol. V. p. 458; comp. Manu, III. 33, 34. In Baudhâyana, Pr. IV. Adh. I. para. 15, it is said that an abduction gives no marital right. The "mundium" jealously guarded by early European law was a corrective of the rough wooing of capture. It is found insisted on in the "Vagaru Dhammathat," translated from Pâli by Dr. Forchhammer; but the law is evaded by three successive elopements.

The passage quoted from the Atharva Veda in Muir's Sansk. Texts, vol. I. p. 280, seems to indicate that Brâhman women were sometimes taken from their husbands by powerful men. It shows also that Brâhmans married the wives or widows of Râjanyas and of Vaiśyas. In such a case the Bráhman is to be regarded as the only real husband. *See* Zimmer, Altin. Leb p. 326. Such practices are far removed from the Brâhmanical usages and ideas of the present day.

(*a*) The purchase or hiring of another man's wife to procure offspring for oneself is authorized by the texts of Nârada, quoted in Coleb. Dig. Bk. V. T. 342, 343. *See* also T. 257, 264, 265 and Comm. The prevalence of such a custom affords the readiest explanation of the illegality of the adoption of a sister's or a daughter's son. The adopted is "a reflexion of a begotten son." The conditions of legality in the case of the begotten son adhere therefore as far as possible to his representative. Now when a sonless man leased another's wife to provide him with offspring, it was impossible that he should take his own sister or daughter: incest was abominable, while other immoralities had not yet assumed that character. When adoption took the place of procreation an imitation of nature was still kept up, and she who could not be to a man the actual mother of a begotten substitutionary son, was not allowed to be mother of *his* substitute the son given in adoption.

The Dattaka Mîmâṃsâ, Sec. V. 16 ss. places the prohibition on the ground that a man could not be called in to procure a son for the husband of his own daughter or sister. The statement is of course quite true. The one form of license even with its limitation is as revolting to modern ideas as the other. Of the two it seems more reasonable to trace the rule to an extension of the fiction of a natural relation in the adoptive father's own family rather than to limitations on the replenishment of another family. The Roman

but otherwise (*a*) to the husband. Vasishtha (*b*) calmly deals with the case of a woman who, having left the husband of her youth to live with another, afterwards returns to his family. She stands on the same social footing as a widow remarried in the family she joins. (*c*)

It is not amongst people of such habits and ideas that we can look for the delicacy which now characterizes the relations of the sexes in advanced communities. The gradual abolition of the grosser means of supplementing a family in favour of the system of adoption is itself a striking

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law said "Adoptio demum in his personis locum habet in quibus etiam natura potest habere," Poth. Pand. Li. I. Tit. VII § XVI ; and the Hindû law of adoption presents many instances of the influence of the same principle, as in preventing a man's adoption of one older than himself, and whom therefore he could not possibly have begotten, and adoption by an immature girl who could not be mother of the representative son. *See* Steele, 388, 44, 48.

(*a*) Hence the story of Paṇḍu in the Mahâbhârata, quoted Coleb. Dig. Bk. V. T. 273, Comm. There was much controversy on the point, as may be seen from Coleb. Dig. Bk. V. T. 253 Comm., and many other passages.

One of the laws of the Alamanni provided that where a man had carried off the wife of another he was to pay a fine to the husband. If the captor took her to wife while the fine remained unpaid any child resulting from the marriage before the fine was paid was to belong to the former husband. So as to the children of a daughter taken without the mundium or guardianship being acquired from her father, *see* Canciani, Leg. Barb. vol. II. p. 335.

(*b*) Chap. XVII. 19.

(*c*) Along with general censures of adultery (Manu IX. 30) there are in Manu (VIII. 352, ss.) and the other Smṛitis (Yâjñ. I. 72, 74 ; comp. Vishṇu XXXVII. 33,) such indulgences allowed as show that caste was thought much more of than mere chastity. Girls are indeed encouraged to fornication with men of high class. (Manu VIII. 365 ; comp. 2 Str. H. L. 162, and p. 376 *supra*.) The penalties provided are for the insolence of those who connect themselves with members of a class different from their own, (Vyav. May Chap. XIX. para. 6,)—in the case of men with their superiors (Manu VIII. 374 ss), in the case of women (Manu VIII. 371) with their inferiors. To the same

evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the

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effect is Nârada. (Pt. II. Chap. XII. Sûtra 78; Vyav. May. Chap. XIX. para. 11; comp. 2 Str. H. L. 167.) The object of the restrictions and the indulgences was to maintain the lordly superiority of the twice born (Manu III. 155, 156, 178; IV. 80; V. 104; X. 317, 319; XI 84, 101; XII. 43), and to prevent their corruption (Manu V. 89; VIII. 353; IX. 7; Coleb. Dig. Bk. IV. Ch. I. T. 8, 77, 78, 79, 83) through the infusion of low-caste blood; the sons being supposed to partake more largely of the nature of their fathers (Manu, III. 49; IX. 9, 32, 35, 36; X. 5, 12, 30, 64, 67, 72; Yâjñ. I. 93).

The notion that male offspring partake more largely of the father's nature, and female offspring of the mother's, has been widely entertained: *see* ex. gr. Lucr. De Nat. Rer. IV. 1229—1232, Ed. Munro; and the denunciations of adultery that occur rests on its tendency to confuse caste, and to deprive the manes of the true ancestors of their due offerings,—a privation regarded as a great though undefined calamity. *See* Thomson's Bhagavadgîtâ, p. 7. Vasishṭha says (Chap. XXVIII. 1—9; Chap. V. 1—4.) that a woman is not by unchastity made more than temporarily impure. (So Yâjñ. I. 72.) She imparts no taint of sin during dalliance, and is not to be cast off by her husband for any impurity. A tradition preserved in the Mahâbhârata commends king Mitrasaha for accommodating the sage Vasishṭha with his wife Damayantî.

In the case of unmarried women the state of feeling may be gathered from the functions assigned to the Apsarases in the Vedic heaven (*see* Muir, Sansk. Texts, vol. V. pp. 307, 308, 345, 430; vol. IV. p. 461.) Manu's approval or permission of a sacrifice of modesty to a man of higher class (Manu VIII. 364) is reproduced in the Pâli law books of the Burmese. *See* Notes on Buddhist Law, III. Sec. 140, p 14. And that some men had no troublesome sensitiveness about their wives' chastity is plainly indicated (*see* Vas. XIV. 6—11). The Taittirîya Brâhmaṇa gravely explains the character of the reward given for sexual association, and the sage Yâjñavalkya (II. 290, 292) provides against cheating on either side. With "Dâsis" or slaves not secluded, Nârada thinks connexion innocent (Nâr. Pt. II. Chap. XII. paras. 78, 79), and he treats the ornaments of courtesans as exempt from seizure like the instruments of musicians, as the means by which they gain their livelihood. This way of regarding the subject has come down to modern times, and not to go farther Nîlakaṇṭha in the Mayûkha ranks courtesans with the members of other business

coarse materialism of the earliest modes of substitution. (*a*) It is no longer recognized, (*b*) but traces of the institution still remain in the existing law. From it on the one hand has been derived the right of succession of the daughter and the daughter's son, (*c*) while on the other it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adoptive father could have married. (*d*) This excludes the son of a daughter, and such is the law generally received amongst the higher castes, (*e*) but amongst the lower castes sub-divisions of the great Śûdra class almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on account of the place he might formerly have taken as a son by appointment, as well as of the blood connexion on which the system of appointment itself was founded. (*f*)

The passage of Vasishṭha (*g*) which directs that a man desiring to adopt shall make his selection from amongst

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associations. (Vyav. May. Chap. XVII. 2; Chap. XIX 10, 11; Chap. XXII.) The sisterhoods of dancing women must hence be deemed not wholly foreign to the Hindû system as it was, though that system contains within itself the means of a gradual purification corresponding to the advance in moral and social refinement manifested in the adoption of higher standards in the customary law.

(*a*) Coleb. Dig. Bk. V. T. 295, 296, 304.

(*b*) Vyav. May. Chap. IV. Sec. IV. para. 46.

(*c*) *See* above, pp. 84, 429; *Bhâu Nânâji* v. *Sundrâbâi*, 11 Bom. H. C. R. at p. 274.

(*d*) *See* above, p. 883, note (*a*).

(*e*) *See* Daṭṭ. Mîm. Sec. II. 74; Vyav. May. Chap. IV. Sec. V. para. 11.

(*f*) Datt. Mîm. Sec. II. 74, 93, 105, 107, 108; comp. Vishṇu XV. 47.

(*g*) Chap. XV. para. 6; Datt. Mîm. II. 15, 75.

near relatives, and for choice take the nearest, (a) is so obscurely expressed as to admit of various interpretations. (b) How the ingenuity of commentators has been exercised upon it may be seen in Colebrooke's note to the Mit. Chap. I. Sec. 11, para. 13. The Saṃskâra Kaustubha, (c) and the Nirṇaya Sindhu, (d) construing the direction most liberally, approve the adoption, failing a sagotra sapiṇḍa, of a daughter's or a sister's son. (e) The Śâstris, following the Vyav. Mayûkha, (f) are almost uniformly opposed to this, except in the case of Śûdras. (g) They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered perhaps to have confirmed the Sâstris' view, (h) but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to. (i) These were no doubt written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths

(a) This is not compulsory now, see *Sreemati Uma Dayi* v. *Gokool Anandlás Mahapatra*, L. R. 5 I. A. 40, 51, unless for Bombay a special local law is constituted by the Vyav. May. Chap. IV. Sec. V. paras. 16, 19. This does not seem to be admitted by the Śâstris. *See* below, Sec. 4.

(b) The Datt. Mîm. rests on a passage of Śaunaka. *See* D. M. Sec. II. 2.

(c) Sec. III. pp. 45*b*, 47*a*.

(d) Sec. III. p. 63*a*.

(e) This is opposed to the Datt. Mîm. Sec. II. 32, 33, 74, 95, 98, 102.

(f) Chap. IV. Sec. V. para. 36.

(g) See *ex. gr.* above, p. 434.

(h) *Gopal Narhar Safray* v. *Hanmant G.*, I. L. R. 3 Bom. 273, 298; *Sriramalu* v. *Ramayya*, I. L. R. 3 Mad. 15.

(i) Steele, L. C. 44, 46, 183; 2 Str. H. L. 101. See *Gopal Narhar* v. *Hanmant G. Saffray*, Bom. H. C. P. J. 1881, p. 175; S. C. I. L. R. 6 Bom. 107.

of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Śâstra had however to be interpreted accordingly, and this interpretation setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father paved a way for the admission of the sister's son. (*a*) In the South of India the Brâhmanical law was for the most part apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the North, but allowed in the South, because it could not be prevented. (*b*)

The appointment of a daughter appears to have been conceived in two ways. According to the one the appointed daughter herself took the place of a son, (*c*) and then her son naturally succeeded her by representation. She was given for inheritance the place of a male, a place as a source of further succession, such as the Vyavahâra Mayûkha assigns her in the devolution of property not included amongst the special varieties of strîdhana. According to the other conception she was merely the instrument by which an heir to her father could be produced in the person of her son. (*d*) Vasishṭha places the appointed daughter third amongst the

(*a*) The sister's son was amongst many of the aboriginal tribes heir to his uncle, *see* above, pp. 283, 287; and as adoption became regarded as necessary to heirship he would thus appear to the lower castes the most fit for adoption. Amongst the higher castes such adoptions are probably imitations suggested by natural affection.

(*b*) Baudh. Pr. I. Adh. 1, Kaṇḍ. 2, para. 3; comp. *supra*, pp. 7, 155.

(*c*) Coleb. Dig. Bk. V. T. 203, 204, 215, 216; Vasish. Chap. XVII. para. 15. *See* Dr. Bühler's note *ad loc.*

(*d*) Vishṇu, Chap. XV. paras. 4—6. The two senses of putrikâ-putra are dwelt on in the Vyav. May. Ch. IV. Sec. VI. para. 43. The

subsidiary sons, and he says, (*a*) "It is declared in the Veda, a maiden who has no brothers comes back to the male ancestors, returning as their son." In Manu IX. 127ss, the transition may be observed to the second conception. The daughter, it is said, meaning the appointed daughter, is a man's heir failing a son, and as a woman's daughter usually takes the property given to the mother at her marriage, so in the particular case of the appointed daughter her son takes the property of his maternal grandfather through her. That her right is deemed the prior one appears from verse 134, in which it is said she takes equally with the after-begotten son of her father, and from v. 135, which on her death without a son gives the property that has devolved on her to her surviving husband. Yet in verse 136 it is said that by the son whom she produces "the maternal grandfather becomes in law the father of a son: (*b*) let that son give the funeral cake and possess the inheritance." This seems to make a subsidiary son of the grandson by the appointed daughter; but again in verse 139 this grandson is placed on the same footing as a son's son, which implies an intervening right through which his own is derived and a consequent precedence of his mother. Âpastamba makes no provision for appointment, or for the succession of a widow. He hesitatingly admits the daughter on failure of other heirs. (*c*) Gautama recognizes the son of the appointed daughter but not the daughter herself. (*d*) Vishṇu has a

institution, though continued in some places down to modern times, is distinctly excluded by Nîlkaṇṭha from the law of the present day. Vyav. May. *loc. cit.* para. 46.

(*a*) Sec. 16.

(*b*) Colebrooke, Dig. Bk. V. T. 207 says "sire of a son's son," probably from a different reading. See also T. 209, compared with Manu IX. 131.

(*c*) Pr. II. Pat. 6, Khaṇḍ. 314, Sûtra 4.

(*d*) Chap. XXVIII. Sûtra 33. He gives him only the tenth place, which is explained or explained away by Haradatta *ad loc,* and Vijñâneśvara in the Mit. Chap. I. Sec. XI. para. 35.

similar rule, (*a*) to which he adds one providing for the daughter's succession as such after the widow. (*b*) Baudhâyana (*c*) also recognizes the appointed daughter's son, but not the daughter, as a subsidiary son, to whom he assigns the next place after the son lawfully begotten. In his list the adopted son comes fourth.

By the time when the Mitâksharâ was written the daughter's right as heir had gained general recognition apart from her appointment.(*d*) As putrikâ-putra her place is speculatively recognized, (*e*) but as secondary to that of her son born under the prescribed condition. She no longer enjoys an equal right with her own after-born brother as in Manu, and her son ranks but as a subsidiary son, equal, as Viśvesvara says, to a lawfully begotten son in the absence of such a son, but inferior in being one degree more distant from the propositus. (*f*)

The son by simple adoption had in the mean time been gaining a greater and greater preference to the other substitutionary sons. When traversing a wide interval we pass from the Vedic period to that of the Smṛitis, (*g*) we find

(*a*) Chap. XV. Sûtra 4.

(*b*) Chap. XVII. Sûtra 5.

(*c*) Pr. II. Adh. 2, Kaṇḍ. 3, Sûtras 15, 31. *See* Coleb. Dig. Bk. V. T. 213, and Comm.

(*d*) Mit. Chap. II. Sec. II. para. 5. *See* the *Utpât* case, 11 Bom. H. C. R. at p. 274.

(*e*) Mit. Chap. I. Sec. XI. para. 3.

(*f*) The appointed daughter's son, superior to his own mother as heir to her father, had almost a counterpart amongst the Greeks. The heiress given in marriage by her father transmitted to her son a right of succession to her father which excluded herself and her husband, though, failing sons, she was capable of inheriting. *See* the seventh and ninth speeches of Isaeus, translated by Sir W. Jones in his works, vol. IX pp. 188, 200 and 226, 231, with the summary of the Attic laws prefixed to the collection. The son born under such an arrangement appears to have been capable of taking both estates unless he had brothers. *See* Dem. *adv.* Makart; Secs. 12, 13, 14.

(*g*) Above, pp. 25 ss.

adoption recognized, but still in a comparatively subordinate rank, as a means of continuing the family. It is mentioned along with the appointment of a daughter, the levirate and other means of procuring offspring, in all the principal compilations whose precepts on this subject have been preserved. The different relative places assigned in these works to the different kinds of sons are due probably to the several modes of affiliation having come into vogue in different families or tribes long before any methodical classification of them was attempted. A reference to some vague principle or a mere convenience in enumeration determined the order of the sons in the earliest lists. In the later ones contained in such systematic compilations as Manu and Vasishtha the different kinds of sons are divided into those who are kinsmen and heirs, and kinsmen without being heirs. (*a*) Several lists are given in Colebrooke's Digest, Bk. V. Chap. IV., Sec. 1, and in the Vîramitrodaya, Chap. II. Pt. II.

The kinsmen not heirs are described by the Mitâksharâ (*b*) as not heirs to collaterals. To their fictitious fathers they are in their turn equally heirs as the other substitutionary sons. (*c*) The place of the several kinds of sons in the one

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(*a*) *See* ex. gr. Gautama, Adh. 28, paras. 29—32. This Smṛiti assigns the third place to the adopted son, making him a kinsman and heir, while the son of an appointed daughter stands tenth, and amongst the kinsmen without heirship.

(*b*) Chap. I. Sec. XI. p. 30.

(*c*) It seems probable from the rule evidently derived from the Hindû law, still preserved amongst the Burmese, that the "sons not heirs" were originally not heirs to their ceremonial father. They may have been taken merely to perform the indispensable exequial rites, as they seem to have had in competition with the other class no higher right than the illegitimate son; a right to what the father gave them. *See* Notes on Buddhist Law by J. Jardine, Esq., Judicial Commissioner in Burmah, Part V. Chap. II. Sec. 85. The dharma-putra or ceremonial son, appointed merely to perform exequial rites, not taking any share in the estate, is a still existing institution, Steele,

or the other class differs in different Smṛitis. (a) It is probably impossible to find any better ground of reason for the variances than that assigned by Vijñâneśvara, who says that precedence must be determined by the character of the subsidiary son. (b) Viśveśvara in the Subodhinî says that Manu's list is a mere loose enumeration not aiming at a precise regulation of priority, and that the same observation applies to the other Smṛitis in which a similar apparent classification occurs.

This grouping of the several kinds of subsidiary sons in two classes with important differences of rights does not occur in the Smṛiti of Yâjñavalkya on which the Mitâksharâ is founded. The task of the native expositor was thus made easier, since taking Yâjñavalkya as his guide, he construed the other Smṛitis with reference to this as the chief, but it forced him to go to other sources for the determination of the right of an adopted son to succeed collaterally. (c) This is established on the authority of Manu, (d) in whose list, as well as in Baudhâyana's, (e) the adopted son is placed in the higher class of sons and heirs. (f)

Yâjñavalkya, II. 129—133, enumerates twelve kinds of sons as capable of continuing the succession in a Hindû family. These are: (1) the aurasa or ordinary son; (2) the

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L. C. 185, 226. The Mâdhavîya (Transl p. 21) quotes Vishṇu as wholly excluding the four classes of sons of unknown paternity in competition with the legitimate son, refusing them even the quarter of a share allowed to other secondary sons. This passage is wrongly attributed it seems to Vishṇu, but it may still embody an ancient rule.

(a) Comp. Baudh. Pr. II. Kaṇḍ. 2, para. 23, with Gaut. Adh. 28, paras. 29, 30.

(b) *See* also Coleb. Dig. Bk. V. T. 277, Comm.; T. 278, Comm.

(c) Comp. Coleb. Dig. Bk. V. T. 277, Comm.

(d) Mit. Chap. I. Sec. 11, paras. 30, 31.

(e) Baudh. Pr. II. Adh. 2, Kaṇḍikâ 3, paras. 20, 31, 32.

(f) *See* Coleb. Dig. Bk. V. T. 277, Comm.

putrikâ-putra, or son of an appointed daughter; (3) the kshetraja or son begotten by an appointed kinsman; (4) the gûḍhaja, or one furtively produced in the husband's house; (5) the kânîna, the love-child of a damsel taken with her when she is married; (6) the paunarbhava, or son of a twice-married woman; (7) the dattaka, or son given by his father, by both father and mother, or by the mother alone with the father's assent, in his absence or after his death; (8) the krîta, or the son bought; (*a*) (9) the kṛitrima, or orphan taken with his own assent only; (10) the svayamdatta, or son self-given either on losing his parents or being abandoned by them; (11) the sahoḍhaja, or son of a bride pregnant at the time of her marriage; (12) the apaviddha, or son cast out by his father and mother and taken as a son by a protector.

It will be seen that in the case of the first six there was either an actual connection by blood with the legal father or at least a strong probability of it. In the case of the last six this connection subsisted if at all only accidentally. The son by gift and acceptance stands at the head of this second class, and as the gradual purification of manners brought the other substitutionary sons into discredit, the son lawfully begotten and the son by adoption have now become the only ones recognized by the general Hindû law.

(*a*) The sale of children by their parents was a recognized institution amongst the Romans. The gradual spread of Christian ideas made such sales disreputable, but the attempts to prevent them as illegal caused so much infanticide under the form of abandonment, that Constantine allowed sales in cases of distress. Justinian, after much hesitation, at last prohibited all alienations of children. They were still seized and sold by the Roman "revenue department" for some time after private sales had been forbidden. The person who preserved an exposed child (on the exposure of infants at Athens and Rome, *see* Petit, Leg. Att. p. 144,) with its parents' knowledge might keep it either as a son or as a slave (Maynz, Dr., Rom. § 328), and infants might be given in adoption, but arrogation was till a late period limited to those who had attained the age of puberty and discretion (Tomkins and Lemon, Gaius, p. 96.)

Thus the Hindû law of the present day (*a*) does not recognize the putrikâ-putra (*b*) or any kind of subsidiary son (*c*) except the dattaka, (*d*) and in some districts the kṛitrima. (*e*) The latter mode of affiliation is still allowed in the Mithila region, (*f*) but it does not appear to be much in use. (*g*)

(*a*) *See* Vyav. May. Chap. IV. Sec. IV. para. 46; Smṛ. Chand. Chap. X. para. 5; 2 Str. H. L. 82; Coleb. Dig. Bk. V. T. 279, 280, 420, Comm.; Smṛiti Chandrikâ, Chap. X. para. 6.

(*b*) It is to be observed that the putrikâ-putra is not found in Manu's list of subsidiary sons, IX. 159, 160. But vv. 132 ss. leave no doubt that either the appointed daughter herself or else her son took the place of a son to the appointing father. Comp. 2 Str H. L. 199.

(*c*) Many of the smṛitis allot to the substitutionary sons various specific aliquot parts of the father's estate All such rules are inoperative, the Mâdhavîya says, in this Kali Yuga. *See* Mâdhavíya by Burnell, pp. 21, 22, 24.

(*d*) Steele, L C. 43; Datt. Mîm. Sec. I. 64; MS 1633; Coleb. Dig. Bk. V. T. 280; Vyav. May. Chap IV. Sec. IV para. 46.

(*e*) *Nursing Narain* v. *Bhutton Lall*, Sutherland's Rep. for 1864, p. 194. As to the Kṛitrima adoption, *see* Coleb. Dig. Bk. V. Ch IV. Sec. X. note; *Wooma Daee* v. *Gokoolanand*, I. L. R. 3 Cal. 587 (P C.) S. C., L. R. 5 I. A. 49, referring at p 51 to *Ooman Dutt* v. *Kunhia Sing*, 3 C. S. D A. R. 144; and *see* the cases under note (*f*) *infra.*

As to the classes (9) and (10), see *Balvantrav Bhaskar* v. *Bayabai*, 6 Bom. H. C. R. 83 O. C. J, deciding that an orphan cannot be adopted, though self-given or given by his brother; *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. p. 268 : *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. R. 129.

(*f*) The *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 C. W. R. 500; *Mussamut Shibo Koeree* v. *Joogun Singh*, 8 *ib* 155; *Baboo Juswant Singh* v. *Dooleechund*, 25 *ib*. 255; *Wooma Daee* v. *Gokhoolanund Dass*, I. L. R. 3 Calc. 587 (Pr. Co.); Tagore Lect. 1880, p. 527.

(*g*) In 2 Str. H. L. 155 ss. there is an interesting discussion between Colebrooke and Ellis on the legality in the present age of the Krîta form of adoption by purchase. Ellis contends that in the South of India usage has sanctioned this form, and that the standard authorities, at any rate in the shape in which they have there been received, do

Amongst some of the lower castes the levirate still prevails (*a*) as a source of offspring received as legitimate. In Orissa the usage, once general, (*b*) is becoming restricted to the lower orders. (*c*) With these exceptions and those arising from the peculiar marriage customs of some of the non-Aryan tribes, (*d*) Adoption may now be regarded as the only legal means of satisfying the need of a son when natural offspring fails or has perished.

A Svayamdatta, the Śâstri said, was not to be recognized in the Kali Yuga, so that though a man of fifty and having children might be deemed apt for adoption, yet he could not be adopted if his parents did not survive to give him away. (*e*)

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not prohibit it. Sir T. Strange referred the question to the Court of Tanjore, and there thirteen Śâstris were unanimous in pronouncing against the validity of such an adoption. In the same discussion Colebrooke admits that an appointed daughter may take the place of a son, as provided in the Mit. Chap. I. Sec. II, para. 23; but the Śâstris do not assent to this. They insist that in this Kali Yuga "the competency of any son other than that of the body and one given in adoption is repealed," and that the prohibition extends to all the castes. *Op cit.* pp. 188, 189. *See* to the same effect the Śâstri, *ib.* p. 82.

(*a*) Above, pp. 418 ss.

(*b*) Coleb. Dig. Bk. V. Chap. IV. Sec. X. note. The practice in Orissa of raising seed to one deceased is recognized by Jagannâtha, Coleb Dig. Bk. V. T. 300, Comm. *ad fin.*

(*c*) Comp. 2 Str. H. L. 164.

(*d*) These have gained a partial recognition in various parts of India from the Brâhmans, who in return have imposed their own doctrines, and especially that of their own superiority on the classes below them. Proofs of these statements in the province of law we are now considering may readily be found in such works as Buchanan's Mysore, and Wilks's South of India. Mr. Ellis thought that the Krîta or son bought was forbidden to Brâhmans only, but he was contradicted by Coleb. and the Śâstris. *See* 2 Str. H. L. 149 ss.

(*e*) MS. 1755; Vyav. May. Chap IV. Sec. V. para. 6. *See* Coleb. Dig. Bk. V. T. 275; the *Mahârâj* case, 1 Borr. 202 (No. 43); *The*

A section of the Mitâksharâ (*a*) is devoted to the subject of the Dvyâmushyâyaṇa, or son of two fathers. As a means of reconciling the texts of Manu which allow and condemn the procreation of a son by a substitute, (*b*) Vijñâneśvara expounds them as permitting this in the case of a widow who has only been betrothed, not in the case of one whose

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Collector of Surat v. *Dhirsingji Vaghbaji*, 10 Bom. H. C. R 235; *Balvantrao Bhaskar* v. *Bayabai*, 6 Bom. H. C. R. 83; *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. R. 129.

The word putra employed in the Smṛiti passages to express "son" *see* ex. gr. Coleb. Dig. Bk. V. T. 273, does not properly include an adopted son. Hence these passages cannot be literally cited to justify the gift in adoption of an adopted son, or generally such a gift by a grandfather or other head of the family. Custom conforms to these restrictions, as may be gathered from the absence of cases of attempted gift of the kind in question in the records of the High Courts. Disinheritance is a different thing, and so is separation. *See* St. L. C. 185; Coleb. Dig. Bk. V. T. 264; above, pp 583 ss. It is the parents or the father who must needs give in adoption, and to a father in person or represented by his wife or widow. *See* Coleb. Dig. Bk. V. T. 275 Comm.

The influence of a growing refinement of feeling is seen in the ascription to Vishnu of the text by which the sons of uncertain origin were to be excluded from the funeral oblation and succession to the estate. *See* Mit Chap. I. Sec. XI. p. 27, note; Vishṇu, Chap XV.; Datt. Mîm. Sec. II. 61.

The influence of the older on the development of the newer institu tions is well seen in the story of Śunaḥśepa on which the Saṃskâr Kaustubha, by a characteristic argument, founds a justification for th adoption of a man already initiated in his family of birth. The "give son," it is said, must include the son "self-given." Śunaḥśepa wa self-given. It is not to be supposed that he had not been initiate The transaction in his case cannot be questioned, as it rests on Ved authority. Hence initiation does not impede "self-gift" nor cons quently gift by parents in adoption. The story of Śunaḥśepa relied on as an instance of a svayamdatta. *See* Coleb. Dig. Bk. T. 300, Comm., which immediately afterwards pronounces again any such substitutionary son in the present age. *Ib.*

(*a*) Chap. I. Sec. X.

(*b*) Comp. Baudh. Pr. II., Kaṇḍ. 2, para. 12.

marriage has been completed. The brother of the deceased husband may beget one son on the widow, who is to be formally married to him for this purpose, and the son thus produced belongs to the husband deceased, unless the procurator is himself destitute of male issue, in which case or by special agreement the son becomes a dvyâmushyâyaṇa, capable of offering oblations to both fathers and of inheriting from both. Vijñâneśvara thus mitigates the coarseness of the ancient rule. (*a*)

The raising up of seed in the manner here contemplated being disallowed in the present age (*b*) it is impossible that there should be a dvyâmushyâyaṇa of the original type. But the sense of the term has been extended by the commentators on the Mitâksharâ (*c*) so as to include the only son of one man given in adoption to another on an agreement that he shall retain his filial relation to the giver at the same time that he assumes it to the donee. The Vyavahâra Mayûkha fully accepts this doctrine, and deals at length with the double relationships that arise from such an adoption (*d*)

The giving of a son as dvyâmushyâyaṇa is recognized by the Judicial Committee as allowed by the existing Hindû law. (*e*) In the case of an only or eldest son it is said the presumption is that his father would not break the law by giving him in adoption otherwise than as a son to both fathers. "This latter kind of adoption would not sever the connection of the child with his own family." (*f*)

(*a*) *See* Baudh. *loc. cit.*; Nârada, Pt. II. Chap. XIII. paras. 14, 23; and Yâjñ. I. 68, 69.

(*b*) Datt. Mîm. Sec. I. para. 66.

(*c*) *See* Mit. Chap I. Sec. X. para. 32, notes.

(*d*) *See* Vyav. May. Chap. IV. Sec. V. para. 21 ss. The translation of Rao Saheb V. N. Mandlik is here greatly superior to that of Borrodaile.

(*e*) See *Wooma Daee's* case, above, p. 894 (*e*).

(*f*) *Nilmadhub Doss* v. *Bishumber Doss*, 13 M. I. A. at p. 100.

The Madras Sadr Court ruled (a) that the dvyâmushyâyaṇa son is not to be recognized in the present age, but from personal inquiries it appears that he is not at all unusual in the Southern districts of Bombay. For this Presidency the Śâstris have held that an agreement may be made between the father of a boy and the man receiving him in adoption that he shall represent both as a son. (b) In a case in which a Brâhman had adopted a boy of a gotra different from his own it was said that the boy was to be regarded as a dvyâmushyâyaṇa. As he would be subject to certain disabilities in his family of adoption, supposing his tonsure had taken place in his family of birth, the Śâstri seems to have given him the benefit of a presumption like that relied on by the Judicial Committee in the case lately referred to. (c)

It follows that for the Bombay Presidency the answer given to Sir T. Strange, (d) rigidly limiting succession to the aurasa or the dattaka son, cannot be regarded as an accurate statement of the law. Steele (e) includes amongst the rules of the customary law one to the effect that a boy adopted by his father's brother is to perform the Śráddhas of both and to inherit the property of both, subject as to his real father's estate to a prior right of heirship down to a brother's son. This means simply that he is reduced to the

(a) *Oonnámala Awchy* v. *Mungalum*, Mad. S. D A R. for 1859, p. 81.

(b) MS. 1692; *see* Steele, L. C 47. In the case of an adoption by an uncle the boy inherits from him. From his real father also, failing heirs down to brother's sons, *i. e.* to his own fictitious relation to his real father. *Ib.* This agrees with what Colebrooke says at 2 Str. H. L. 121, that the son of such an adopted son belongs to the family of his father's upanayana (investiture) and consequent grotraship.

(c) MS. 1675. In the Datt Mîm. it seems to be assumed as of course that a brother's only son taken in adoption becomes a son of two fathers. *See* below.

(d) 2 Str. H. L. 82.

(e) L. C. 47.

rank of a son of his adoptive father; but the Vyav. May. (*a*) makes him heir to his real father immediately on failure of other sons, at the same time that he ranks as heir to his adoptive father, though subject to be reduced to a quarter share by the birth of a begotten son.

The son of such an adopted son belongs, Colebrooke says, to the family in which the dvyâmushyâyaṇa received his investiture of the sacred thread. (*b*) In the Bombay Presidency the dvyâmushyâyaṇa celebrates the śrâddhas of both fathers, but his son it seems those of the grandfather by adoption only, not of his natural grandfather. (*c*) Whether any right of inheritance to the latter passes to him on his father's predecease has not been decided. (*d*)

It will be evident from the foregoing discussion how throughout the gradual narrowing of the field of choice a sense of the absolute necessity of a son, actual or representative, has never lost its hold on the Hindû mind. (*e*) This

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(*a*) Chap. IV. Sec. V. para. 25.

(*b*) 2 Str. H. L. 122. He receives his own investiture in that family. Any adoption after investiture is an irregularity which causes the son of the person thus adopted to return to his father's gotra, if different from that of his adoptive family. Such an irregularly adopted son is called anityadatta *Ib.* The adoption would probably not be recognized in Bombay. *See* Steele, L. C. 43.

(*c*) This statement rests on oral information as to the general practice. As to this however, and the right of succession *see* Coleb. Dig. Bk. V. T. 262, 263 Comm.

(*d*) As an only son he should not be given, and his succession in his family of birth would be excluded by brothers.

(*e*) The man of perfect life ought, at the close of his "householder" stage, to become a hermit, and hand over his temporal interests to his son. *See* Tiele, Outlines, &c. p. 128. The craving for a son to celebrate sacrifices is very widely spread. In China it is said that one half the families have adopted children. Only a sonless man can adopt. Nephews are to be taken by preference. The form is that of a sale which may be real or fictitious. *See* Journal of North China Branch R. A. Soc. Pt. XIII. p. 118.

central impulse has persisted through every variation of detail and must be recognized as due to the deepest-lying principles of the national character. That character is reverential, affectionate, and speculative, but always or nearly always within narrow limits and with a certain meagreness of thought. (a) In the family with its roots and its branches extending beyond the present world the Hindû mind has found its appropriate centre of interest, in the material perpetuation of the sacra, an intelligible and fit connection to their mutual advantage amongst all the members of the family line. (b) To it in its vulgar type an interchange of influence between the seen and the unseen is inconceivable except through the palpable connection of sacrifices. (c) They are indispensable, as the material chain was to Newton for the transmission of physical activity. (d) The purpose of the interchange that is sought is not of an elevated character, it is not spiritual expansion and enlargement of being, (e) but rather such limited and prosaic ends (f) as may conceivably be furthered by an humble type of divinities. (g) From the Vedic hymns downwards, boasts of sacrifices offered have been made the ground for never-ending claims to aid in the sordid exigencies of ordinary life. (h) Those of the family the son can best understand; he by his

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(a) As *ex. gr.* Baudh. Pr. II. Kâṇḍ. 14, paras. 9, 10; Kâṇḍ. 15, paras. 1—6. *See* Tiele, Anc. Rel. 123. On the mixed intellectual charact er even of the Brâhmanas, *see* Whitney, *op. cit.* p. 68.

(b) *See* Gaut. Chap. IV. 30 ss.; Chap. V. 3, 5, 9.

(c) *See* Thomson's Bhagavad Gîtâ, p. 7, and note 36.

(d) *See* Baudh. Pr. II. Kaṇḍ. 5, paras. 2, 3, 18; Kaṇḍ. 9; Kaṇd. 11, paras. 2, 3; Kaṇḍ. 12, paras 11—15; Kaṇḍ. 14, para. 12; Kaṇḍ. 15, para. 12.

(e) *See* Phil. of the Upanishads, p. 266.

(f) *See* Ṛig. Veda, I. Hymn 9. Âpast. Pr. II. Pat. 7, Khaṇḍ. 16, paras. 24, 26 ss, show the former prevalence of animal sacrifices.

(g) *See* Philosophy of the Upanishads, pp. 10 ss.

(h) *See* Ṛig Veda, I. Hymns 12, 14; II. Hymns 4, 12.

initiation becomes born again into the unseen family; (*a*) he has the traditional formulas and sacred names. Without these little or no material good can be hoped for; failing a son by birth a substitute must be found to gain it ; (*b*)— fertile fields, long life, (*c*) success in law suits, continuous male offspring, (*d*) and ruin of enemies. The nobler craving for an object of special affection, the desire to perpetuate one's name (*e*) and worldly influence, (*f*) the wish to educate a youth who may rule a chief's subjects kindly,—all these motives no doubt operate on occasion with more or less strength in inducing adoption, but the persistent cause and basis of the institution is the conception of spiritual gain, (*g*) an other-worldliness of a special variety. (*h*)

(*a*) Manu II. 172.

(*b*) Capable therefore of gaining it or of receiving the requisite qualification by (tonsure and) the sacred thread. 2 Str. H. L. 100; Coleb. Dig. Bk. V. T. 273 Com.; *Lakshmappa* v. *Râmâva*, 12 Bom. H. C. R. 364.

(*c*) Baudh Pr. II. Kaṇḍ 14, para. 1; Pr. IV. Adh. II. para. 11; Âpast. Pr II. Paṭ 7, Khaṇḍ 16, paras 7 ss.

(*d*) Manu III. 262, 263, 277; Vishnu LXXVIII. 9, 19.

(*e*) *See* Âpast. Pr. II. Khaṇḍ. 24, para. 1; Datt. Chand. Sec. I. 3.

(*f*) Coleb. Dig. Bk. V. T. 312.

(*g*) Coleb. Dig Bk. V. T. 304, 313.

(*h*) " Fathers desire offspring for their own sake, reflecting 'this son will redeem me from every debt whatsoever due to superior and inferior beings.' " Nârada, Pt. I. Chap. III. para. 5. Spiritual benefits however are not the only reason for adoption. The Jains recognize adoption though they have no śrâddha or paksha ceremonies, *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87; *Bhagvândás Tejmál* v. *Rájmál*, 10 Bom. H. C. R. 261; *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

Regard being had to the immeasurable benefits to be secured by the adoption of a son it may be a matter of surprise that any Hindû should, except through accident, die childless. The hope of a begotten son however is not readily resigned. The widow can be instructed to adopt. In poor families the expenses caused by an adoption both for the ceremonies and the subsequent maintenance of the adopted son cannot easily be met. In families

It is in this sphere of thought that the procreation of a son is regarded as imperative on a Hindû of the higher castes, or at least an endeavour to that end. (*a*) In the event of incapacity or failure it becomes a religious obligation (*b*) to adopt a son in order that the sacrifices may not fail. (*c*) The stringency of this religious obligation is strongly insisted on by Mitter, J. (*d*) It was in the case referred to made a ground for upholding an authority to adopt given by a minor as being an act at once obligatory and beneficial to

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of wealth and position the natural parents are brought into an intimacy that is not perhaps quite welcome, and there is always a chance of the attachment of the adopted son to his mother and his family of birth making him comparatively indifferent to the one he has entered by adoption. There is room for fear even of his plotting against his adoptive father and endeavouring to get him set aside. Many Hindûs being lukewarm and dilatory faintly intend to adopt but do nothing. Hence it happens that adoption is less practised than might be expected, and the right of selecting an heir to a chiefdom or a great estate often devolves on the widow. The interest which, in such cases, the representatives of the junior branches have in a good choice has gained general acceptance for the doctrine that their assent is requisite to the validity of the adoption, though this is not by all the Marâthâs perhaps regarded as absolutely essential. The widow, left to herself, is generally inclined to adopt. She thus in an undivided family gains consideration, and she is anxious to provide not only for her husband's śrâddhs but for her own and her father's, the celebration of which is a duty of the son, though not an absolutely indispensable one. *See* Vyay. May. Chap. IV. Sec. V. paras. 17, 36; Mit. Chap. I Sec. XI para 9; Steele, L. C. 47, 48, 187, 394; Vîram. Transl. p. 116; *Bhaguandas* v *Rajmal*, 10 Bom. H. C. R. at p. 265; *Rakhmábai* v. *Rádhábái*, 5 Bom. H. C. R. 181 A. C. J; *Gopal* v. *Naro*, 7 Bom. H. C. R. XXIV. App.; Coleb. Dig. Bk. V. T. 273, 275 Comm.

(*a*) *See* above, p. 871; Baudh. Pr. II Kaṇḍ. 16, paras. 10–14; Pr. IV. Adh. I, paras. 17–19; and Manu IX. 137; Coleb. Dig. Bk. V. T. 270.

(*b*) 2 Str. H. L. 194, 198.

(*c*) Datt. Mîm. Sec. I. para. 5; Manu IX. 180.

(*d*) *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548.

him. This deduction may be doubtful, and a merely religious obligation is not one that Civil Courts can enforce. Colebrooke says: (*a*) " Passages of law recommend, but do not enjoin, adoption for the oblation, the obsequies, and the honour of his name" according to a text said to be of Manu. The sense of the religious obligation felt by a true Hindû raises a presumption of fact which is of weight in cases of conflicting testimony, yet as has been said by the Judicial Committee: " Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindûs die daily without having fulfilled this obligation or made provision for its fulfilment after their death." (*b*)

Were the duty to adopt a son more than a merely moral obligation it would follow apparently that a power to adopt given to a widow (*c*) must be promptly executed. So long as a man lives he may in most cases reasonably hope for offspring, but with his life the possibility ceases, and the duty resting on his widow becomes imperative (*d*) and urgent lest she too should die without adopting. The Judicial Committee, however, approved the judgment of the Sadr Court of Bengal that the " fact of an authority to adopt being possessed by a widow, does not supersede and destroy her personal right as a widow," (*e*) and "the claim of a widow duly authorized to adopt to claim under any circumstances her personal rights until she does adopt is not

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(*a*) 2 Str. H. L. 83

(*b*) *Nilmadhub Doss* v. *Bishumber Doss*, 13 M. I. A at p. 100.

(*c*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414.

(*d*) This is more particularly the case when an express direction has been given by the deceased husband than where he has left the widow merely to fulfil the duty as her own conscientiousness and prudence suggest. *Musst. Subudra Chowdryn* v. *Golooknath Chowdree*, 7 C. S. D. A. R. 143.

(*e*) So *Musst. Tareenee* v. *Bamundoss Mookerjee*, 7 C. S. D. A. R. 533.

affected by a consideration of what might be the proper course if she could be proved to have violated any clear and positive legal obligation." (a) The widow must fulfil in good faith the direction given to her, (b) but she is allowed a discretion as to time and choice unless restricted by the terms of the power. (c) In the Bombay Presidency and in Madras a widow may adopt without an express power, (d) but this is not held to lay her under a positive legal obligation, or to prevent her husband from forbidding an adoption.(e) Nor are coparceners of the deceased husband, whose assent is generally necessary, compelled to assent to an adoption, as, were this a legal duty, they apparently must do. (f) The conclusion seems to be that "though it may be the duty of a Court of Justice administering the Hindû law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence," (g) yet it is only a duty of imperfect obliga-

(a) *Bamundoss Mookerjee* v. *Mussamut Tareenee*, 7 M. I. A at pp. 178, 190.

(b) A testator may bequeath property to a boy designated by him for adoption, and the widows must adopt the boy. They are not allowed to defeat the bequest by not adopting. "Widows" should for Bombay be "the elder widow," unless she refuses, and then the younger, Steele, L. C. 187; *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(c) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. 6 Mis. Rul.

(d) Mit. Ch. I. Sec. XI. para. 9; *The Collector of Madura* v. *Moottoo Ramalinga Satthupatty*, 12 M I. A. 397 The Pandit at 2 Str. H L. 115 does not seem to have thought any sanction essential; Colebrooke did; Ellis thought it might possibly be needless amongst Śûdras, *ib.*

(e) *Bayabai* v. *Bala*, 7 Bom. H. C. R. 1 App.

(f) The Datta Kaustubha, as construed by the Śâstris, *see* above, pp. 864, 880, says their assent is not essential.

(g) Pr. Co. in *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R. 3 I. A. 191.

fied in the Śâstras, but it is merely said that a son who hates or injures his father is his enemy (*a*).

Rutnagherry, August 24th, 1850.

Authorities.—(1*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (2*) f. 50, p. 1, l. 7 (*see* Chap. II. Sec. 1, Q. 1); (3) Vyav. May. p. 161, l. 8 (*see* Auth. 1); (4) p. 94, l. 1; (5) p. 94, l. 2 (*see* Auth. 2); (6) p. 84, l. 4; (7) p. 91, l. 2:—

"The father and sons are equal sharers in houses and lands derived regularly from ancestors; but sons are not worthy (in their own right) of a share in wealth acquired by the father himself, when the father is unwilling." (Borr. p. 54; Stokes, H. L. B. 48).

Remarks.—1. A son by birth or adoption can, for adequate reasons, be disinherited; but the course of devolution prescribed by the law cannot be altered by a private arrangement; on the son's disherison the son's son becomes his grandfather's lawful heir. (*b*)

2. A son was disinherited and afterwards restored, in *Musst. Jye Koonwar* v. *Bhikaree Singh.* (*c*)

3. The sons of outcasts born before their fathers' expulsion are not outcasts but take their fathers' places. Sons born after expulsion are outcasts, but Mitramiśra says a daughter is not, for "she goes to another family," Vîram. Tr. p. 254. (*d*) That man is in a special degree an enemy of his father who cannot or will not perform the religious ceremonies by which the father is to benefit, *see* Coleb. Dig. Bk. V. T. 320, Comm. Comp. Vîram. Transl. p. 256.

(*a*) "*Jure etiam pro tacite exheredato habebitur qui grave crimen commiserit in patrem si nulla sunt condonatœ culpae indicia,*" Grot. L. II., C. VII. 25, and the references to the Civil Law. Translation:—"He is also held as tacitly disinherited by operation of law, who has been guilty of a grave offence against his father, there being no proof of subsequent condonation." The Roman law imposed no restraints on an unamiable father. At Athens it seems to have been much the same down to Solon's times. Thenceforward public notice of disinheritance had to be given. *See* Schoemann, Ant. Gr. 502. Zachariae His. J. Graec. Rom. Tit. II. shows the gradual modifications of the patria potestas.

(*b*) *Balkrishna* v. *Savitribai,* I. L. R. 3 Bom. 54.

(*c*) 3 Mor. Dig. p. 189, No. 27.

(*d*) With this may be compared the early English law exempting already born children from their father's outlawry which the afterborn ones had to share. *See* Bigelow, Hist. of Proc. p. 348.

b.—PERSONS ADDICTED TO VICE.

Q. 1.—A man has a son, but as he was addicted to gambling and opium-eating, the father has constituted his grandson his next heir. Can he legally do so?

A.—It is quite legal for the father to disinherit his son on the ground of his misconduct, and to appoint his grandson to be his heir.—*Ahmedabad, March 7th,* 1856.

AUTHORITIES.—(1) Mit. Vyav. f. 45, p. 2, l. 8; (2*) Mit. Vyav. f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (3) Vyav. May. p. 163, l. 3:—

"If there be other sons endowed with good qualities the inheritance is not to be taken by a vicious one; for says Manu—'all those brothers who are addicted to any vice lose their title to the inheritance.'" (Borr. p. 132; Stokes, H. L B. 109.)

REMARK.—This opinion has in several forms been repeated in other cases It cannot however be received without a safeguard against caprice and an appeal to the Civil Court. *See* 1 Str. H. L. 157.

Q. 2.—A Paradeśî had acquired some moveable and immoveable property before his death. He had a wife and two sons. One of these sons was addicted to gambling and other vices. He contracted some debts and died. The property of the Paradeśî was not divided. His deceased son had acquired no property. The question is, whether the creditor of the deceased son can recover the debt from the Paradeśî's property? The mother of the deceased son states that her son was a man of bad character, and therefore he was not entitled to any share of his father's property. Is her objection legal?

A.—The son was addicted to gambling and other vices. The debt contracted by him was not on account of the family. The creditor cannot therefore have his claim satisfied from the deceased's share of the common property. The objection of the mother that her son is not entitled to any of the father's property is valid.—*Khandesh, August 7th,* 1849.

REMARK.—*See* the preceding case. "The father shall not pay his sons' debts; but a son shall pay his father's." Nârada, Part II. Chap. III. sl. 11; so held in the case of *Udaram* v. *Ranu Panduji et al.* (a)

(a) 11 Bom. H. C. R. 76.

Q. 3.—A man had four sons. One of them was a man of bad character. The father therefore excluded him from all participation in his property, and left a direction in his will that the share due to him should be given to his son. The son protested against the validity of the will on the ground that his father was 60 years old at the time of the will, that his hand used to shake, and that the will does not bear his signature. Is it lawful in a father to assign only maintenance to his son, and to bestow his share upon his grandson?

A.—A father is at liberty to distribute the property acquired by himself among his sons in such a manner as he pleases. If one of his sons is insane, or addicted to vicious habits, or hostile, or disobedient to his father, he cannot be allowed a share of his father's property, but a maintenance only. His share would properly be given to his son. The will is not invalid merely because the father being very old could not sign it himself, but desired some other person to sign it for him.—*Ahmednuggur, January* 25*th*, 1859.

AUTHORITIES.—(1) Vyav. May. p 163, l. 3 (*see* Chap. VI. Sec. 3 *b*, Q 1); (2) p. 161, l. 7 and 8; (3) f. 47, p. 1, l. 7; (4) f. 47, p 2, l. 15; (5) f. 46, p. 2, l. 2; (6) f 50, p. 1, l. 1; (7) f. 22, p. 1, l 2; (8) f. 32, p. 1, l. 9; (9) f. 32, p. 2, l 5 and 8; (10) f. 60, p. 1, l. 13 (*see* Chap. VI. Sec. 1, Q. 1); (11) Mit. Vyav. f. 60, p 2, l. 1:—

Nârada also declares:—" An enemy to his father, an outcast, an impotent person, and one who is addicted to vice, take no share of the inheritance, even though they be legitimate; much less if they be sons of the wife by an appointed kinsman." Mit. Ch. II. Sec. X. para. 3. (Colebrooke, Inh. p. 361)

REMARK—The father has no right to disinherit any one of his sons without reason, and consequently a will to this effect is void according to Hindû Law. (*See* Bk. II. Chap I Sec. 2, Q. 4, 5, 8.) Mitramiśra quotes Âpastamba to the effect that an outcast is deprived of his right to inherit, and Bṛihaspati and Manu (*see* Q. 1) to show that a son incapable of offering funeral oblations is disqualified for the inheritance which is the proper remuneration for the performance of this duty. "Those," he says, "who are incapable of performing the rites enjoined by the Śruti and the Smṛiti, as well as those that are addicted to vice are disentitled to shares." Viram.

Transl. 256. Hence degradation from caste caused an extinction of property, (a) but without serving as a cause of retraction when the share had once been assigned and taken. (b)

c.—ADULTERESSES AND INCONTINENT WIDOWS.

Q. 1.—Can a man's wife, who has been guilty of adultery, lost her caste and left her husband, be his heir ?

A.—If the ceremony of Ghaṭasphoṭa (divorce) has been performed, the wife cannot be the heir.

Ahmednuggur, June 17*th,* 1846.

AUTHORITY.—Vyav. May. p. 134, l. 6 :—

"The wife, faithful to her husband, takes his wealth; not if she be unfaithful; for it is declared by Kâtyâyana :—'Let the widow succeed to her husband's wealth, provided she be chaste.'" (Borr. p. 100 ; Stokes, H. L. B. 84.)

REMARK.—A wife guilty of adultery cannot inherit from her husband, whether the Ghaṭasphoṭa has been performed or not. But there must be positive proof or at least *very well grounded* suspicion. (c)

Q. 2.—Can the wife of a deceased Vairâgî, who forsook him without obtaining a written permission from him, and conducted herself as a prostitute for 12 years, become his heir ?

A.—No.—*Dharwar, March* 16*th,* 1860.

AUTHORITIES —(1) Mit. Vyav. f. 55, p. 2, l. 6; (2*) Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 *c*, Q. 1).

Q. 3.—A widow bore a son two years after her husband's death. Can she claim the property of her husband ?

A.—A widow of bad character has no right to claim the property of her husband.—*Dharwar, May* 10*th,* 1850.

(a) *See* P. C. in *Moniram Kolita* v. *Kerry Kolitany,* L. R. 7 I. A. at p. 146.

(b) *Ibid.*

(c) *Ramia* v. *Bhgi,* 1 Bom. H. C. R. 66.

AUTHORITIES.—(1) Mit. Vyav. f. 56, p. 2, l. 5; (2*) Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 *c*, Q. 1.)

REMARK.—*See* below, Q. 6, Remark.

Q. 4.—A deceased person has left distant cousins, the descendants of the fourth ancestor, and a widow, who, on account of her incontinency and pregnancy after the death of her husband, has been refused communication with the caste. Which of these will be his heir?

A.—Should the cousins and the deceased have lived together as an undivided family, the cousins will be the heirs. If they were separate, the widow of the deceased, notwithstanding her bad character, will be the heir.

Poona, August 31*st*, 1848.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) f. 60, p. 2, l. 2; (3*) Vyav. May p. 134, l. 6 (*see* Chap VI. Sec. 3 c, Q. 1).

REMARK.—The widow cannot inherit if she has been guilty of adultery before her husband's death. For the effect of her incontinence after his death, *see* Q 6

Q. 5.—Can a Brâhman widow, who is guilty of adultery claim her husband's vatan?

A.—No; by her misconduct she has forfeited her right.

Ahmednuggur, 1845.

AUTHORITY.—Vyav. May. p. 134, l. 6 (*see* Chap. VI. Sec. 3 c, Q. 1).

Q. 6.—A woman of the Dorik caste, having lost her husband, became the mistress of a man of (another) Śûdra caste, and had a daughter by him. Can she claim to be the heir of her husband?

A.—A woman who was chaste at the death of her husband becomes his heir.—*Khandesh, January 4th*, 1851.

AUTHORITY.—Vyav. May. p. 134, l. 4; Mit. Vyav. f. 55, p. 2, l. 1 (*see* Chap. I. Sec. 2, Q. 4).

REMARKS.—1. According to Strange, El. H. L., adultery divests the right of a widow to inherit after it has vested. *See* Steele, 35, 36, 176.

2. On the other hand, the Śâstri's opinion seems to be supported by the Vîramitrodaya, where it is said, f. 221, p. 2, l. 8:—"And these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made, a resumption of the divided property does not take place, because there is no authority (enjoining such a proceeding)." It is only through an extension by inference of the rule of exclusion that it is made to include females, who are therefore equally entitled to the benefit of the exception with the males specified, *see* Vîr. Transl. 253, which allows an outcast to recover his rights by performing the proper penance. *See* Mitâksharâ, Chap. II. Sec. 10, pl. 6; Stokes, H L. B. 456. Colebrooke, quoted in 2 Strange, H L 272, lays down the principle that after the estate has once vested it can be forfeited only by loss of caste. A woman would in general be expelled from caste for proved incontinence, and hence Sir T. Strange (p. 164) has inferred that a widow holds "*dum casta fuerit*" only; but the authorities quoted by Colebrooke do not support the view that any forfeiture of property necessarily attends expulsion from caste. It would follow as a necessary consequence in the case of a member of an undivided family, as all the property would be appropriated by those members who remained in communion with the caste; but this would not be so in the case of a separated person. (*a*)

3. The Mitâksharâ, while it excludes the outcast from participation, adds:—"But one already separated from his coheirs is not deprived of his allotment," Mit. Chap. II. Sec. 10, pl. 5, 6; Stokes, H. L. B. 456. And now by Act XXI. of 1850, expulsion from caste causes no deprivation of any right of inheritance. At the same time a widow, who remarries, forfeits her widow's estate under Act XV. of

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(*a*) Under the English Law, Freebench, as it is called, "is generally an estate for life. In many manors it is forfeited by incontinency or a second marriage . . . . If a widow is found guilty of incontinency she loses her freebench unless she comes into Court riding upon a black ram and repeats certain words," 1 Cruise's Dig. 285.

The widow takes as dower a moiety of gavelkind lands, but her estate is divested by her remarriage or incontinency. Elt. T. of Kent, 87.

1856. Thus subsequent unchastity does not divest her, but remarriage does. (*a*) In the case at 2 Macn. Prin. and Prec. of Hindû Law, 19, the Śâstri seems to have held that subsequent incontinence defeated the widow's estate, but "an estate once vested by succession or inheritance is not divested by any act which before succession or incapacity would have formed a ground for exclusion from inheritance." (*b*)

4. Subsequent unchastity does not divest an estate vesting in a mother. (*c*) In the case of *Advyappa* v. *Rudrava,* (*d*) it is ruled that incontinence does not affect a daughter's succession to her father's estate among Lingâyats. *See* same case, p. 118, as to the similar rule in the case of a mother. This was followed in *Kojiyadu* v. *Lakshmi.* (*e*) The disqualification of an incontinent mother to inherit from her son is expressly declared in *Ramnath* v. *Durga.* (*f*) It does not prevent a widow's inheriting from her maternal grandmother. (*g*) Incontinence is held to prevent one widow getting her share from the other. (*h*) Compare 2 Macn. H. L. 133, cited in the Introduction; compare also the case under the Bengal Law of two daughters inheriting jointly from their father, and on the death of one leaving a son while the other is a childless widow, the latter's inheriting, notwithstanding a state has supervened which would have originally been a disqualification. (*i*) The daughter's right to inherit arises in case of a disqualification of the widow through incontinence. Smṛiti Chandrikâ, Chap. X. Sec. 2, para. 22.

5. In *Honamma* v. *Timanabhat et al,* (*j*) it is laid down that a bare maintenance awarded as such is not forfeited by subsequent

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(*a*) *Parvati* v. *Bhiku,* 4 Bom. H. C. R. 25 A. C. J.; *Abhiram Das* v. *Shriram Das et al,* 3 Beng. L. R. 421 A. C.; *S. Matangini Debi* v. *S. Jaykali Debi,* 5 *ibid.* 466.

(*b*) P. C. in *Moniram Kolita* v. *Kerry Kolitany,* L. R. 7 I. A. 115, in appeal from 13 Beng. L. R. 1. So *Bhawani* v. *Mahtab Kuar,* I. L. R. 2 All. 171; *Nehalo* v. *Kishen Lall,* I. L. R. 2 All. 150.

(*c*) *Musst. Deokee* v. *Sookhdeo,* 2 N. W. P. R. 361.

(*d*) I. L. R. 4 Bom. 104.

(*e*) I. L. R. 5 Mad. 149.

(*f*) I. L. R. 4 Calc. 550.

(*g*) *Musst. Ganga Jati* v. *Ghasita,* I. L. R. 1 All. 46.

(*h*) *Rajkoonwaree Dassee* v. *Golabee Dassee,* C. S. R. for 1858, p. 1891.

(*i*) *Vyav. Darp.* 170; *Amrit Lal Bhose* v. *Rajoneekant Mitter,* L. R. 2 I. A. 113.

(*j*) I. L. R. 1 Bom. 559.

incontinence. Sir T. Strange, 1 H. L. 172, thought it was doubtful. At 2 Str. H. L. 310, Colebrooke, referring to Mitâksharâ, Chap. II. Sec. 1. p. 17, says that brethren are not bound to maintain the unchaste widow of their childless brother. Several cases to the same effect are cited in Norton, L. C. 37. The Vyavahâra Mayûkha, Chap. IV. Sec. 8, pl. 6 and 8, and the Mitâksharâ, Chap. II. Sec. 1, pl. 7, relying on a passage of Nârada, seem to consider that unchastity, distinguishable from the mere perverseness of pl. 37, 38 of Mitâksharâ, Chap. II. Sec. 1, causes a forfeiture of the right to maintenance. So too the Vîram. Tr. p. 143, 153, 174, 219, and the Smṛiti Chandrikâ, Chap XI. Sec. 1, par. 49. Good character is insisted on as a condition of the right by the Śâstri; above p. 354, Q. 25. The distinction between the two degrees of misconduct is very clearly taken in Mitâksharâ, Chap. II. Sec. 10, pl. 14, 15 (*see* also Coleb. Dig. Bk. V. T. 414, Com.), from which it appears that in the case of wives of disqualified persons, those merely perverse or headstrong, must be supported, but not those actually unchaste. The case of an adulterous wife and mother are provided for by special texts, and Mitramiśra insists on the distinction, Vîram. Tr. p. 153. The outcast mother is not outcast to her son, and the outcast wife is not a trespasser in her husband's house (*a*) though to be kept apart: Nârada, Pt. II. Chap. XII. sl. 91; Manu, cited in 2 Macn H. L. 144. In his answer to Chap. IV. B. Sec. 1, Q. 1, the Śâstri seems to have considered that a woman of abandoned character could claim no more than maintenance out of her mother's estate. A share or an allowance assigned to a widow in an undivided family by way of maintenance is resumable on her grossly misbehaving, according to the Smṛiti Chand. Chap. XI. Sec. 1, paras. 47 and 48. The view here taken has very recently been confirmed by the decision in *Valu* v. *Ganga* (*b*) in which the Court declined to follow *Honamma* v. *Timanabhat*.

6. The adulteress may claim bare subsistence from her husband only, Smṛiti Chand. Chap. XI. Sec. 1, para. 49, but not while she lives apart, (*c*) nor can a woman, who has obtained a *Soḍa-chiṭi* (divorce)

(*a*) *The Queen* v. *Marimuttu*, I. L. R. 4 Mad. 243.

(*b*) Bom. H. C. P. J. 1882, p. 399.

(*c*) A claim for maintenance by a wife was disallowed, she not having shown sufficient reason for her desertion or absenting herself from her husband, *Narmada* v. *Ganesh Narayen Shet*, Bom. H. C. P. J. for 1881, p. 215. This applies equally to any wife wrongfully withdrawing, *Kasturbai* v. *Shivajiram Devkuran*, I. L. R. 3 Bom. at p. 382.

felt themselves embarrassed by the inapplicable doctrine of *factum valet.* (*a*)

In the case of *Huebutrao* v. *Govindrao Mankur*, (*b*) referred to by Sir M. Westropp in the judgment lately quoted, the question was submitted to the Sâstris of whether the gift in adoption of both of two sons could be valid. The impossibility of undoing an adoption once completed is insisted on in the answers, but the gift really in question was that of the sole remaining (and the eldest) son to the widow of the donor's brother. In such a case the passages which declare that by the existence of a son of one of several brothers, all are made fathers, have been variously applied by Hindû lawyers to support the approval and the disapproval of an adoption. Nanda Paṇḍita in the Datt. Mimaṃsâ (*c*) devotes an elaborate argument to proving that where there is a son of a full brother available for adoption, he and no other ought to be taken. (*d*) Even the son of a half-brother ought not to be chosen if the nearer relative can be had. And the injunction he contends has such force that even the only son of a brother may be and ought to be adopted. (*e*) Without adoption he is not a son in the required sense to his uncle, and is indeed provided for as heir after his uncle's widow, his daughter and her son, while by adoption he does not lose his faculty of ministering spiritually to his real father and the ancestors who are equally ancestors of his adoptive father

(*a*) Steele, L. C. p. 381, shows that the castes, with a few exceptions, admit the restriction.

(*b*) 2 Borr. R. 83.

(*c*) Sec. II.

(*d*) So Steele, L. C. 182.

(*e*) The possibility of adopting the only son even of a brother is doubted by the Judicial Committee in *Sreemutty Uma Deyi* v. *Gokool-anand Das Maheepatra*, L. R. 5 I. A. 19, 53. The customary law of Bombay favours this particular kind of adoption though generally opposed to the adoption of an only son, see Steele, L. C. 183.

It is obvious that in such a case the manes of progenitors will not be left destitute by the transfer of the boy to another family, while if filial relation to one of a group of brothers involves a similar relation to all, the real father must still benefit, though in a less degree, through the sacrifices of the son adopted by his uncle. The boy becomes in fact a dvyâmushyâyaṇa (*a*) who will perform his real father's obsequies and take his estate if that father should not have any other son. The Mitâksharâ and the Vyavahâra Mayûkha do not discuss this particular case, but as they recognize the dvyâmushyâyaṇa and the theories connected with his double relations, it seems that the adoption of an only son of a brother should, as an exception, be deemed permissible. (*b*)

As an only son cannot be given away in adoption, so on a strict conformity to principle ought the eldest son, if living, to be retained in his family of birth for the celebration of its sacra and the discharge of the father's obligation to his ancestors. This son alone, Manu says, (*c*) is begotten from a sense of duty, and on this he grounds a rule of primogeniture which is soon after qualified, (*d*) and which, as we have seen, has not, except in special cases, been retained in the law of inheritance. (*e*) The gift or acceptance of an only son, however, is expressly forbidden by the Smṛitis, (*f*) and

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(*a*) Datt. Mîm. Sec. II. 36; above, pp. 897, 898.

(*b*) This was Colebrooke's view, *see* 2 Str. H. L. 107, where he cites Mit. Chap. I. Sec. X para. 1, and Sec. XI. para. 32. So too Sutherland, Synopsis, Head II.

(*c*) IX. 107; *see* Dâyabhâga, Chap. I. para. 36; 2 Str. H. L. 105.

(*d*) IX. 111.

(*e*) *See* above, pp. 69, 736; Dâyabhâga, Chap. I. para. 37. It is pronounced a sin for a younger brother to precede the elder in offering a Śrauta sacrifice or in marrying, Baudh. Pr. IV. Adh. 6. para. 7.

(*f*) Vasishṭha XV. 3, 4; Baudh. Pariśishṭa, Pr. VII. Adh. 5, paras. 4, 5.

this prohibition is recognized by the modern authors. (*a*) In the case of an eldest son, though the importance of him to his family of birth is so strongly insisted in the earlier authorities, yet more recent writers have in some instances pronounced the gift effectual, though censurable. (*b*) After such a gift there is still a son left to perform the father's obsequies, and no one supposes that if an eldest son dies a second son is not perfectly competent to take his place. Why not then when the eldest is removed from the family by gift? This may not be a satisfactory answer to an unqualified prohibition exacting obedience apart from the reasons that may be assigned for it, but it may have influenced the Śâstris in forming the opinion now and then expressed, (*c*) that the gift of an eldest son out of several is not invalid. The giving, it is said, in such instances is prohibited, but not the taking. (*d*) In Bombay it has recently been decided that such a transaction is legally valid. (*e*) Thus the case of the eldest son (*f*) is distinguished from that of the only son, the gift of whom has been pronounced void, (*g*) though possibly in part for reasons going beyond those set forth in the foregoing pages.

(*a*) Datt. Mîm. Sec. II. 38; Sec. IV. 1; Vyav. May. Chap. IV. Sec. V. para. 36.

(*b*) Vyav. May. Chap. IV. Sec. V. paras. 4, 5; 2 Str. H. L. 105. It is not opposed to Hindû notions that a man should benefit spiritually by moving another to an act which in him is sinful. *See* ex. gr. Baudh. Pr. IV. Adh. 8, para. 10 and note; Mit. Chap. I. Sec. XI. para. 10; Vyav. May. Chap. IV. Sec. V. paras. 13, 14.

(*c*) MS. 1612, 1621. So *Janokee Debea* v. *Gopaul Acharjea*, I. L. R. 2 Calc. 365. *See* 2 Str. H. L. 105.

(*d*) MSS. 1682, 1684.

(*e*) *Kashibai* v. *Tatia*, Bom. H. C. P. J. 1883, p. 40; S. C. I. L. R. 7 Bo. 225. So *Abaji Dinkar* v. *Gangadhar Vasudev*, 3 Morris, 420.

(*f*) *Somashekhara* v. *Subhadrámáji*, I. L. R 6 Bom. 524.

(*g*) *Dada* v. *Appa*, Bom. H. C. P. J. 1882, p. 294, referring to Appeal No. 1 of 1879, under Act XXVII. of 1860; *Vithoba* v. *Ramchandra*.

As in the absence of a son by birth an adopted son takes his place in relation to the adoptive father, (a) the same principle which prevents the adoption of a son while a begotten son exists, (b) equally forbids the adoption of a second while a first adopted son is living. (c) In the important case of *Rangamma* v. *Atchamma* (d) the Sâstris of the Provincial Courts of Madras pronounced in favour of multiple adoptions. They relied on a passage quoted by Jagannâtha to the effect that many sons are to be desired, as the father will get the benefit of the religious acts performed by any one of them, and maintained that several adoptions were as laudable as the procreation of several sons. They are supported no doubt by some of the treatises on adoption which take the passage in this sense, (e) but Jagannâtha appears to limit its meaning to the allowance of taking in adoption sons of the various descriptions, that is by the several modes of substitution or such as would spring from

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(a) Steele, L. [illegible] 47, [illegible] H. [illegible] 218.

Under the Roman law the adoptive father could give his adopted son in adoption to another (Gaius, I 105) This was by the earlier law. Justinian deprived an adoption of any one but a descendant of most of its legal effects, especially subjection to the patria potestas, so that an adopted son could not be given away again, nor was it worth while to give him away seeing that the adoptive father was under no particular obligation to him. In the case of sons taken by "arrogation" many safeguards were enacted to prevent their being defrauded by the adoptive fathers (*See* Maynz, *op. cit* § 328 *ad fin*) The latter was obliged to leave to his adopted son at least one-fourth of his estate

(b) *Joy Chundra Raee* v *Bhyrub Chundra Raee*, M. S. D. A. R. for 1819, p. 461.

(c) *Nursing* v *Khooshal*, 1 Borr 88; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 361; H H Wilson, Works, vol. V. p 57.

The Athenian laws had such care for the adopted son that they did not allow an unmarried man who had adopted to marry without a special permission from the judges. (*See* Petit, Leges Atticæ, p. 141).

(d) 4 M. I. A. 1. *See* the discussion, 2 Str. H. L. 194.

(e) It is taken from the Karma Purâṇa, and being quoted by Hemâdri is from him copied by Kamalâkara in the Nirṇayasindhu.

wives of the different castes. (a) This cannot be regarded as more than a speculative licence, seeing that a marriage out of a man's own caste, or a substitution otherwise than by adoption, is no longer permitted, (b) but Sir T. Strange sets forth a double adoption as valid. (c) The doctrine however is entirely opposed to the Dattaka Mîmâṃsâ, which allows only the sonless man to adopt. (d) In Bengal the passage as to several sons had already been limited to sons by birth, (e) though a second adoption was under peculiar circumstances, and perhaps wrongly, upheld. Sutherland pronounced strongly against the attempted extension of it, (f) and a similar opinion was expressed by Sir W. Macnaghten. (g)

The Judicial Committee on a consideration of the authorities determined, in the case just referred to, that a second adoption during the subsistence of the first was not to be allowed. (h) This decision, which has recently been reaffirmed, (i) agrees with the customary law of Bombay; (j) and the existence of a son's son equally with that of a son makes adoption impossible, (k) as in the absence of a son his son

(a) Coleb. Dig. Bk V. T. 308, Comm

(b) *See* however 4 M. I. A. at pp. 95, 96.

(c) 1 Str. H L. 78.

(d) Datt Mîm Sec. 1, paras 3, 6. So also Datt. Chand Sec. 1, para. 3.

(e) *Gouree Prosad Raee* v. *Joymala*, 2 C. S. D. A. R. 136, in 4 M. I. A. at p. 67.

(f) 2 Str. H. L 85

(g) P. & P. H. L. Vol 1. p. 80. A simultaneous adoption of two sons is not effectual as to either, *Gyanendro Chunder Lahiri* v. *Kalla Pahar Haji*, I. L R 9 Cal. 50, referring to *Sidessurry Dossee* v. *Doorga Churn Sett*, 2 In. Jur. N. S. 22; *see Ib* 24.

(h) *Rangama* v. *Atchama*, 4 M. I. A. at p. 102.

(i) *Gopee Lal* v. *Musst. Sree Chundraolee Buhoojee*, L. R. S. I. A. 131.

(j) Steele, L. C. 42, 45, 183, 387.

(k) Steele, L. C. 42.

represents him both in rights and in religious duties towards the family. (*a*)

The purpose of Adoption being such as we have seen, it would seem that consistency with the theory of the institution should have prevented an unmarried man from adopting a son. (*b*) Such a man can but seldom be able to say that he cannot have a begotten son, (*c*) and at any rate he is bound to marry. (*d*) The Dattaka Mîmâṃsâ and Chandrikâ do not contemplate adoption by a bachelor, nor in the rule laid down in the Vyavahâra Mayûkha (*e*) is there the express provision in favour of a bachelor's capacity that might have been expected, had there been an intention to recognize his right to adopt. Jagannâtha however (*f*) says there is no law forbidding adoption by an unmarried man, and Sutherland (*g*) thinks such an adoption ought to be admitted. The Śâstris have in one or two instances said that a bachelor can adopt, (*h*) and the Sadr Court of Bombay upheld a similar rule as a local usage. (*i*) In Madras the question of a widow's capacity to adopt without trying the effect of a remarriage has twice been resolved in the affirm-

(*a*) In *Virbuddra* v. *Bace Rance*, 2 Morr. 1, the question arose of whether an adopted son could renounce his adoption and return to his family of birth. The Śâstri, relying on Manu IX. 142, said he could not, but that he could resign his rights in the family of adoption on which the adoptive mother became free, with the consent of the near relatives, to adopt another son in his place.

(*b*) *See* Steele, L. C. 43.

(*c*) *See* Steele, L. C. 182.

(*d*) *Ib.* 25; above, p. 873.

(*e*) Chap. IV. Sec. V. para. 36.

(*f*) Coleb. Dig. Bk. V. T. 273, Comm.

(*g*) Note iv.

(*h*) MS. 1670.

(*i*) *Gunnappa* v. *Sankappa Deshpande*, Sel. Rep. 202 (2nd Ed. 229). *See* Steele, L. C. 182, which states a contrary rule for the Southern Maratha Country.

ative. (a) In the latter of the two cases an opinion was expressed in favour of the validity of adoption by a bachelor, but this was extra-judicial, and rested entirely on the authorities already discussed. Celibacy is very rare amongst Hindûs sufficiently rich to bear the expense of maintaining an adopted son, so that the validity of the adoption in question is not likely to occur often. Should it arise, the Courts will have to consider whether Jagannâtha's principle is the correct one, or whether adoption being allowed only as a privilege to supply a defect, the indulgence ought to be extended beyond the terms of the law permitting it.

It seems probable that adoption in the full sense has been but recently introduced amongst most of the lower castes (b)—recently, that is in comparison with its establishment amongst the twice-born. (c) It is the Brâhmaṇa, not the man of inferior race, who is born with the triple debt to the gods, the manes, and the ṛishis. (d) The Vedic study due to the last is forbidden to the Sûdra. (e) The religious ceremonies, the celebration of which is the first duty of a Brâhman's son, do not exist for the Sûdras, and Vâchaspati contended that a Sûdra could not affiliate because he could not offer the requisite sacrifice and prayers. The Datt. Mîm. refutes this by reference to a text of Śaunaka, (f) which distinctly recognizes the adoption of a Śûdra by a Sûdra with liberty to take a daughter's or a sister's son—a liberty

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(a) *Nagappa* v. *Subba Śâstri,* 2 Mad. H. C. R. 367; *N. Chandrashekarudu* v. *N. Brahmanna,* 4 Mad. H. C. R. 270.

(b) As to the gradual extension of the Aryan influence, *see* Whitney's Or. and Ling. Studies, 2nd Series, p. 7.

(c) Vasish. II. pp. 1-4.

(d) Vasish. XI. 48 ; Phil. of the Upanishads, Chap. IV.

(e) Vasish. XV. 11; XVIII. 12-14; Baudh. Pr. I. Adh. 11, para. 15; Adh. 10, para. 5; Manu II. 115, 116, 173; IV. 81; Âpast. Pr. I. Khaṇḍ. 1, para. 5.

(f) Datt. Mîm. Sec. I. 26; Sec. II. 74.

which the Vyav. May. makes a duty when such a son is available. (*a*) The authority (Parâśara) relied on by Nîlkaṇṭha says that the requisite sacrifice may be offered by a Bráhmaṇa on behalf of the Sûdra, and is effectual for the latter, though a sin in the former. Adoptions by women are made effectual by similar vicarious celebration of the ceremonies. (*b*)

In a passage at 2 Str. H. L. p. 89 Ellis refers to a Dattaka Mîmâṃsâ of the Madhaviya in which it is said there is no adoption for a Sûdra. (*c*) The ceremonial adoption cannot, he shows, be properly performed by Sûdras (*d*) who are incapable of celebrating the fire sacrifice (Datta homam) with the requisite Vedic texts. (*e*) But the Sûdra having no gotra the transfer of a boy of that caste from one to another gotra cannot take place, and this transfer it is the purpose of the Datta homam to effect. He concludes not that an adoption is impossible, but that the ceremonies necessary in the case of one of the twice-born may be dispensed with and replaced by public acknowledgment.

The Maithila doctrine seems to disallow adoption by a Sûdra on the ground of his incapacity to offer the Homa sacrifice and recite the sacred formulas. (*f*) The Datt. Mîm. (*g*) refutes this by reference to the text of Saunaka; and Ellis, *loc. cit*, says that a public avowal amongst Sûdras takes the place of the ceremonial prescribed for the other castes. Thus amongst Sûdras a formal gift and acceptance are sufficient, and may be established by

(*a*) Vyav. May Chap. IV Sec V. para. 11

(*b*) Vyav. May. Chap. IV. Sec V paras. 12—15; Steele, L. C. 46.

(*c*) Comp. Gaut. Chap. IV. 25—27.

(*d*) *See* the extracts from the Śûdra Kamalâkara and from Vyâsa at p. 433 of Rao Saheb V. N. Mandlik's Vyav. May.

(*e*) *See* 2 Str. H. L. 218.

(*f*) 2 Str. H. L. 131. *See* also the Vyav. May. Chap. IV. Sec. V. paras. 12, 13.

(*g*) Sec. I. 26; Sec. II. 71.

inference. The Datt. Mîm. Sec. I., 27, says that the express ascription of the power of adoption to Śûdras and to women who cannot pronounce the formulas necessarily implies that these may in their case be dispensed with, contrary to the Vivâda Chintâmaṇi, (*a*) and a Śâstri said that a Gosâvi of the Sûdra class could adopt but should omit the Vedic formulas.(*b*)

In Bengal it was at one time held (*c*) that even amongst the Śûdras the ceremonies of adoption could not be dispensed with. The services of a Brâhman it was said were to be obtained to do what the Sûdras themselves could not do towards the completion of the sacrifices. (*d*) But on a further consideration of the matter a Full Bench determined (*e*) that no ceremonies were essential except the giving and taking of the child. It is certain that Sûdras cannot recite the prescribed mantras ; (*f*) the question really was whether their incapacity in this and other respects did not exclude them altogether from the institution. (*g*) This has been resolved in favour of their competence. (*h*) The purposes of adoption have been widened so as to embrace objects in which the Śûdra is interested equally with the Brâhman, and besides the kriyâ and the śrâddhas the Saṃskâra Kaustubha insists on the necessity of preserving the renown of a deceased by

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(*a*) Transl. p. 88.

(*b*) MS 1678.

(*c*) *Bhyubbnath Tye* v. *Mohesh Chunder Bhadooree*, 13 C. W. R. 168.

(*d*) So 2 Str. H. L. 130.

(*e*) *Beharee Lall Mullick* v. *Indur Mohinee Chowdhrain*, 21 C W. R. 285.

(*f*) Steele, L. C. 46.

(*g*) Vyav. May. Chap. IV. Sec. I. para 14.

(*h*) Ellis at 2 Str. H. L. 149, points out that the "twice-born" really means in the present age the Brâhmans, and the Śâstris in some of their replies say that the Kshatriyas and Vaiśyas have disappeared as distinct castes. The application of the law of adoption thus restricted would be of comparatively very small extent.

alms, by feasts to Brâhmans, and by pilgrimages. (a) A son too must assist his father in old age. (b) These duties a Śûdra's adopted son can perfectly well perform, and it is easy to understand how, as they are conspicuous, they should with many come to appear the most important. The desire to imitate the higher castes (c) has been gratified, and the impossibility of satisfying the ceremonial conditions has led to their sometimes being dispensed with (d) or regarded as not essential, (e) not only in the case of Śûdras but of the higher castes. (f) Where there has been a formal giving and acceptance the adoption is, for all classes in Bombay, as in Madras probably, to be regarded as complete. (g)

The custom in some castes, as Jains and Talabda Kolis, of adoption without regard to the spiritual benefits to be obtained through the adopted son, forms a point of transi-

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(a) Steele, L. C. 42.

(b) *Ib* 181.

(c) *See* above, p. 426.

(d) Manu regarded the śrâddhas apparently as not competent to Sûdras, Manu IV. 223; but this need not prevent a laukika adoption, *i.e.* one for mundane purposes, unless the latter are to be deemed purely incidental. The customary law approves and requires the celebration of the śrâddhas by nearly all castes, as may be seen by reference to Steele's L C. 27, 42, 181, 380.

(e) *See* Ellis in 2 Str. H. L. 131.

(f) *See* Coleb. Dig. Bk. V. T. 273 Comm. The Śâstris usually insist on the regular ceremonies as indispensable, but they do not define which are essential. *See* Steele, L. C. 184, and the Section below on the METHOD OF ADOPTION. The castes annul irregular adoptions, Steele, L. C. 388. The Hindû authorities generally regard a boy defectively adopted as a dâs or slave of the highest class; *see* below, "CONSEQUENCES OF ADOPTION."

(g) Steele, L. C. 184. See *V. Singamma* v. *Vinjamuri Venkatacharlu*, 4 Mad. H. C. R. 165. In *Kenchava* v. *Ningappa*, S. A. 645 of 1866, 10 Bom. H. C. R. 265, the parties were not Brâhmans but apparently Lingâyats. Jagannâtha in Coleb. Dig. Bk. V. T. 273,

tion to a custom in other castes by which adoption is not

Comm., dwells at great length, if not with invincible logic, on the oblation to fire as being not essential. In *Crastnarav* v. *Raghunath*, Perry O. C. 150, the safe opinion is expressed that where the essential ceremonies have been performed the omission of unessential ones does not invalidate an adoption. Colebrooke more definitely pronounces the sacrifice not essential, 2 Str. H. L. 126, 131.

In *Sree Narain Mitter* v. *Sreemuthy Kishen Soondory Dassee*, L. R. S. I. A. 157, the Judicial Committee say: "The most important issue in the cause was whether there was a formal gift of the child . . . . . whether there was an actual delivery of the child in addition to the execution of the deeds." That was a Bengal case, but the parties were Śûdras; the decision is conclusive of the sufficiency of actual giving and receiving to constitute adoption in that caste in every province. Corporeal gift and acceptance are again pronounced necessary and sufficient in *Mahashoya Shosinath Ghose* v. *Srimati Soondari Dasi*, L. R. 7 I. A. 250. In *Bhagvandas* v. *Râjmal*, 10 Bom. H. C. R. 241, Sir M. Westropp, C. J., after pronouncing Jains subject generally to the Hindû law of inheritance, discusses an alleged adoption by gift to a man and his wife deceased. This his Lordship held to be impossible, but from what is said in the course of the judgment (*see* p. 265), it may be gathered that a gift accepted by the adoptive parents would have been thought enough.

Lakshman v. *Malu*, Bom. H. C. P. J. 1875, p. 186, was apparently a case between Marâthâs, and there it was decided that there must be strict proof of the gift as well as of the acceptance.

These last two cases, though they point to the general sufficiency of a gift accepted, in so far as they do not dwell on any distinction of caste, yet do not precisely establish the validity of an adoption amongst Brâhmaṇas without the prescribed religious ceremonies. The Śâstris generally insist on these as indispensable, but in one case at least, that of *Jagannatha* v. *Radhabai*, S. A. 165 of 1865, it seems to have been held by the High Court of Bombay that no particular religious ceremony is absolutely necessary even in the case of Brâhmans. It will be seen that there is hardly authority for laying down a proposition as to this caste with perfect confidence. The ceremonies are by all Brâhmans thought important, and in practice the omission of them would throw such suspicion on an alleged adoption as to impair very seriously the proof of an alleged giving and taking with the requisite expression of intent.

recognized at all, or only under certain circumstances, (a) and with incidents different from those of ordinary adoption. The mere "celebrity of the name" (b) of the adoptive father hardly affords a sufficient basis in the absence of the intimate spiritual connection for so important a part of the family law as adoption, and the lower castes have in many instances proceeded but a short way in their imitation of the Brâhmaṇical institution. It seems probable indeed that such adoption as they recognize is of independent natural growth, and giving effect merely to an instinctive craving stands on a principle quite apart from the adoption commanded by religion and primarily serving religious purposes. In the continued associations of the lower orders with the Brâhmans their ideas on this as on other subjects have been coloured, sometimes quite changed, but in other cases they remain in substance what they have been from the first. Regarding such classes as dissenters from orthodox Hindûism the recognition of their own customs as binding on themselves is still consistent with the Hindû law. (c)

It will have been noticed that in several cases in the earlier parts of this work rights were set up by men claim-

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(a) In one case a thâkur (a Rajput Râjâ) seeking to exclude from succession his half-brother (elder) and his brother (younger) devised his estate (called a râj) to his daughter-in-law. The Śâstri pronounced this valid, and he said that the daughter-in-law could not adopt while the brothers of her deceased husband survived; MS. 281. This must have been an instance in which a son of an elder wife had taken precedence of an elder son by a junior wife, a modification accepted in some families of the rule favouring mere seniority of birth, *see* above, pp 69, 78; Steele, L. C. 40, 60, 63, 178, 229. It is plain that the male kinsmen were opposed to the adoption, and that being so the case must probably be reduced to one in which a widow could not adopt for want of the requisite assent of the kinsmen, *see* Coleb. in 2 Str. H. L. 92; Mit. Chap. I Sec XI. para. 9, note. It does not appear that in the class in question the mere existence of male heirs makes adoption legally impossible.

(b) Datt. Mîm. Sec. I. 9.

(c) Above, p. 597.

ing as pâlaka-putras, or foster sons of one deceased. A similar instance occurs in *Bhagvân* v. *Kâla Shankar*, (a) and it seems likely that the case at 2 Str. H. L. 113 was one of the same kind. (b) These instances point to a custom pretty widely prevalent amongst the lower castes by which a sonless householder assumed the guardianship of a boy, and either forthwith or afterwards declared him his heir, whereby without further ceremony he was vested with the rights of a son subject to partial defeasance only on the birth of a begotten son. (c)

The replies of many castes in Gujarath to Borradaile's inquiries show that the foster son was as well recognized amongst them as the son by regular adoption. In many

(a) I. L. R. 1 Bom. 641.

(b) *See* also Sp. App No. 74 of 1851, M. S. D. A. D. for 1852, p. 62, referred to in *V. Singamma* v. *Vinjamuri*, 4 Mad. H. C. R. 165.

(c) Steele, L C. 184. The Pâlaka-Kanyâ amongst the dancers was an imitation which implied the pretty wide prevalence of the institution copied. *See* Steele, L. C. 186. In one case the Śâstri said a foster son of a temple dancer was her heir to an allowance from the temple estate. A foster-son, he said, may be heir by custom, MS. 1707, though according to the case above, Q. 4, p. 356, he can ordinarily take even by gift from the foster-father only so much as may be becoming and usual where there is a real son.

The adoption of a person sui juris under the earlier Roman law was a very solemn proceeding, to which effect could be given only by a decree of the people in the Centuria Curiata. (*See* Poste's Gaius, I. 107, Comm.) It was preceded by an inquiry and declaration of the Pontiffs that there was no religious objection, and being formally voted by the assembly after formal public questioning of the parties, was hence called "*Arrogatio.*" (*See* Gaius I. 99.) It was accompanied by a formal renunciation of the sacra of the family of birth. These formalities were gradually disused, and at length adoption and arrogation were allowed by will as a mere means of constituting an heir who would preserve the testator's name. The adopted son retained his place in his family of birth while he acquired in that of his adoption merely a right of intestate succes-

cases adoption was not at all practised, (*a*) in some no foster son was taken. Especially where the remarriage of a widow was allowed it was said that no adoption or fostering by her was possible. "Yet," it was answered, "if the Śastras allow adoption we cannot presume to set them at nought."(*b*) This indicates how adoption of the Brâhmanical type has gradually superseded the looser tie of mere fosterage. (*c*) The latter had the advantage that the foster son did not lose his right of inheritance in his family of birth, and that

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sion to his adoptive father (Maynz, Dr., Rom. § 328.) His position was thus very like that of the pâlakputra amongst many Indian castes.

(*a*) Thus adoption is not recognized amongst the Kumbhârs at Surat (Borr. MSS. G. Koombhâr 10). In some castes, as the Bhatele, the Śâstri said adoption is not allowed while there is a male kinsman surviving, MS. 405. The non-recognition of adoption was found to prevail amongst some of the Dekhan castes also, *see* Steele, L. C. 181, 381. This might be regarded as a survival of the objection to giving or taking a son recorded by Âpast. Pr II Khaṇḍ 13, para. 11; but the classes who reject adoption are probably for the most part non-Âryan in origin.

(*b*) Hujjâm Kahnoomiya, Bk. F. p. 130 In the case of fifty-six castes at Poona it was said that ancient usage established by evidence and a vote of the caste constituted the law. But in cases of unusual difficulty Brâhmans were called in and a decision made according to the dharmaśâstra. It is obvious that as transactions and affairs grow more complicated this must give to the Śâstras a continually widening influence as law. It is not thought necessary to conform to the Śâstra in every particular, but submission to it is considered as at least proper and desirable. *See* Steele, L. C. 122, 126. A Śâstri said that the different opinions held on the subject of adoption ought to be applied to any case according as they agree with the custom of the community, and in the case of a Brâhman with the doctrines of the Shâkhâ to which he belongs, MS. 405.

(*c*) The mânasaputra in *Abhachari* v. *Ramchandrayya*, 1 Mad. H. C. R. 393, was probably taken with an idea derived from a similar kind of fosterage at one time recognized in Madras. The Paṇḍits said the mânasaputra was not known to the Hindû law, but the High Court held the *quasi* father bound by the deed of general donation in favour of the mânasaputra.

it fitted the needs and habits of castes to whom the elaborate system of adoption could not be adapted without violent distortions of the institution itself and of the customs amongst which it was introduced. (a) The foster son however has always been frowned on by the Śâstris. (b) He has failed to get recognition from the Courts, (c) and the member of a lower caste who now desires to benefit a nephew or the son of a friend has to adopt him in order to give him rights which will avail after the adoptive father's death. (d) The iron tie thus forged often becomes irksome to one or both parties, but the easier connection has been so discredited that it cannot apparently be restored except by an act of the Legislature.

(a) Many classes called Ati-Śûdras rank below the recognized Śûdras themselves, who have been brought fairly within the Brâhmanical system.

(b) A man having purchased or otherwise obtained a boy brought him up as a foster-son, and bequeathed part of his property to him. The Śâstri upheld the bequest, but held that the legatee's title did not extend any further as against the blood relatives of the testator, as there had not been a formal adoption, MS. 122.

In another case it was said that nephews, though separated, inherit before a mere foster-son, MS. 119.

(c) See *Nilmadhab Dás* v. *Biswambar Dás*, 3 B. L. R. 27, 32 Pr. Co.

(d) An intermediate case in which the Brâhmanical law of adoption has been partially accepted is that of the Talabda Kolis of Surat. The son is not taken for the same spiritual purposes as in the higher castes. His adoptive or foster father is to dispose of his property; but failing such disposition the foster son succeeds, and his rights in his family of birth are extinguished. Meanwhile he does not take his adoptive father's name as a true adopted son should do. These particulars are gathered from the papers in Sp. App. No. 64 of 1874.

The influence of imitation and a desire to rank higher in the social and religious scale, strong as it is, has done less in late years towards the assimilation of the lower classes to the Brâhmanical pattern than the action of the Courts. The law of the Dharmaśâstra being taken as the common law of the Hindûs, exact proof has been required of deviations from it, and on such proof failing through the ignorance or misapprehension of

The adopted son, according to Manu's rule (Chap. IX. 168, 169), must be "sadriśam" (= adequate, alike). This Medhâtithi in his commentary explained as meaning of appropriate family and character. (*a*) But Yâjñavalkya (Bk. II. v. 133) says the adopted or other subsidiary son must be of equal class with the father, and resting on this Nilakaṇṭha adopts Kullûka's interpretation of Manu to the same effect. It was a natural process, as marriage of a wife of lower caste became unlawful, (*b*) that adoption should be similarly restricted. It was part of the imitation of nature which has influenced the whole institution that when a Kshatriya son of a Brâhman became impossible, or one of intermediate caste, the adoption of such a son should become impossible also. The different construction given to the text of Manu under these different circumstances is a good instance of a process to which the smṛitis have frequently been subjected in adapting their precepts to the needs of the age.

A boy bestowed in adoption is usually given before the tonsure, (*c*) which amongst the twice-born takes place at

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those concerned, one rule after another of the Brâhmanical Code has been established as the law of the lower castes. Bold generalizations too have been ventured on, which by ignoring the distinctions of caste tend to uniformity at the cost of usage. A good instance of this is the broad statement in *Pandaya Telaver* v. *Puli Telaver*, 1 Mad. H C. R. 478, that connubium subsists amongst the sub-divisions of each of the four historical castes. This is manifestly incorrect, as shown above, p. 776, however desirable it may be to get rid of restrictions on the choice of a wife.

(*a*) *See* Coleb. Dig. Bk. V. T 285, Comm. So under the Roman law an adrogatio was allowed only after an inquiry "quae causa . . . sit adoptionis quae ratio generum ac dignitatis, quae sacrorum." Cic. Pro. Domo. XIII. 34; *see* Aul. Gell. V. 19; Willems, Dr. P. Rom. p. 84.

(*b*) Coleb. Dig. Bk. V. T. 173.

(*c*) As to the second birth of initiation *see* Vishṇu XXVIII. 37—40; XXX. 44; Vasishṭha XI. 49—51; II. 3; Baudh. Pr. I. Adh. 2,

three, four, or five years of age. (*a*) The general opinion of Hindû lawyers is against the validity of an adoption after this ceremony into any other gotra than that of birth (*b*) and of dedication of the boy. (*c*) Within the same gotra, using the same invocations, an adoption at a later age is deemed permissible. (*d*) Amongst the lower castes the limitations resting on gotra relations in the stricter sense have no place. (*e*) In these cases, as marriage is the only initiatory rite giving an advanced status to the Sûdra, (*f*) some lawyers would pronounce married men unfit for adoption. (*g*) This opinion has not been generally accepted. (*h*) Men of all ages up to fifty have been adopted when

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Kand. 3, 6, 12; Gaut. Chap I. paras. 5-14; Manu II 35, 36. The difference in status arising from the performance of the earlier Saṃskâras is indicated by the funeral ceremonies and the ceremonial impurity provided for in Manu V. 67 ss.

(*a*) Steele, L. C. 43; Coleb. Dig Bk V. T. 182, 183, Comm. The genuineness of the text is doubted by Nîlkaṇṭha, Vyav. May. Chap. IV. Sec. V para. 20, and some others.

(*b*) *P. Venkatesaiya* v. *M Venkata Charlu*, 3 Mad H. C. R. 28; 2 Str H. L. 104, 109

(*c*) Coleb. Dig. *loc. cit.* *See* the Smṛitis quoted above as to initiation The Śûdras are expressly excluded from it and from Vedic study, Âpast. Pr. I Paṭ. I Khaṇḍ. 1, paras 5. 8, 20, 21.

(*d*) Vyav. May. Chap. IV. Sec. V. para. 19; Steele, L. C. 44. *Sri Brijbhookunjee Maharaj* v *S G Maharaj*, 1 Borr R 202.

Under the Roman law an adoption could not be attended with a "term" postponing its operation or with a condition making its existence insecure. (Maynz. Dr., Rom § 328; above, p. 187)

(*e*) Such relations as are contemplated in Vishṇu XXII. 21—24 cannot now be found. Quasi-gotra, *i.e.* blood relationships, are recognized amongst the lower castes, though not to the same distance of connection as amongst the Brâhmans

(*f*) Coleb. Dig. Bk. V. T. 122; Rao Saheb V. N. Mandlik's Vyav. May. p. 431. As to women, Vishṇu XXII. 32. Various ages are prescribed by caste custom, Steele, L. C. 182.

(*g*) 2 Str. H. L. 87; Steele, L C 44, 383, 384.

(*h*) *Ráje Vyankatráo* v. *Jayavantráo Raṇadive*, 4 Bom. H. C. R. 191 A. C. J.; *Náthâji Krishnáji* v. *Hari Jágoji*, 8 Bom. H. C. R. 67 A. C. J. *See* Steele, L. C. 384.

no change of gotra (*a*) was involved. Even this change has been held not to be an obstacle, (*b*) as the tonsure and even investiture may be annulled, (*c*) but it may be doubted whether this licence ought to be recognized in Bombay.(*d*) The Sâstris are generally opposed to it: the High Court seems in one case to have looked on it with favour, (*e*) but the case was one between Śûdras in whose case there could be no initiation by tonsure and investiture to undo. (*f*)

In the case even of an adult the giving by his father or mother cannot be dispensed with.(*g*) The adopted son's own assent is equally necessary when he has reached years of

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(*a*) Steele, L. C. 43. Within the same gotra no ceremonies other than gift and acceptance are essential. Steele, L. C. 46. Comp. Coleb. Dig. Bk. V. T. 275, Comm.

(*b*) Datt. Chand. Sec. II. 26 ss.

(*c*) Datt. Mîm. Sec. IV. 50—52.

(*d*) See *Balvantrav* v. *Bayâbai*, 6 Bom. H. C. R at p 85

(*e*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R 361, 371.

(*f*) There is no Śrâddha even, in the proper sense, for a Śûdra. It involves ceremonies which the Śûdra cannot perform. See above, p. 873, 919.

(*g*) *Bashetiappâ* v. *Shivalingappâ*, 10 Bom. H. C. R. at p. 271; *Collector of Surat* v. *Dhirsingji Vaghbâji*, ib 235; *Subbaluvammal* v. *Ammakutti Ammal*, 2 M. H. C. R 129; *Balvantrav* v *Bayâbai*, 6 Bom H. C. R. 83 O. C. J. The formula pronounced by the giver is appropriate only to the father, *see* 2 Str. H. L. 218. Hence, as the cases decide, an orphan cannot be given by his brother. In Steele, L C p. 46, it is incidentally noticed that an elder may adopt a younger brother. This may have been established in some castes by custom, but instances of the custom have not occurred in the superior Courts, or have been so rare as to escape particular observation. It is opposed to the generally received principle of a possibility of union between the real mother and the adoptive father, but this principle is not regarded amongst Śûdras

A woman (widow) cannot adopt until she attains puberty and therefore could be a mother. Steele, L. C. 48. A man *ought* not to adopt prematurely. *Ib.* 43.

Under the Roman law the imitation of nature was held to prevent the adoption of any one who was not at least eighteen years younger

intelligence. (*a*) The son, though a man's own, is not a chattel to be given away without his own consent, (*b*) and the rule of Baudhâyana (*c*) which exacts this in the case of a Kṛitrima adoption is equally applicable to any case where the person adopted is old enough to have a will and judgment of his own. (*d*) While he has no discrimination his father may part with him, but only, according to the religious law, under the pressure of some great exigency. (*e*) Parents

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than the adoptive father (Maynz, Dr., Rom. § 328). In case of arrogation of one *sui juris* the adoptive father was required to be sixty years of age. Fifty is the age prescribed in the French and the Italian Codes.

Gaius says it was still disputed in his time whether any one could adopt a person senior to himself; but this was afterwards settled so as to require a seniority of eighteen years in the adoptive father. (Poste's Gaius, I. 106, 107, and Comm.)

(*a*) Coleb. Dig. Bk. V. T. 275. Comm.

Under the Roman law of the XII Tables a father could transfer his child by mancipation, (*s.* Cod. Li. VIII. Ti. 48 l. x.) which in the case of a son given in adoption had to be performed thrice (Maynz, Dr., Rom § 326), though for a *noxæ datio*, in which a son was given up to escape damages incurred on his account, a single ceremony was sufficient. Justinian replaced this ceremony by a declaration made before a public officer (*op. cit.* 328.) In the case of a boy *sui juris* his "arrogation" or gift of himself had to be preceded by an inquiry whether this would be advantageous to him. (Gaius I. 102.) His express assent was required (Gaius, I. 99) as well as that of his guardian if he had one. An ordinary adoption could not be made against the consent of the boy adopted, but in the absence of protest the gift by his father or other person exercising the patria potestas was sufficient, and at the same time indispensable. An "arrogation" was under the later law completed by a rescript under a petition to the Emperor. (Maynz, Dr., Rom. § 328.)

(*b*) Vyav. May. Chap. IV. Sec. I. paras. 12. 13; Datt. Mîm. Sec. IV. 47.

(*c*) Coleb. Dig. Bk. V. T. 284.

(*d*) *See* Datt. Mîm. Sec. IV. 47; Bâlambhaṭṭa on Mit. Chap. I. Sec. XI. para. 9.

(*e*) Mit. Chap. I. Sec. XI. para. 10; Vyav. May. Chap. IV. Sec. I. paras. 11, 12, 15; Chap. IX. para. 2.

are to bestow their son with anxious care (*a*) on one to whom he has an affectionate feeling. (*b*)

Jagannâtha, relying on the fact that the Smṛiti texts speak only of the adoption of sons (*c*) denies altogether that a daughter can be adopted. The Datt. Mîmâñsâ, Sec. VII., has an elaborate argument to establish that an adoption of a daughter may be admitted by analogy to that of a son. The argument would have been needless had the sacred writings afforded any direct authority for Nanda Paṇḍita's position. He supports it by several instances drawn from the Purâṇas, but whatever weight may be due to these they have not led to any general imitation which would constitute a custom. When we consider the main purpose and the history of adoption it is plain that the admission of a daughter within the scheme would be quite anomalous. Even the appointed daughter taking in her own person the place of a son was centuries ago found incongruous with the general Hindû system, and no local law seems to have preserved or invented such an exaggeration of a discarded rule as would be involved in recognizing a substitutionary daughter bound as a daughter to leave the family by marriage.

It was said indeed that the adoption by a woman of a daughter given by her mother might be recognized if conformable to the caste rules, (*d*) and there are no doubt several venerable legends which state or imply the giving of daughters. On these a system of female adoption might

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(*a*) Vyav. May. Chap. IV. Sec. V. para. 1.

(*b*) Manu IX. 168.

(*c*) Coleb. Dig. Bk. V. T. 420, Comm.

Women could not originally be adopted under the Roman law, and it is obvious that they could not serve the intended purpose of maintaining the family sacra. But as this purpose was gradually superseded by considerations of another kind, the adoption of daughters as well as of sons was allowed. (Gaius, I. 101.)

(*d*) MS. 1681.

have been built, but it must have been the embodiment of a theory essentially distinct from that which has in fact prevailed in the law of adoption. The process must be looked on as merely imitative, and having no other jural efficacy than may be given to it by some special usage. It does not appear that any caste rules in the Bombay Presidency allow such an adoption, in the sense of giving a particular status to the adopted daughter. (*a*)

The relation of a Guru and his disciple is said to be similar in many respects to that of adoptive father and son. (*b*) It is a relation recognized by the Śâstras, but the connections subsisting amongst ascetics of the lower castes and their disciples are governed entirely by the custom of the class or of the institution to which they belong. (*c*) Some

(*a*) *See* 2 Str. H. L. 217 In the case of an adoption by a Kalavantin (temple woman) the Śâstri replied that no rules for such an adoption were to be found in the Śâstras, MS. 1651. In Steele's Law of Caste, adoptions by dancing women are incidentally recognized as possible, p. 183. But the adopted girl is called a pâlak-kanyâ (foster-daughter) p. 186, and the (so-called) adoption may be annulled at the pleasure of the foster-mother, p. 185, while a true adoption cannot be annulled, p. 184 It is therefore merely an imitative institution which can be supported on the custom of the class only if the class are as such capable of making binding rules for their members. This is denied in the Nâikin's Case (*Mathura* v. *Esu N.*, I. L. R. 4 Bom. 545) as opposed to public policy and to the general customary law of the Hindûs as constituted by present usage. The purchase of children by dancing women was once common. Such children ranked as slaves, 2 Str. H. L 225, 229. Ellis at 2 Str. H. L. 128, says that women have no right to adopt even for the transmission of their separate property. "No spiritual benefit," he says, "results to a woman from adoption." But then śrâddhas are performed by their sons, whether real or adopted. The incapacity must be placed on other grounds, such as those stated in the text.

The Roman law seems not to have allowed an arrogation of a female prior to Justinian's legislation. Ort. Inst. § 140.

(*b*) Steele, L. C. 192. App. B. para. 12.

(*c*) 1 Str. H. L. 150.; above, pp. 550 ss.; Steele, L. C. App. B. A Śâstri replied in one case that all classes, gosâvîs included,

gosâvîs buy boys to bring up as their disciples and successors. (a) More frequently they take them by gift as pupils and spiritual sons without the ceremonies of adoption, (b) the theory of which indeed is opposed to the ranking of such boys as adopted sons. It is the grihastha or householder (c) in the stage of life when he may properly attend to worldly affairs who is bound to provide a son for the continuation of the family. (d) A man retired from the world has no such duty. The ascetic who renounces ordinary affairs (e) as a young man, ought to do so effectually, and look to spiritual fatherhood (f) as the only one open to him for the future. (g) The relations of the gosâvî and his disciple differ widely, as has been seen, from those of the ordinary father and son, and though some of the ceremonies of adoption are imitated in taking a *chela*, the latter does not in any practical sense become an adopted son. (h)

The effect of adoption is to sever the boy adopted entirely from his family of birth. (i) His proper residence is with

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can adopt with the due ceremonies. Gosâvîs, he said, must be considered Śûdras, and in adopting omit the recitations from the Vedas, MS. 1678.

(a) Colebrooke points out that the practice of gosâvîs and sannyâsis in this particular is analogous to adoption by purchase, which is itself obsolete, 2 Str. H. L. 133.

(b) *Op. cit.* para. 26 ss.

(c) Vasishṭha, VIII. 1, 11.

(d) Âpast. Pr. I. Paṭ. I. Khaṇḍ. 1, para. 19. He escapes this duty if he proceeds immediately from his studentship to a life of ascetic meditation. *See* Phil. of the Upanishads, Chap. IV.

(e) Vasishṭha, Chap. X.

(f) Âpast. Pr. II. Paṭ. 9, Khaṇḍ. 21, paras. 8, 10, 19.

(g) *See* Mit. Chap. II. Sec. VIII. paras. 2, 8; 2 Str. H. L. 248.

(h) *See* Steele, L. C. App. B.

(i) Datt. Chand. Sec. II. 32, IV. 1 ss.; Vyav. May. Chap. IV. Sec. V. para. 21; Steele, L. C. 47. An adoption once concluded is indefeasible. Amongst Brâhmans the homa sacrifice marks the completion of the ceremony. Steele, L. C. 184.

his adoptive parents. (*a*) He exchanges "the gotra" of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. (*b*) He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place. (*c*) His right of inheritance as the son of his real father perishes, (*d*) at the same time that he acquires the same right as son of his adoptive father. (*e*) Yet in the latter capacity his right is so far defeasible that the birth of a son reduces him to one-fourth of a share, (*f*) as compared with the full share taken by the begotton son. (*g*)

According to most of the authorities (*h*) the severance of the boy from his own family is effected according to the Hindû law by the requisite ceremonies, even though on account of a difference of caste or some other insuperable obstacle he cannot be initiated in the family of adoption. (*i*) In such a case he is regarded like a child uninitiated as being only of the rank of a dâsa (slave) or a śúdra. (*j*) He is entitled to maintenance, but does not inherit. (*k*)

(*a*) *Lakshmibai* v. *Shridhar Vasudeo Takle*, I. L. R. 3 Bom. 1.

(*b*) Smṛ. Chand. Chap. X. paras. 13, 14

(*c*) Vyav. May. Chap IV. Sec. V. para. 21. An adopted son fully represents his father in a partition of property after the father's death. Smṛ Chand. Chap X. para. 18.

(*d*) Steele, L. C. 186; Smṛ. Chand. Chap. X. paras. 14, 15.

(*e*) Vyav. May. Chap. IV Sec. V. 21—23; Steele, L. C. 47, 407.

(*f*) Vasishṭha XV 9; Vyav. May Chap. IV. Sec V. para. 25; Steele, L. C. 17. The proportions vary according to caste custom, *ib.* 186, 387.

(*g*) *See* above, p 365. The begotten son takes precedence, and where primogeniture prevails is entitled to the advantages of the firstborn, Steele, L. C. 186, 387.

(*h*) Vyav. May. Chap. IV. Sec. V. para. 16.

(*i*) Steele, L. C. 46.

(*j*) Baudh. I. Khand. 3, 6, 12; Coleb. Dig. Bk. V. T. 182, 273, Comm. See below "CONSEQUENCES OF ADOPTION."

(*k*) Datt. Mîm. Sec. II 1. 3.

The caste customs are more liberal than the books to the boy defectively adopted. Where an adoption has failed, either through the unfitness of the persons or defect in the process, they simply annul the relation supposed to have been constituted, with the effect apparently of restoring the adopted son to his family of birth. (a) It might be supposed that in some cases difficult questions would arise out of

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(a) Steele, L. C. 388.

According to the Roman law an adopted son became a member of the group of agnates to which his adoptive father belonged. This was because agnation rested on a conceivable dependence on a single head of the family. Cognation on the other hand rested essentially on connection by blood Hence the adopted son retained his cognate relation to his family of birth and did not acquire such a relation to his family of adoption except the agnates. The husband was an *affinis* of his wife's cognates and she to his, but the cognates had no affinity *inter se.* The adopted son acquired no affinity to his adoptive family: much less therefore did he gain any such relation to the family of his adoptive mother. "In adoptionem datus, aut emancipatus, quascunque cognationes adfinitatesque habuit, retinet: adgnationis jura perdit. Sed in ea familia, ad quam per adoptionem venit, nemo est illi cognatus præter patrem eosque quibus adgnascitur: adfinis autem ei omnino in ea familia nemo est." Dig. Lib. XXXVIII. Tit. X. Fr. 4, § 10.

As the Roman wife married by the ancient forms came under the "manus" or full authority of her husband, she and her children were co-agnates. The free form of marriage was in the end the only one used, and then there was no agnation between her and her children; much less therefore between her and an adopted son. Mutual rights of inheritance between a mother and her children were established by special laws, and Justinian placed cognates on the same footing generally as agnates; but this did not extend the connection of the adopted son. Adoption indeed, as we have seen, was by the same legislator reduced almost to a form which left the adopted son still a member of his family of birth. (*See* Maynz, Dr., Rom. § 15, 304, 338.)

The influence of the Church made itself felt in this as in other spheres. It became customary to obtain a religious sanction to adoptions by a ceremony performed by a priest. This was supposed to induce such a relation that the impediments to marriage in the

the legal relations that had intermediately grown up, but the records of the Courts do not show that these have in practice produced litigation of any importance.

The blood connection of the adopted boy with his family of birth is still recognized for the purpose of prohibiting marriage with a relative within seven degrees. (*a*) Some have maintained that the same restriction arises in the family of adoption, (*b*) but the more general opinion perhaps is that this extends to only three degrees, (*c*) though

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case of a real son were regarded as subsisting equally for the adopted son. This position was reached by successive steps like the other prohibitions which gained recognition in the early centuries of the Christian Church. The original significance of adoption was in the meantime continually declining, and at last Leo the Philosopher allowed even eunuchs and women to adopt at pleasure without the petition and endorsement which had previously been required. (*See* Zach. Jus. Græc Rom, §§ 4, 23). But when the former legal importance of adoption died out the old associations connected with it died out too, and it fell into comparative desuetude until reconstituted under altered conditions in recent times as a means for satisfying the parental instinct. Codice Civile, Lib. I. Tit. VII.; Code Nap. § 343 ss. Comp. Civ. Co. of New York, Chap. II.

The nomination of grandsons or others as heirs by such documents as the one preserved by Marculfus (*see* Canciani, Leg. Barb. v. II. p. 228,) had little or no connection with the ancient law of adoption; and when the Feudal system was established, kings and over-lords naturally discountenanced adoptions which would deprive them of the advantages of reversion. In India adoption was too intimately connected with religion to be extinguished, but the ruling powers have usually insisted on their sanction being taken and on receiving reliefs in the form of nuzzarânâ or salâmi in return for recognition of the adopted heir. The right is recognized as belonging generally to grantors of inams. *See* Steele, L. C. pp. 182, 183, 386.

(*a*) Datt. Chand. Sec. IV. 7, 8, 9; Vyav. May. Chap. IV. Sec. V. para. 29; Steele, L. C. 27, 47. The prohibition extends to his great-grandson. *Ib.*

(*b*) Vyav. May. Chap. IV. Sec. V. paras. 32, 35.

(*c*) Datt. Mîm. Sec. VI. 32.

for purposes of inheritance a connection is recognized to seven degrees (*a*) or even as far as in the case of a begotten son. (*b*) The adopted son takes that position relatively to the wife of his adoptive father as well as to the adoptive father himself. (*c*) Whether a connection arises between him and his adoptive mother's family of birth such as to engender mutual rights of inheritance has been controverted. The prevailing opinion is in favcur of the existence of such rights. (*d*)

The change of status induced by adoption cannot be renounced. (*e*) The adopted son may, if he will, give up his right of inheritance, and if he positively declines to fulfil the duties of a son, the widow, it was said, may adopt another in his place. (*f*) But this does not restore him to his family of birth. (*g*) A complete adoption amongst the twice-born implies initiation as the adoptive father's son (*h*) and a conse-

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(*a*) Vyav. May. Chap. IV. Sec. V. 34.

(*b*) The Saṃskâra Kaustubha and the Dharmasindhu limit the connection by the Saṃskâras performed in each family. A full connection to seven and five degrees exists where the upanayana, plus the preliminary rites have been performed; where only the one or the other, a connection extending to but five and three degrees. See above, pp. 116, 117; and Rao Saheb V. N. Mandlik's Vyav. May. p 352. A sister succeeds to her brother by adoption as to one by birth; *Mahantappa* v. *Nilgangawa*, Bom. H. C. P. J. 1879, p. 390.

(*c*) Datt. Mîm. Sec. VI. 53 ; Steele, L C. 188.

(*d*) *Pudma Coomari Debi*, v. *the Court of Wards*, L. R. 8 I. A. 229 ; where however the term "relations" may perhaps be confined to blood relatives through the adoptive father.

(*e*) *Ruvee Bhudr* v. *Roopshankar*, 2 Borr. 713, cited and approved by Sir M. Westropp, C. J., in *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 388.

At Athens an adopted son was allowed to return to his family of birth, but only on condition of his leaving a son to represent him in the family of adoption. *See* Petit, Leges Atticæ, p. 141.

(*f*) *Verbadru* v. *Baee Ranee*, 2 Morr. 1, 3.

(*g*) Comp. Manu IX. 142; *Sreemutty Rajcoomaree Dosee* v. *Nobcoomar Mullick*, 2 Sevestre 641 n.

(*h*) Coleb. Dig. Bk. V. T. 183 Comm.

quent severance from the sacra of the family of birth, which must devolve on the same person who takes the estate. (*a*)

An adopted son like a real son may take a share or compound for it, and part from his adoptive father. He thus becomes separated, but he does not lose his rights of inheritance. (*b*)

(*a*) Vyav. May. Chap. IV. Sec. V. para. 21.

(*b*) Steele, L. C. 185. *See* above, pp. 59, 340, 359.

We gain a more vivid conception of the extreme antiquity of the Vedas, and the social life of which they afford glimpses by considering that the stages in the constitution of the family which they and even the post-vedic literature present as still existing facts, had already for the most part been passed through by the Greeks and Romans at the remote beginnings of their history. Adoption had then already superseded amongst them the other modes of continuing the family, which at a still earlier time they had no doubt shared with the Brâhmanic branch of the race. In Sparta it is said that down to a comparatively late age the eldest brother taking the patrimony became lord of his brethren after the fashion commended by Manu, and sharing the scanty produce of a small estate with them, took one wife also for the whole group. (Polyb. Excerpt. Vat XII. 6 ; Schöm, Ant. Gr., p. 214.) Sparta was the asylum of archaic traditions. Poverty was given as a reason for this custom, but the reason was probably one invented to account for what had existed from time immemorial, and which affords a mark by which to track the Greeks back to a time before the dispersion of the Aryan nations.

The legend of Draupadî is referred to in the Datt. Mîm. Sec. II. 49, to show that there is nothing anomalous in a boy's being the son at the same time of several fathers. This confirms the suggestion made above, p. 419 (*h*), which is also supported by such stories as the one recorded in Datt. Mîm. Sec. II. 45. The limited polyandry thus indicated was itself an amelioration of that implied in the female gentileship of Śûdras asserted by Śaunaka in Datt. Mîm. Sec. V. 18, and made a basis for the doctrine of the eligibility amongst the Śûdras of a sister's or daughter's son for adoption.

The survival of the more primitive institution in Malabar is referred to by Ellis in 2 Str. H. L. 167. In Puffendorf's Law of Nature, Bk. VI. Chap. I. will be found several references on this subject to the early travellers in India.

SECTION III.

THE CAPACITY TO ADOPT AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

A. 1.—ADOPTION BY MALES.

The first duty of the married Hindû householder is to beget a son. The nature and the stringency of this obligation have been discussed in the preceding Section. (a) But failing a son by birth, adoption becomes a duty incumbent on all males except ascetics and members of those castes which, as to this institution, have remained without the pale of ordinary Hindû law. The duty implies a capacity to adopt, and this is a general attribute of a Hindû, subject only to such qualifications and exceptions as arise from particular circumstances of mind, body, or estate, such as will presently be considered. The desire to make sure of a successor has led to several infringements of a purely logical development of the first principles of the law, and the faculty of adopting has been widened far beyond the religious need, for which its main purpose is to provide. Such irregularities occur in almost every system of law, and have to be dealt with in detail, as in the following paragraphs gathered from the native sources and the decisions of the Courts.

It has been observed (b) that the duty to adopt a son does not arise until the birth of a son becomes very improbable. It is not quite consistent with theory that the authority should exist without strict regard to the need, but custom has settled this point the other way, and it may be said that any sonless male, married or unmarried, if capable of legal acts, may adopt. (c)

(a) *See* above, p. 902.

(b) Above, p. 905.

(c) *See* above, p. 918.

" In the ancient rule the adopter is spoken of only in the masculine. (*a*) A woman cannot perform a ceremony prescribed by the Vedas, and adoption requires the recitation of hymns. The Saṃskârakaustubha allows a woman to adopt, (*b*) the Vyavahâra Mayûkha does not, except with the permission of her husband or of his relatives." (*c*)

"The different opinions held on the subject of adoption should be applied to any case as they agree with the custom of the community, and with the Śâkhâ to which a Brâhman belongs." (*d*)

" A man may adopt a boy in his lifetime, or authorize his widow to do so after his death." (*e*)

Adoption is for the husband and not for the wife, (*f*) except by delegation as shown below. Adoption is primarily resorted to for the sake of securing a performance of the funeral rites of a man having no male issue, and to perpetuate his name. Inheritance follows, but it is a secondary consideration. (*g*) The religious obligation or the spiritual benefit raises a

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(*a*) *See* above, p. 873. A husband putting away a worthy wife must endow her with one-third of his property, or if poor maintain her; but one element of her worth is that she have borne " an excellent son." Vyav. May. Chap. XX. para. 2.

(*b*) See *Bayabai* v. *Bala Venktesh Ramakant*, 7 Bom. H. C. R. xiii. App.; above, pp. 864, 880.

(*c*) MS. 405.

(*d*) MS. 405. From the same answer it appears that in some castes (the Bhâtele) adoption is not allowed while there is a male kinsman surviving.

(*e*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

(*f*) *Chowdry Padom Singh* v. *Koer Udaya Singh*, 12 C. W. R. P. C. 1; S. C. 2 Beng. L. R. 101 P. C.; S. C. 12 M. I A. 350; *Bykant Mony Roy* v. *Kristo Soondery Roy*, 7 C. W. R. 392; *R. V. Venkata Krishna Row* v. *Venkata Rama Lakshami Narsayya*, L. R. 4 I. A. 1.

(*g*) *Rungamah* v. *Atchummah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.

strong probability in an appropriate case in favour of an adoption. (*a*) The celebrity or perpetuation of the family name of the adopter is however recognized as a sufficient motive for adoption, even though there be in the caste a disbelief regarding the spiritual motives for an adoption. (*b*)

In one case it was ruled that an irregularly adopted son cannot adopt his wife's sister's son, so as to defeat the reversionary rights of a daughter and daughter-in-law of his adoptive father, who are alive. Otherwise it was said the adoption of such a relation may be made. (*c*) The first adoption however being of a daughter's son was invalid. The additional reason given that the adoptive father had a daughter was unfounded in law. His having a daughter-in-law would, according to some, indeed most, opinions, make an adoption by him improper if not impossible, even had there been no other objection. The pseudo-adopted son thus pretended to be taken into the family acquired no position in it, and an adoption made by him could not affect the devolution of the property. As a really adopted son he could undoubtedly have adopted so as to defeat the expectations of other heirs.

Adoption *pendente lite* is valid, though made to defeat a gift previously made. The adopter, it was held, was not under an obligation to the donee not to adopt. Even if a contract to this effect had been made, it was doubted

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(*a*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

Extreme old age, a wife past child-bearing, the apparent adoption of a boy, his death in the family of adoptive father, the need of such a son in a religious point of view, are, it was said, considerations that tend, when evidence is conflicting, to prove the fact of adoption.

(*b*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67 ; the parties in this case were of the *Talabda Koli* caste ; Datt. Mîm. I. 9 ; Datt. Chand. I. 3.

(*c*) *Baee Gunga* v. *Baee Sheoshunkur*, Bom. Sel. Rep. 73.

whether such contract would affect the validity of the adoption. (*a*)

Adoption by an unmarried person is not prohibited by Hindû law.(*b*)

" A Brahmachâri (*c*) can adopt and transmit his heritable right to his adopted son." (*d*)

" An unmarried Brâhman may adopt." (*e*)

" A sonless widower may adopt." (*f*)

The decisions of the Courts agree with this opinion. Thus it was ruled that an adoption by a widower is valid. (*g*)

A. 1. 2.—IN RELATION TO PATERNITY.

A second son cannot be adopted during the life of the one first adopted (*h*) except by special caste custom, (*i*) unless

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(*a*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 631. This ruling is not inconsistent with the legal principle that no son can set aside a valid alienation made prior to his birth or adoption. The adopted son was held bound by the donation.

(*b*) *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270. *See* above, p. 905 Note (*d*)

(*c*) A Brahmachâri is a professed student of the sacred writings.

(*d*) *Gunnapa Deshpandee* v. *Sunkapa Deshpandee*, Bom. Sel. Rep. 202, 229 (2nd Edn.); Suth. Syn. Note 4; Coleb. Dig. Bk. V. T. 273.

(*e*) MS. 1670. As to adoption by an unmarried man, *see* above, p. 918.

(*f*) MS. 1677.

(*g*) *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270; *Nagapa Udapa* v. *Subba Śâstry*, 2 Mad. H. C. R. 367.

(*h*) Datt. Mîm. Sec. I. para. 6; Steele, L. C. 45; 2 Macn. H. L. 200; 2 Str. H. L. 85; *Daee* v. *Motee*, 1 Borr. R. 75; *Yachereddy Chinna Basapa et al* v. *Y. Gowdapa*, 5 C. W. R. 114 P. C.

(*i*) Steele, L. C. 181, 183.

The Peshwa, it is said, received a present of some lakhs of rupees on one occasion for allowing a double adoption. *Ib.*

The existence of a daughter makes no difference. See *ex. gr.* the appointment in *Sri Raghunadha* v. *Sri Brozo Kishore*, L. R. 3 I. A. p. 156.

the son has been expelled from caste. (*a*) The expulsion even of a begotten son is held to warrant an adoption in his place.

The following opinions of the Śâstris fully recognize this principle.

"No one having a lawfully begotten son can adopt. (*b*) Nor one having an adopted son living." (*c*)

The adoption of a son, while a son is living and retains the character of a son, is invalid. (*d*)

In Madras, a person having adopted a son married a second wife, and in conjunction with her adopted a second son, the first adopted being still alive. The second adoption was held valid. (*e*) But this cannot now be considered as law except where supported by special custom : the Judicial Committee indeed have said that it is settled law that a man having an adopted son living cannot adopt another. (*f*)

(*a*) Steele, L. C. 42.

(*b*) MS. 1659.

(*c*) MS. 1637. As to the invalidity of a plurality of sons sought by adoption, *see* above, p. 916. Yet one or two castes allow an adopted son for each wife, and traces of the same custom are pretty widely spread. *See* Note (*e*).

(*d*) *Joy Chundro Raee* v. *Bhyrub Chundro Raee*, 1 M. S. D. A. R. 1849, p. 461. A grandson obstructs adoption equally with a son. *See* above, pp. 905, 917, 918.

(*e*) See *Rungamah* v. *Atchummah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.; Datt. Mîm. Sec. I. paras. 6, 12; Coleb. Dig. Bk. III. T. 295.

(*f*) *Gopeelal* v. *Musst. Chundraolee Buhajee*, L. R. S. I. A. 131; S. C. 11 B. L. R. 391 Pr. Co., 19 C. W. R. 12 C. R. approving *Rangamma* v. *Atchamma*, 4 M. I. A. 1. *See* above, p. 917. In 1 Str. H. L. 78 a second adoption is allowed, subsisting the first, but this is denied by Sutherland (2 Str. H. L. 85), though Jagannâtha allows adopted sons of the several castes (various descriptions), Coleb. Dig. Bk. V. T. 308 Comm.

The Dattaka Mîmâṃsâ, it is said, allows the adoption of a second son, living the first, with the consent of the first. (*a*) But the author plainly disapproves the doctrine though he cannot deny the instances afforded by the Purânic writings, and it cannot now be considered part of the law.

The death of the son first adopted does not render the adoption of a second son made in his lifetime a valid one. (*b*)

A second adoption on the death of the first adopted son without issue is good, (*c*) as a son in the situation of the first adopted son could not exhaust the whole of the spiritual benefit which a son was capable of conferring on his deceased father. (*d*)

A wife's pregnancy, though known, does not, it was said, prevent an adoption. (*e*)

" A second son may be adopted in place of one whose adoption was illegal." (*f*)

(*a*) MS. 1657. Passage not cited, but obviously Datt. Mîm. Sec. I. para. 12

(*b*) *B. Camumah* v. *B. Chinna Venkatasa*, M. S. D. A. R. 1856, p. 20; *Veraprashyia* v. *Santanraja*, M. S. D. A. R 1860, p. 168.

(*c*) *Rungamah* v. *Atchummah et al*, 4 M. I. A 1 ; S. C. 7 C. W. R. 57 P. C.; *Shamchunder* v. *Narayani Dibeh*, 1 C. S. D. A. R. 209; *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.; *Musst. Bhoobyn Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279 ; S. C. 3 C. W. R. 15 P. C.

(*d*) *Ram Soondur Singh* v. *Surbanee Dossee*, 22 C. W. R. 121. The adopted son simply takes the place of the begotten son, and his death is attended with the same consequences as that of the begotten son.

(*e*) *Nagabhushanam* v. *Seshamma Garu*, I. L R. 3 Mad. 180, contrary to *Narayana Reddi* v. *Vardachala Reddi*, M S. D. A. R. for 1859, p. 97. This decision is opposed to the general principle of adoption being a merely supplementary process to provide against orbation, but practice, as will have been seen, has diverged from first principles in many instances.

(*f*) MS. 1665. "Illegal" here means void. Comp. *Lakshmappa* v. *Râmava*, 12 Bom. H. C. R. at p. 393, 397.

A. 1. 3.—FICTITIOUS CESSER OF PATERNAL AND FILIAL RELATION.

"The insanity of a man's son enables him to adopt, (a) or that of his adopted son." (b)

A. 1. 4.—EXISTENCE OF A WIDOW OF A SON OR GRANDSON.

"A father-in-law (son deceased) may adopt notwithstanding the existence of the daughter-in-law; but she cannot adopt without his permission (Brâhman)." (c)

"A father-in-law is competent to adopt after his son's death notwithstanding the existence of his daughter-in-law, but the preferable course is to allow her to adopt." (d) "The son adopted by her indeed even after an adoption by her father-in-law, succeeds to her property and that of her husband," though not apparently in the Śâstri's opinion to that of the husband's father. (e)

(a) MS. 1654; comp. Manu. IX. 169, and *see* above, pp. 905 ss.

(b) MS. 1702. The father is regarded as virtually sonless, seeing that the lunatic son cannot perform the requisite ceremonies for ensuring his repose in the other world, or satisfy the debt to the father's ancestors, *see* above, pp. 155, 579 ss. For the rules of the customary law as to the disqualifications of a son which justify adoption, *see* above, pp 907, 908. It may perhaps be doubted whether under the present law expulsion from caste of itself causes such a moral death that the father of a man so expelled can adopt another, *see* above, p. 906; Steele, L. C. 185. The outcast may be restored, and unless there has been a formal and valid act of disinheritance (above, p. 585) he would claim the succession against the adopted son.

(c) MS. 1668. The daughter-in-law is obviously the proper person to adopt a son to her deceased husband and herself. According to the authorities which give her the right to adopt, the competence of her father-in-law would introduce rival claimants to succession and sacra. But her dependence makes the assent of her father-in-law necessary to her performance of a religious act, such as adoption.

(d) MS. 1660. *See* below.

(e) MS. 1666.

A. 1. 5.—CAPACITY IN RELATION TO AGE.

Though there is no exact restriction as to the adopter's age, it is inferred that he should not adopt until no hope remain of begetting a son.(*a*) But this cannot be regarded now as more than a simply moral precept, the age is really unlimited by law,(*b*) provided only it exceed that of the adopted son,(*c*) and the adopter has reached years of discretion. (*d*) The last restriction is uncertain. In the *Mankar* case (*e*) the Sâstris were asked at what age a man hopeless of offspring might adopt. One says at sixteen, another at twenty. Others say no precise time is fixed by the Sâstras, whence, probably, one replies that he may adopt when he pleases. Three of the nine sages insist strongly on all possible measures being first used to remove the disability, and one says that hope must not be abandoned or a son adopted until the proposed father has reached old age.

The principle stated above, (*f*) as to the imitation of nature, should prevent the adoption of a son at any rate by a boy under puberty; but this can hardly be stated with certainty as a rule of the positive law. Mr. Shâmacharn, in the Vyavasthâ Darpaṇa, seems to think that an adoption by a child between 8 and 15 may be good for religious, but not for civil, purposes; but the proposed severance seems inconsistent with the principles of the law of inheritance. It is opposed too to the principle laid down by Holloway, J., and apparently approved by the Privy Council, (*g*) that the validity of an adoption is to be de-

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(*a*) Steele, L. C. 43. *See* above, pp. 902, 903, 905.

(*b*) *Ib.* 182, 383.

(*c*) *Ib.* 384; compare Cic. Pro. Domo. Ch. 13, 14.

(*d*) *See* above, p. 905 Note (*d*).

(*e*) 2 Borr. R. at p. 102.

(*f*) Page 884 (Note).

(*g*) *Sri Viradi Pratapa Raghunada* v. *Sri Brozo Kishoro Patta Deo*, 7 Mad. H. C. R. 301, I. L. R. 1 Mad. 69; 25 C. W. R. 291, (C. R) L. R. 3 I. A. 154, 193.

duced by the spiritual rather than by temporal considerations, that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent distribution of property a mere accessory to it.

Bengal Reg. X. of 1793, § 33, says that an adoption shall not be competent to a minor (*a*) of whose estate possession has been taken by the Court of Wards. The Sadr Court of Bengal held that this prevented the minor equally from giving a power to adopt. (*b*) In other cases the power to adopt may be given at the ordinary age of discretion. (*c*) The judgment last referred to discusses the evidence as to minority but does not expressly say that adoption by a minor is generally incompetent. No provision on this subject is made by Act XX. of 1864, which provides for the care of minors and the administration of their property in the Presidency of Bombay. Act IX. of 1875, fixing the age of majority in ordinary cases at eighteen, but in that of wards at twenty-one, does not affect capacity in relation to marriage or adoption.

"A man aged 20 may adopt." (*d*)

A. I. 6.—CAPACITY IN RELATION TO INTELLIGENCE.

An insane man may, it is said, adopt with the consent of his kinsmen. The adoption is generally made by his wife under an assumed authority sanctioned by the kinsmen or the caste. (*e*)

(*a*) Under 18, Reg. XXVI. of 1793, Sec. 2

(*b*) *Anandmoyee Chowdrain* v. *Sheebchandar Roy*, S. D. A. R. for 1855, p. 218

(*c*) *Jumoona Dassya* v. *Bamasoondari Dassya*, 25 C. W. R. 235, I. L. R. 1 Cal. 289 (P. C.); S. C. L. R. 3 In Ap. 72, citing *Rajendro Narain* v. *Saroda Soondaree Debia*, 15 C. W. R. 548. Whether adoption by a minor without consent of the Court of Wards is wholly void is questioned in *Musst. Anundmoyee Chowdhoorayan* v. *Sheeb Chunder Roy*, 9 M. I. A. 287.

(*d*) MS. 1623. *See* above, p. 905 Note (*d*).

(*e*) Steele, L. C. 43, 182, 382.

An adoption by a person in a state of insensibility (*i.e.* disturbed mind) from dangerous illness, by verbal declaration, without performance of the prescribed ceremonies, was held invalid. (*a*) The transactions of sick and dying men always call for close scrutiny, and the Judicial Committee have said that in a case of adoption or will by a dying man the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully to be complied with. (*b*)

"The adopter must be able to ask for the son, to accept him, and to smell his head." (*c*)

A. 1. 7.—CAPACITY IN RELATION TO BODILY STATE.

A person disqualified to inherit cannot adopt, and thus secure to a stranger the right to a share which is allowed to the natural born son. (*d*)

In case No. XX., under the head of Adoption in Macnaghten's Hindû law, (*e*) the Śâstri says a leper is incompetent to adopt. In case No. XXI. the Śâstri thinks competence may be regained by penance, and with this Macnaghten agrees; but as a leper in Bombay cannot qualify himself for inheritance, (*f*) neither it seems can he for adopting a son.

(*a*) *Bullubkant Chowdree* v. *Kishenprea Dassee*, 6 C. S. D. A. R. 219.

(*b*) *Tayammaul* v *Sashachalla Naiker*, 10 M. I. A. 429, 437.

(*c*) MS. 1662. The authority for the last mentioned ceremony is not quoted. In performance it resembles the uttering of a prayer or formula in a whisper. The smelling of the head (aghrâna) however is a mode of salutation used in receiving a child or younger brother after any prolonged absence. It is practised amongst some of the South-Sea Islanders. It may have become a part of the ceremony, through a real or supposed capacity thus to distinguish a member of one's own gotra. As to the extreme olfactory sensibility of some races, *see* Tyler's Anthropology, pp. 2, 70, and Letourneau's Sociology, p. 75.

(*d*) Mit. Chap. 2, Sec. 10, para. 11; above, p. 880.

(*e*) Vol. 2, p 201.

(*f*) *See* above, pp. 576, 579.

An impotent man it is said cannot adopt, at least until his incapacity has been proved by marriage. (*a*) His religious duty no doubt is to beget a son if he can; but the allowance of adoptions by bachelors and widowers shows that the religious obligation is not accompanied by a legal incapacity. A man who is blind, deaf, dumb, or diseased may adopt. (*b*)

A. 1. 8.—CAPACITY IN RELATION TO RELIGIOUS STATE.

Adoption by one who has renounced the world and devoted himself to a life of study and asceticism ought not, according to theory, to be possible, but the restriction is now only speculative. (*c*)

Pollution from the death of a relative incapacitates during its continuance for adoption. (*d*)

"A person *in extremis* is not so affected with impurity by a death in the family as to be incompetent to adopt." (*e*)

A. 1. 9.—CAPACITY IN RELATION TO CASTE CONNECTION OR EXCLUSION.

A man degraded from caste cannot adopt (*f*) during his exclusion.

The Mitâksharâ denies the capacity to adopt generally to a man himself disqualified for inheritance, (*g*) and specifies loss of caste in particular as a cause of disinherison. This ex-

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(*a*) Steele, L. C. 43.

(*b*) Steele, L. C. 43.

(*c*) *See* above, pp 559, 572, 934; Âpast. Pr. II, Pat. 9, Kh. 21, para. 19, Kh. 23.

(*d*) *Ramalinga Pillai* v. *Sudasiva Pillai*, 1 C. W. R. 25 Pr. Co. The periods of pollution vary with the caste and the nearness of relationship, as noticed above, p. 510 n. For Brâhmans the extreme time is 10 days, for Kshatriyas 12, for Vaiśyas 16, for Sûdras 30 days.

(*e*) MS. 1674.

(*f*) Steele L. C. 43, 182, 382.

(*g*) Mit. Chap. II. Sec. X. para. 11; *see* above, p. 880.

tends equally to women as to men. (*a*) The only persons who can take the father's place in such cases are the legitimate issue and the son begotten on the wife by a kinsman. (*b*) The latter is not now recognized, so that the man born blind or deaf is deprived of all resource. Loss of caste is now declared by statute not to involve loss of inheritance, and by analogy the out-cast ought perhaps to have power to adopt, but the whole position of the out-cast retaining his heritable rights is so anomalous that no very confident opinion can be offered on this subject. (*c*) The questions that can arise out of it must be very few, as an out-cast could scarcely obtain a son in adoption.

A. 1. 10.—IN THE CASE OF PARTICULAR CASTES.

In the case cited above, p. 924, the Śâstri said that a daughter-in-law could not adopt while the brothers of her deceased husband's father survived. (*d*)

A. 1. 11.—VAIŚYAS.

A Vaiśya, who has undergone the ceremony of *vibhut vidá* is capable of adopting a son. The Hindû law does not expressly prohibit it. A contrary custom is to be proved by satisfactory evidence. (*e*)

A. 1. 12.—ŚUDRAS.

" An unmarried Śûdra may adopt." (*f*)

(*a*) *Loc. cit.* paras. 8, 9.

(*b*) Coleb. Dig. Bk. V. T. 334.

(*c*) Comp. the remarks above, pp. 906, 907, and Manu IX. 125, as to the precedence of the first-born son.

(*d*) MS. 281, but on this *see* the note *loc. cit.*

(*e*) *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. App. 26. " Vibhut vidâ" is a renunciation of worldly affairs and interests analogous to that prescribed by the Smṛitis for Brâhmaṇas, *see* Manu VI.; Gaut. III.

(*f*) MS. 1653. *See* above, p. 921.

A. 1. 13.—JAINS.

The Jains generally submit to the Hindû law of adoption though denying important doctrines. Their capacity to adopt is therefore governed by the ordinary rules. (*a*)

A. 1. 14.—BHÂTELES.

"The custom of the Bhâtele caste prevents adoption when there is a kinsman in existence." (*b*)

A. 1. 15.—SANNYÂSIS AND GOSÂVÎS.

"All classes may adopt with due ceremonies, Gosâvîs included." (*c*)

A married Gosâvî took a boy (Talabda Koli) in adoption, on a promise to settle property on him. This was carried out by his widow about 30 years after the husband's death, and was disputed by his relatives, but was held sufficient. (*d*)

A. 2.—ADOPTION BY A MALE—BY DELEGATION.

A. 2.—1. BY MEANS OF WIFE.

"A woman may adopt with her (living) husband's order. (*e*) It is not lawful for her to do so without the permission of her husband." (*f*)

If the husband's death approaches the wife may obtain his permission and afterwards adopt as a widow. (*g*)

(*a*) *See* above, p. 901 note (*h*); below, Sec. III. A. 3.

(*b*) MS. 405.

(*c*) MS. 1678. *See* 2 Str. H. L 133. Instances will be found below of adoptions by Prabhus, by Lingâyats and others; and also above, p. 365 ss.

(*d*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*e*) Reply of a Śâstri in the *Mankar* case, 2 Borr. R. at p. 102.

(*f*) Reply of Śâstris of the Sadr Court in *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. R. at p. 211. *See* the Vîramitrodaya and the Dattakakaustubha to the same effect, quoted in *Narayan* v. *Nana*, 7 Bom. H. C. R. at p. 159, and Coleb. Dig. Bk. V. T. 273 Comm. Also Vasishtha XV. 5.

(*g*) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow.

A. 2. 2.—BY MEANS OF WIDOW.

If a man begins the ceremonies of adoption, and dies before completing them, his widow, it was said, might complete them. (*a*)

A. 2. 3.—BY MEANS OF DAUGHTER-IN-LAW.

In case of lunacy of a husband the wife of the lunatic may adopt with her father-in-law's sanction. (*b*)

The Śâstri in one case held a "daughter-in-law bound by her father-in-law's engagement that she should adopt" a specified sapiṇḍa. (*c*) This was after the father-in-law's death. It is not clear whether the adoption was to be to the promisor or to his deceased son. If to the former he could not properly thus deprive his dead son of his due śrâddhas, and the delegation was altogether questionable if meant to operate during the father-in-law's life; equally questionable as an attempt to bind the widow of his son after his death.

A. 3.—RESTRICTIONS ON ADOPTION TO PERSONS DECEASED.

Spiritual benefits are not the only ground of adoption. The Jains recognize adoption though they do not practise the Śrâddha or Paksha ceremonies. (*d*) Adoption rests generally on the advantage of having a son to perform funeral rites, which the Jains deny. But though the Hindû law of succession is applicable to them, yet it cannot be further extended so as to allow adoption to

(*a*) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow.

(*b*) *See* above, Sec. III. A. 1. 6. As to adoption by a wife on behalf of a disqualified person, as an insane husband incapable of appointing her, *see* above, p. 908. She ought to adopt to her husband in the case in the text. Comp. *Ramjee Hurree* v *Thukoo Baee*, 2 Borr. R. 485.

(*c*) MS. 1682; *Y. Venka Reddi* v. *G. Soobha Reddi*, M. S. D. A. Dec. 1858, p. 204.

(*d*) *See* above, p. 568.

dead parents or sanction the exercise of a power of adoption by another to dead persons (*a*) through a fictitious gift.

A son cannot, it was said, be adopted to the great-grandfather of the last taker after the lapse of several years, when all the spiritual purposes of a son, according to the largest construction of them, should have been satisfied.(*b*)

A 4.—QUALIFICATIONS OF THE POWER TO ADOPT ARISING FROM FAMILY AND POLITICAL RELATIONS.

A 4. 1.—CONSENT OF WIFE.

A wife's consent to adoption by her husband is not indispensable to the validity thereof. (*c*) Adoption is the act of the husband alone. The wife may join in it, (*d*) and ought to do so for a full compliance with the religious law. (*e*)

The Poona Sâstris replied in the *Mânkar* case (*f*) that the husband ought to consult his wife on a proposed adoption, but that the right belongs to him alone.

A. 4. 2—FAMILY RELATIONS—KINDRED.

The existence of brothers or other kinsmen does not affect a man's capacity to adopt. It is said, indeed, that in a few castes the parents or an undivided brother (*g*) may object to a particular adoption, and in many the assent of

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(*a*) *Bhagvandas* v. *Râjmâl*, 10 Bom. H. C R 241, 265.

(*b*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D A. R. 1856, p. 122. A narrower limitation exists as held in the case of Jains. *See* above.

(*c*) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*d*) See *Rungamah* v. *Atchummah et al*, 4 M. I. A. 1; S. C. 7 C. W. R. 57, P. C.

(*e*) Colebrooke says that according to the Mitâksharâ, though the mother's consent may perhaps be essential to the gift, it is not to the taking of a son in adoption. Mit. Chap. I. Sec. XI. para. 9, note. *See* below, Sec. V, as to the gift.

(*f*) 2 Borr. R. at p. 102.

(*g*) Steele, L. C. 385, 386. The consent may be a necessary restriction when a minor proposes to adopt—especially the consent of his parents.

near relatives must be asked, (*a*) but it is not provided that their disapproval shall invalidate the adoption. (*b*) They must be invited to take part in the ceremony, and a son of a brother or other near relative is to be chosen by preference, but these obligations are of a simply religious character.

A. 4. 3.—PUPILLAGE.

The sanction of the Court of Wards is necessary to an adoption by a minor under its care. (*c*) Act XX. of 1864 makes no provision on this subject. It provides for the guardianship of a minor's person and the administration of his estate, but does not declare him generally incapable of jural acts. In the Bombay presidency therefore a boy under guardianship, but capable of religious acts, may possibly adopt or marry, though he may not deal with his property.(*d*)

A. 4. 4.—CONSENT OR ACQUIESCENCE OF THE SOVEREIGN.

"The writing of documents is insignificant (not essential). The Śâstras do not require the permission of Government to be obtained for an adoption." (*e*) But "they enjoin that a proposed adoption should be notified to the Government." (*f*) "The object of applying to Government is that it may continue to the adopted son Watans, &c., held from it. When the seat of Government is distant intimation may be made to the local officer." (*g*) Even notice to the ruling power is not necessary to validate an adoption, (*h*) but it is so usual

(*a*) Steele, L. C. 183, 385.

(*b*) Steele, L. C. 45.

(*c*) *See* above, Sec. III. A. 1. 5, p 947.

(*d*) *See* above, A. 1. 5; and below, B. 3.

(*e*) MS. 1675.

(*f*) MS. 1677, 1683.

(*g*) MS. 1711; 2 Str. H. L 87.

(*h*) *Sutroogun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

that an omission of it in an important case casts suspicion on the transaction. A want of sanction by the ruling power is not sufficient to invalidate adoption duly made with sufficient ceremonies. (*a*) The sanction of the ruling power to an adoption by a Kulkarni or his widow, or by a coparcener in Kulkarniship or his widow, is not necessary to give it validity, nor has Government a right to prohibit or otherwise intervene in such adoption. (*b*)

In several cases it seems to have been supposed that the sanction of the Government was necessary to an adoption by a widow where it would not have been essential to an adoption by her deceased husband. (*c*) The authorities however on which the widow's power rests impose no such condition on its exercise.

Bombay Act II. of 1863, Sec. 6, Cl. 2, as to the non-recognition of adoption by a Court relates only to a question of assessability of land when raised between Government and the claimant by adoption. (*d*) It is not intended to regulate the enjoyment of an estate as amongst the heirs of the original grantee.

THE CAPACITY TO ADOPT AND ITS EXERCISE.

B.—ADOPTION BY FEMALES.

B. 1.—NO ADOPTION BY A MAIDEN.

The Hindû law imposes on parents the duty of getting their daughters married. It does not contemplate children as necessary to women on their own account. (*e*) Even

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(*a*) *Bhaskar Buchajee* v. *Narroo Ragonath*, Bom. Sel. R. 25.

(*b*) *Ramachandra Vasudev* v. *Nanaji Timaji*, 7 Bom. H. C. R. 26 A. C. J.; *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Ed.); *Narhar Govind* v. *Narayan Vithal*, I. L. R. 1 Bom. 607; *Huebutrao Mankur* v. *Govinrao Mankur*, 2 Borr. 75, 83 (2nd Ed.); *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*c*) *See* below, B. 3. 36.

(*d*) *Vasudeo Anant* v. *Ramkrishna*, I. L. R. 2 Bom. 529.

(*e*) *See* above, p. 873; below, B 3. 13.

a married woman or a widow adopts only for her husband, and herself takes but an incidental benefit save under the exceptional custom allowing a kṛitrima adoption to the woman alone in Maithila. For the unmarried woman there is no adoption ; nor in strictness for any woman except to her husband.

B. 2.—ADOPTION BY A WIFE.

A wife only can receive authority to adopt (*a*) either as wife or as widow. She can adopt only as the representative of her husband, and under a real or assumed authority from him. This is generally admitted, (*b*) and is established by the following cases.

B. 2. 1 —ADOPTION BY A WIFE UNDER EXPRESS DELEGATION.

In *Thakoo Baee Bhide* v. *Ruma Baee Bhide* (*c*) the Śâstris quote from Vasishṭha—" A husband's commands to adopt are required for a married woman, but for a widow to adopt without such command the permission of the father, or if he be not alive then of the (jñâti) relatives must be obtained."

The express authority of her husband is indispensable, if a wife adopts in his lifetime, in the Bombay Presidency. (*d*)

B 2. 2.—IMPLIED DELEGATION.

This arises in such cases as those of a husband beginning the ceremonies of adoption with the participation of his wife. In the event of his becoming helpless she may complete the adoption. Any unequivocal indication of his assent would probably be taken as equivalent to an express command. This may be gathered from the cases in the next sub-section.

(*a*) *Bhagvándás* v. *Rájmal*, 10 Bom. H. C. R. 241.

(*b*) See *Ramji* v. *Ghamau*, I. L. R. 6 Bom. at p 501.

(*c*) 2 Borr. R. at p. 492.

(*d*) *Narayan* v. *Nana*, 7 Bom. H. C R. A. C. J. 153, 174 ; *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C R. App. i. ; *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. at p. 380 ; *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498.

B. 2. 3.—CONDITIONS OF EFFECTIVE DELEGATION.

The husband directing his wife to adopt must be in a condition with regard to freedom from loathsome disease, such that he could himself adopt. So also as to his relations to his caste. In case of insanity his assent or command is assumed by the rules of several castes, his place being taken by the kinsmen in controlling the choice made by the wife. (*a*)

A husband may authorize his wife to adopt a particular child, named by him, or a child selected by her. (*b*)

B. 3.—ADOPTION BY A WIDOW

"The permission expressed or implied of her deceased husband is requisite to enable a widow to adopt. An implied permission arises from a known intention of the deceased to adopt. Failing this she must obtain the permission of her father-in-law or other relative."(*c*) This permission is merely substitutive in default of any intimation by the deceased husband of his wishes. When he has clearly signified his wishes, these prevail over the wishes either of the widow or of the relatives, as shown further on.

The husband's sanction must have been given, according to the Mitâksharâ, as understood by Colebrooke, (*d*) because otherwise the adoption could not benefit him. But Colebrooke says the sanction may be replaced by that of the husband's kindred. (*e*) Ellis thinks that the prior assent of the husband may not be necessary amongst Śûdras ; but it must be either expressed or presumed.

The capacity of a widow to adopt must thus, like that of a wife, be drawn from a real or an assumed authorization on the part of the husband. If he has intimated a wish that there

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(*a*) Steele, L. C. 43, 182.

(*b*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91; *Ry Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. Dec. 101.

(*c*) MS. 1662.

(*d*) 2 Str. H. L. 91; so Ellis, ib.

(*e*) *Ib.* and Mit. Chap. I, Sec. XI. p. 9, notes.

should be no adoption none can be made. (*a*) If he has left no direction at all, there can, according to the Bengal law, be no adoption. According to the law of Bombay his assent may, in such a case, be assumed; but the widow's choice is controlled by the kinsmen, at least in a united family. (*b*) The consent or authority of the husband has been pronounced indispensable to an adoption by a widow after his decease, in Bengal, (*c*) in the N. W. Provinces, (*d*) and in Madras, (*e*) but in Madras it may now be replaced by the assent of the undivided members of the husband's family, as in Bombay. (*f*)

A widow in Bengal on the other hand cannot adopt without her husband's consent, even though his heirs consent to the adoption. (*g*)

(*a*) *The Collector of Madura's* case, 12 M. I. A. at p. 443; *Bayábai* v. *Bála Venktesh*, 7 Bom. H. C. R. at pp. xvii. ss. App.

(*b*) *Rámji* v. *Ghamau*, I L R. 6 Bom. at pp. 502, 503; *Collector of Madura's* case, 12 M. I. A. 397, 442.

(*c*) *Musst. Tara Munee Divia* v. *Dev Narayan et al*, 3 C. S. D. A. R. 387; *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 144; S. C. 7 C. W. R. 71 P. C.; *Sutroogun Sutputtee* v. *Savitra Dye*, 2 Knapp, p 287; S C. 5. C. W. R. P. C. 109; *Musst. Bhoobun Moye, Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S C. 3 C. W. R. 15 P. C.; *Juggodumba Debea* v. *Moneruth Mookerjea*, C. S. D. A. R. for 1858, p. 834; *Soorodhunnee Debea* v. *Doorgapersad Roy*, C. S. D. A. R. for 1858, p 995; *Jummoona Dasya* v *Bamasoondari D*, I. L. R. 1 Cal. 289; *Musst. Sheboo Koeree* v *Joogun Singh*, 8 C. W. R. p. 155 (a case of Kritrima adoption). *See* the Datt. Mîm. Sec. I. para. 15; Colebrooke's Digest, Bk. V. T 273; 2 Str. H. L. 84, 92, 96; 1 Macn. H. L. 66; 2 Macn. H. L. 175, 182, 189; Macn. Con. H. L. 125, 155, 158.

(*d*) *R. Haimun Chull Singh* v. *Koomer Gunsheam Sing*, 2 Knapp, 203; S. C. 5 C. W. R. P. C. 69; *Thakur Oomrao Singh* v. *Tha Mahtab Koonwar*, 2 Agra Rep. 103; *Jairam Dhama* v. *Musan Dhama*, 5 C. S. D. A. R. 3.

(*e*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str R. 91.

(*f*) *Shri Raghunadha* v. *Shri Brozo Kishore*, L. R. 3 I. A 154, 191.

(*g*) *Raja Shumshere Mull* v *Ranee Dilraj Konwar*, 2 C. S. D. A. R. 169.

Similarly an adoption by a widow was set aside for want of proof of authority for the adoption given by her husband, (*a*) in the N. W. Provinces. Adoption, without the husband's authority, gives to the adoptee, before or after the widow's death, no right to property inherited by her from her husband, (*b*) where this law prevails.

A son having died before his father, no custom of the family was shown to exist such that a widow could adopt a son under authority of her father-in-law. (*c*) The adoption was therefore pronounced void.

The rule however as to an express authority is, as the Judicial Committee have shown, less exacting than the Dattaka Mîmâṃsâ declares. (*d*)

The existence of brothers is not an obstacle to adoption under an authority from a deceased husband. (*e*) A Hindû may execute an instrument giving authority to adopt when he has attained the ordinary age of discretion. (*f*) This the Judicial Committee seem to have considered the age of majority by law, which would now be eighteen years. (*g*) But if the capacity to give authority arises at the same time with the capacity to adopt, that would by some

(*a*) *Musst. Thakorain* v. *Mohun Lall*, N. W. P. S. D. R. N. S. Pt. I. 1863, p. 352.

(*b*) *Chowdry Padom Singh* v. *Koer Udaya Singh*, 12 C W. R. P. C. 1; S. C. 2 Beng. L. R. 101, P. C.; S. C. 12 M. I. A. 350; *Musst. Oodey Koowur* v. *Musst. Ladoo*, 15 C. W. R. 16 P. C.

(*c*) *Musst. Ghylannee* v. *Nirpal Singh*, 8 N. W. P. S. D. R. N. S. 1853, p. 174; see *Bhagvandás* v. *Rájmal*, 10 Bom. H. C. R. 241.

(*d*) *See* below, B. 3. 1.

(*e*) 2 Macn. H L. p. 180 (Chap. VI. Case 5); *Sri Raghunada's* case, *supra*, p. 959 note (*f*); below, B. 3. 1.

(*f*) *Jamoona Dasya v. Bamasoonderai Dasya Chowdhrani*, L. R. 3 I. A. 72, 78.

(*g*) Act IX. of 1875, Sec. 3. The Act does not however affect adoption, *see* Sec. 2.

Hindû lawyers be fixed at the age when religious ceremonies in general can be fully performed. (*a*)

It seems that a state of indivision between a son and his father does not affect the validity of an authority given by the former. In the case of *Gobind Soondaree Debia* v. *Juggodumba Debia* (*b*) the suit was on behalf of a son adopted on an alleged authority from a husband who had died nine years before his father. The authority was discredited, but the discussion shows that the Court thought that if genuine it would be valid. This has an important bearing on the right of the widow, where, as in Bombay, the assent of the deceased husband is presumed.

B. 3. 1—ADOPTION BY A WIDOW UNDER EXPRESS AUTHORITY GIVEN BY ACT *INTER VIVOS*

An adoption thus authorized needs no sanction by the relatives. (*c*) A widow may adopt with the consent of her husband obtained before his decease or with that of his relations thereafter. (*d*)

An authority to adopt under the husband's hand, though not complete as a testamentary disposition, is yet evidence of a declaration of fact. (*e*)

Even in the case of the husband's long absence it was said by the castes in Poona and Khandesh that a wife could adopt only with the written authority of her husband. If

(*a*) See *Rajendro Narain Lahoree* v *Saroda Sundaree Dabee*, 15 C W. R. 548 The attempt to postpone the son's capacity beyond his attainment of majority approved in *R. Huroosoondery* v. *Coomar Kristonath*, 1 Fult. 393, would not now be sustained.

(*b*) 3 C. W. R. 66 ; S. C. 15 *ib*. 5 Pr. Co.

(*c*) See *Bhasker Bhuchajee* v. *Naroo Ragoonath*, Bom. Sel. R. p 24 (1st Ed.) ; above, B. 3.

(*d*) *Ry Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. R. 101 ; *Arundadi Unmal* v. *Kupumall*, 3 Mad. H. C R 283 ; *Collector of Madura* v. *Mutu Ramalinga Sathupatty*, 1 Beng. L R. 1 P C. ; S C. 12 M. I. A. 397 ; S. C. 2 Mad. H. C. R. 206.

(*e*) *Brojo Kishoree Dassee for Radhanath* v. *Sreenath Bose for Judonath* ; 8 C. W. R. 241 ; S. C. 9 C. W. R. 463.

the absence was so prolonged as to raise a presumption of death the wife might adopt as a widow. (a)

Amongst the Poona Brâhmans a widow, it was said, must have her husband's order, and must also consult his kinsmen. In other castes it was said the consent of the relatives and of the caste, in some that the consent of the relatives alone, would supply the place of the husband's order. (b) The leading doctrines on the widow's substitutionary power of adoption have been thus stated by the Judicial Committee :—" Mr. Colebrooke's note on the Mitâksharâ (Chap. I. Sec. XI. Art. 9), which has been much discussed, clearly involves three propositions—First, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the schools of Hindû law except that of Maithila ; second, that the Bengal (or Gaura) school insists that the widow must have the formal permission of her husband in his lifetime; third, that some at least of the other schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The first two propositions are admitted ; but it has been argued for the appellants that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta school, in which the treatise called the 'Mayûkha' is the predominant authority. Balam Bhaṭṭa, however, whom he cites as an authority for a power of adoption in the widow, wider even than that expressed in the third proposition, was a commentator of the Benares school. And the several notes of Mr. Colebrooke at pp. 92, 96, and 115 of the second volume of Strange's Hindû Law seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common to the followers of the Mitâksharâ in the Benares as well as in the Mahratta school, and as

(a) Steele, L C 187. A written authority does not seem legally indispensable, *see* below.

(b) Steele, L. C. 47 187.

such to be receivable as the law current in the Zillah Vizâgapatam, which lies within the Northern or Andra Division of the Dravada Country."

"Again Sir Thomas Strange's statement of the law in his work, Vol. I, p. 79, is clear and unambiguous. He says: 'Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given, to take effect (like a will) after his death; and according to the doctrine of the Benares and Maharashtra schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal Provinces." (a)

According to the Benares (Mitâksharâ) law it was said that the authority of a husband to a widow for adoption could not be replaced by that of his heirs after his death. (b) The Dattaka Mîmâṃsâ, the Paṇdits declared, prevailed over the works which allow a substitutive authority. (c) Macnaghten held the same view; but Colebrooke maintained the sufficiency of the kinsmen's sanction, and his doctrine was approved by the Judicial Committee in the *Collector of Madura's* case. (d)

There is no stereotyped form of authority to adopt. (e) It may be given either orally or in writing. (f)

A deed, containing no words of devise, nor intended by testator to contain any disposition of his estate, except so

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(a) *The Collector of Madura* v. *Muttoo Ramalinga Sathupatty*, 12 M. I. A pp. 432–33.

(b) *Raja Shumshere Mull* v. *Ranee Dilraj Koonwur*, 2 C. S. D. A. R. 169.

(c) *See* Datt. Mîm. Sec. I. para. 16; Vîramitrodaya, Transl. p. 116.

(d) 12 M. I. A. at p. 432.

(e) *Pritima Soondaree Chowdrain* v. *Anund Coomar Chowdhry*, 6 C. W. R. 133 C. R.

(f) 2 Str. H. L. 95, 96; *Gudadhur Pershad Tewaree* v. *Soondur Koomaree Debea*, 4 C. W. R. 116 Pr. Co.

far as that results from adoption of a son under it, is only a deed of permission to adopt, and not of a testamentary character. (*a*)

Defects in evidence relating to the execution of a deed authorizing adoption are less material than as to the disposition of a property by will. (*b*)

B. 3. 2.—ADOPTION BY WIDOW UNDER AUTHORITY GIVEN BY WILL.

A will giving power to adopt is sufficient authority. (*c*)

A will of a childless Hindû, giving power to adopt, though opposed to the interests of the widow or of the next reversionary heirs of the testator, is not inofficious. (*d*)

A permission given for adoption of a boy as co-heir with a son cannot be converted into one for adoption after the death of the natural son. (*e*) It is really void from the first. (*f*)

B. 3. 3.—POSITIVE COMMAND TO ADOPT.

When a husband has given a positive command, the widow's capacity to adopt appears in its strongest form as opposed to the wishes or interests of the kinsmen who will be affected by the adoption. (*g*) The only question that can be raised in such a case is that of whether adoption is compulsory. The duty does not seem to be doubted, but in recent times it has come to be regarded as one that the Courts cannot properly enforce or at least not within any particular

(*a*) *Musst. Bhoobyn Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C, W. R 15 P. C

(*b*) *Jumoona Dassya* v. *Bamasoondari Dassya*, 25 C. W. R. 235; S. C. L. R. 3 I. A. p. 72

(*c*) *Sayamalal Dutt* v. *Soudamini Dasi*, 5 Beng. L. R. 362.

(*d*) *S. M. Sarroda Dossee* v *Tin Cowry Nandy*, 1 Hyde R. 223.

(*e*) *Joy Chundro Race* v. *Bhyrub Chundro Race*, C. S. D. A. R. 1849, p. 461.

(*f*) See *Padma Coomari Debea* v. *Court of Wards*, L. R 8 I A. 229; and B. 5. 3 below.

(*g*) *See* above, B 3 and 3. 1.

time. (*a*) A widow directed by her deceased husband to adopt is bound to give effect to his wishes before she can claim under the deed of permission framed chiefly for the benefit of the son she may adopt. (*b*)

A direction cannot be carried out contrary to the law, as *ex. gr.* while a son of the husband is living. (*c*)

B. 3. 4.—CHOICE PRESCRIBED.

It is common for a husband authorizing an adoption to specify the child he wishes to be taken. (*d*) Should that child die or be refused by his parents the authority would still be held, at least in Bombay, to warrant the adoption of another child unless indeed he had said "such a child and no other." The presumption is that he desired an adoption, and by specifying the object merely indicated a preference. Whether the same rule would prevail in Bengal may be doubtful, as the presumption there is against an authority not clearly given.

A Hindû by will expresses a wish that his wife, after his death, should adopt the second son of a person, who had only one son born and alive at testator's death. The widow is not bound to wait indefinitely till the person begets a second son, but may adopt a boy of her own choice under the power. (*e*)

When a husband authorizes the adoption of a particular boy named by him, his widow or any of his widows (if there are more than one) cannot adopt any other boy so long as the boy thus designated is alive. (*f*)

(*a*) *See* above, pp 903, 904; and below, OMISSION OF ADOPTION.

(*b*) *Musst. Subudra Chowdryen* v. *Goluknath Chowdry*, 7 C. S. D. A. R. 143. *See* above, p 903; and below B. 3 15; B. 3. 37.

(*c*) 2 Macn. H. L. p. 199 (Chap. VI. Ca. 19); *Bhoobun Moyee's* case, 10 M. I. A. 279.

(*d*) *See* above, p. 904.

(*e*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91. *See* above, p. 904, Note (*b*).

(*f*) *Ramchandra* v. *Bapu Khandu*, Bom. H. C. P. J 1877, p. 42. We may add " and not given in adoption." *See* below, Secs. IV. V.

When authority has been given to a widow to adopt the son of a particular person it is exhausted by his adoption. If he die it will not warrant another adoption to replace him. (*a*)

B. 3. 5.—AUTHORITY GIVING QUALIFIED DISCRETION.

The husband sometimes defines the class out of which the adopted son is to be taken, and failing such, names another class without prescribing the individual to be adopted. The same principles of construction would probably be applied in this as in the last case.

An instance of a qualified discretion is to be found in the deed of permission given in *Musst. Bhoobun Moyee Debia's* case. (*b*) In this the selection of a son is directed to be made by preference from the executant's own gotra, but alternatively from another gotra.

B. 3. 6.—AUTHORITY GIVING COMPLETE DISCRETION AS TO PERSON.

This is probably the most common form, and it has been held that under it the widow has a large discretion—or even an unlimited one—as to whom she will adopt or whether she will adopt at all. (*c*)

Such an unfettered discretion as to the boy to be adopted was granted by the Anumati patra, or authority executed by the husband in the case of *Kashee Chundree Mustofee*. (*d*) This is the case most analogous to the assumed permission under which a widow adopts in Bombay.

(*a*) *Purmanand Bhuttacharuj* v *Oomakunt Lahoree and others*, 4 C. S. D. A. R. 318; *Gour Nath Choudhree* v. *Anoopoorna Choudhoorain*, C. S. D. A. R. for 1852, p. 332.

(*b*) 10 M. I. A. at p. 281. The same permission is conditional on the death of the son by birth, and provides for successive adoptions.

(*c*) *See* above, pp. 903, 904.

(*d*) C. S. D. A. Part I. 13 Summ. Cases. The widow, it was directed, was to adopt on attaining maturity.

B. 3. 7.—AUTHORITY TO ADOPT WITH COMPLETE DISCRETION AS TO EXERCISE OF THE POWER.

When a mere permission is given to adopt, should the widow think fit, the authority is complete, but according to the cases no obligation rests on the widow beyond the religious one to further her husband's welfare in the other world. (*a*)

B 3 8—CONDITIONAL AUTHORITY.

According to the Hindû law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural-born son dying under age and unmarried, may, on the happening of that event, make a valid adoption.

Thus an authority to adopt, in case the son dies, is valid, it was held, according to the law of Bengal, (*b*) but a contrary decision was arrived at in Madras. (*c*) Without special power for a second adoption a widow cannot adopt a second son upon the death of a son first adopted. (*d*)

In *Purmanand Bhuttacharaj* v. *Oomakunt* (*e*) the authority was an alternative one between a boy named, and a Brâhman boy in case there was a bar to the adoption of the former, and the widow having adopted a boy under the power, the boy died. She then adopted another boy, not coming within the above description, and the adoption was held illegal, as there was no sanction for the second adoption.

(*a*) *See* 2 Str H. L 97

(*b*) *Musst Solukhna* v *Ramdolal Pande et al*, 1. C. S D. A. R 324.

(*c*) *Pootumall* v. *Goolam Russool*, M S. D. A R. for 1854, p. 47.

(*d*) *Gowrinath Chowdhree* v. *Annapoorna Chowdhrain*, C. S. D. A. R. 1852, p 332 ; *Purmanand Bhuttacharaj* v. *Oomakunt*, 4 C. S. D. A. R. 318; *Sreemutty Dosse* v. *Taracharn Coondoo*, 1 Bourke, 48.

(*e*) 4 C. S. D. A. R. 318. The precise contingency specified must happen. *Mohundro Lall Mookerjee* v. *Rookminey Dabey*, Coryton's R. 42.

An authority to adopt, in case the son and mother disagree, will not operate. (*a*)

B. 3. 9.—IMPLIED AUTHORITY.

This arises when a husband has begun an adoption but has been prevented from completing it by death. In Bombay any distinct intimation of his wish for an adoption would probably be held sufficient to support an adoption proper in itself, but the kinsmen have still a right, in an undivided family, to a controlling voice as to the choice of the boy to be adopted. (*b*)

The adoption of a brother was begun by a husband, and completed by the widows. The widows were not permitted to question the adoption, nor the right of the adopted son to adopt his nephew as his heir after his death. (*c*)

B. 3. 11.—ADOPTION BY A WIDOW—AUTHORITY EXCLUDED BY PROHIBITION OR DISSENT OF THE HUSBAND. EXPRESS PROHIBITION.

The Judicial Committee recognizing the substitutionary character of the widow's function in adopting a son have declared her exercise of it impossible whenever a prohibition was to be gathered from the husband's language or conduct.

"It appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure

(*a*) *Musst. Solukhna* v. *Ramdolal Pande et al*, 1 C. S. D. A. R 324. Conditional grants are not favoured by Hindû law, and here the contingency provided for is one that should not be anticipated.

(*b*) *Ramji* v. *Ghamau*, I L. R. 6 Bom. 498.

(*c*) *Ranees Rathore et al* v. *Q. Khosal Sing*, N. W. P. S. D. R. Pt. II. 1864, p. 465. In the cases quoted above, Sec. III. A. 2. 1, p. 952, the widows proceeded to complete the adoptions on an implied authority from their husbands, with whom they had taken part in the initial ceremonies.

upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites." (a)

Hence where there is a positive prohibition by the husband a widow cannot adopt, (b) nor where the husband's assent cannot be implied. (c)

Such an adoption will not affect his testamentary disposition in favor of his brother. (d)

B. 3. 12.—IMPLIED PROHIBITION OR DISSENT.

"The Marâthâ School of Hindû law permits the widow to adopt .... provided [the husband] has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt."

(a) *Collector of Madura* v *Mootoo Ramalinga*, 12 M. I. A. at p. 443. "Although some of the Marâthâ Schools may use the expression that the widow may adopt without the consent of the husband, this means simply without his express assent The foundation underlying every adoption amongst Hindûs is the consent of the husband. The only difference between the Schools is that some require that it should be express, and that others are content with an implied assent, and are ready to imply it if he have neither said nor done anything inconsistent with such an implication." Per Westropp, J., in *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. xviii. App.

(b) *Bayabai* v *Bala Venkatesh*, 7 Bom. H. C. R. App. i.

(c) See *ib* ; *Narayen* v. *Nana*, 7 Bom H. C. R. 173 A. C. J.; *Ramachandra* v. *Bapu Khandu*, Bom. H. C. P. J. 1877, p. 42. See the Sâstri's opinion below, p. 970 note (c).

(d) *Janki Dibeh* v. *Sadasheo Rai*, 1 C. S. D. A. R. 197.

There is not any good authority for saying that any person, except the widow, can adopt a son on behalf of her husband. (a) She may adopt when her husband has not intimated his dissent, even without the consent of kinsmen, at least according to some of the authorities, (b) but this is properly limited in Bombay to the case of a divided family. (c)

Where a husband writes to the Collector that his daughters are his heirs, this may indicate a prohibition on the husband's part to adoption by the widow while the daughters live or their line continues. (d)

B. 3 13.—ADOPTION UNDER AN ASSUMED ASSENT OF THE HUSBAND.

From the preceding cases it will have been gathered that authority from the husband either express or clearly implied enables a widow to adopt. On the other hand his pro-

(a) Per Westropp, C. J., in *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. 257. The son becomes hers, so that she is deeply interested, as well as the continuator of her husband's existence for this purpose

(b) *See* above, pp. 864, 881.

(c) *Ramji* v. *Ghamau*, I. L. R. 6 Bom. at p. 503.

In the case of *Virubudru* v. *Baee Ranee*, Morris R. Pt. II p. 1, a question was put to the Sâstri of the Sadr Court as follows :—

" Can a widow of the Nâgar Brâhman caste adopt a son without having obtained the permission of her husband ? "

The answer was—" If the husband forbade the adoption of a son, the widow could not adopt ; but if he did not prohibit it, it must be understood that he assented to it For it is commanded in the Shâstr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shâstr, her act would be valid Some law-books deny this right to the widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shâstr " See also *Abajee Dinkur* v. *Gungadhur Vasudeo*, 3 Morr. R. 420.

(d) *Collector of Madura* v. *Mutu Ramalinga Sathorpatty*, 10 C. W. R. 17 P. C. ; S. C. 1 Beng. L. R. 1 P. C. ; 12 M. I. A. 397 ; 2 Mad. H. C. R. 206.

hibition or dissent, however intimated, so it be decidedly intimated, makes an adoption impossible. (*a*) The widow does not, except incidentally, adopt for herself, but for her husband. (*b*) The Marâthâ doctrine of her capacity when no intimation of his will has been given by the husband rests on an assumption of his assent to what would be at once a duty and a benefit to him. The Sâstris have in several cases placed the widow's capacity on this very ground. (*c*) She continues subordinately the ideal religious existence of her husband, (*d*) and when he has not expressed his wishes may express them for him, (*e*) though owing to her dependence, subject to the approval and control of the surviving male members of the undivided family. (*f*)

The Sâstris, to a question put them by the Court in *Thukoo Baee* v. *Rama Baee*, (*g*) replied:—"Kâtyâyana also says—'A married woman (naree) certainly must not act without orders,' which we conceive to mean, those of a father, husband, and son. However, a widow has the power of adopting even without the orders of her husband. A widow destitute of all three legal protectors, is mistress in her own right of the power both of giving and receiving."

The Vyavahâra Mayûkha distinctly declares that the law of Yâjñavalkya as to the dependence of women bears on the

(*a*) See *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. at p. 257; 2 Str. H. L. 91; *Chowdhry Pahlam Singh* v. *Koer Udaya Singh*, 2 Beng. L. R. at p. 104 P. C.

(*b*) *Ib* Her spiritual interests are fully recognized, but are considered as bound up in his.

(*c*) *See* above, p. 970, note (c.)

(*d*) Above, pp. 88, 90

(*e*) *Bhagvandas* v. *Rajmal*, 10 Bom H. C. R. at p. 257.

(*f*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom at pp. 502, 503 The Vîramitrodaya contends strongly for the necessity of assuming the husband's assent, while it recognizes that the assent must be had of the brethren on whom the widow is dependent. Transl. p. 116.

(*g*) 2 Borr. 488.

wife as essentially dependent on her husband and only during her coverture. As a widow she may adopt without the command to which she is subject only as a wife. (*a*) In the *Mankars'* case (*b*) the Śâstris said a widow could adopt her husband's brother's son, but no one else, without her husband's authority. Of the nine Paṇḍits consulted in the case (*c*) two say that the rule of the Dattaka Mîmâṃsâ requiring the husband's express consent is the one generally followed, but that the Saṃskârakaustubha and the Vyavahâra Mayûkha have established for the Marâthâs that a widow may adopt without her husband's order. Four say the order may be dispensed with. One says the adoption may be made with the consent of the husband's kindred and of the caste, or even without any order or consent at all. To this another adds "provided her husband did not say he wished to have no son adopted." In the two answers of the Sâstris which follow, the same vacillation may be noticed.

"A widow without her husband's permission may adopt with the sanction of some senior member of the family." (*d*)

"An adoption by a widow is not invalidated by want of permission from the deceased husband or his brother." (*e*)

Where there is no prohibition, there is a permission on the husband's part for a widow to give but not to take in adoption, according to the Bengal law. (*f*)

(*a*) Vyav. May. Chap. IV. Sec V. p 17, 18.

(*b*) 2 Borr. R. p. 104.

(*c*) 2 Borr. R. at p. 104.

(*d*) MS. 1674.

(*e*) MS. 1753. In this case the permission of the nearest relative, which in the previous answer was said to be necessary, is pronounced needless.

(*f*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 Beng. L. R. 145 A. O. J.; S. C. 11. C. W. R. 468; see Datt. Chand. Sec. I, paras. 31, 32, and Sec. V. below.

"A mother-in-law and then the daughter-in-law adopt different boys. The one adopted by the daughter-in-law is heir to her husband." (a)

"There being an adoptive mother and a widow of an adopted son, the former cannot adopt without special reason." (b)

Under the law which prevails in the Dravida country, a widow without any permission from her husband may, if duly authorized by his kinsmen, adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. (c)

B. 3. 14.—ADOPTION BY A WIDOW, A CONSCIENTIOUS OBLIGATION.

It follows from what has been said that the widow is bound in religion to adopt conscientiously with a view to the benefit of her deceased husband, not capriciously, or so as to spite the husband's family. If a suitable boy can be had she ought to adopt from the husband's gotra, as she is thus most likely to maintain the family sacra. (d) This obligation is not precisely a legal one, (e) but if the widow disregards it without reason and seeks to introduce an objectionable member into the family the kinsmen may interfere. (f) On the other hand they cannot properly refuse their assent to the dependent widow who desires to free her conscience and further her husband's happiness by a fit adoption. (g)

The obligation to adopt is one that cannot be legally and directly enforced even when an express authority or command

(a) MS. 1761. *See* below, Sub-sec. 3 23.

(b) Above, p. 405, Q. 22.

(c) *Rajah Vellanki Venkata Krishna Rav* v. *Venkatrama Lakshmi*, I. L. R. 1 Mad. 174; S. C. L. R. 4 I. A. 1.

(d) 2 Str. H. L. 98.

(e) *See* Sec. IV.

(f) See *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498.

(g) *See* above, pp. 864, 881; Steele, L. C. 45; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.

has been given by the deceased husband, much less can it be enforced when no direction has been given. The widow is then left to the promptings of her own conscience and judgment alone. (*a*)

If a widow in a divided family adopts in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive, the adoption is good in the Marâthâ country, though without permission of the husband or consent of his kindred, (*b*) or even that of the co-widow. (*c*)

The widow adopting must be a free agent. Constraint or undue influence will vitiate the adoption. (*d*)

The observations of the Judicial Committee in the *Ramnad* case to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," were explained in the sense that "Nice questions are not to be entertained as to the motives of a widow making an adoption so long as they are not corrupt or capricious." (*e*)

B. 3. 15.—TIME FOR ADOPTION BY A WIDOW.

The religious obligation under which a widow is placed by a direction to adopt makes it an imperative duty to fulfil her husband's purpose as soon as possible. But though inordinate delay has in one or two cases been considered a

(*a*) *See* above, pp. 903, 905.

(*b*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C R. at p 257; *Râmji* v. *Ghamau* I. L. R, 6 Bom. at p. 501; *Thuckoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd Ed.)

(*c*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J; *Rupchand Rakhmabai*, 8 Bo. H. C. R. 114 A. C. J. It is as incumbent on the sapiṇḍas to allow a widow to appease her husband's manes as it is on the co-widow to join in furthering this pious purpose.

(*d*) *Bayabaî* v. *Bala Venktesh*, 7 Bom. H. C. R. 1 App.; *Somasekhara* v. *Subhadramâji*, I. L. R. 6 Bom. 524, 527.

(*e*) *Raja Vellanki* v. *Venkata Rama*, L. R. 4 I. A. 1.

cause for preventing widows from reserving to themselves benefits in which they were intended to have only an incidental share, yet it cannot generally be said that promptness in adopting is more than a pious duty. On the other hand the capacity to adopt is not barred by limitation; it may be exercised virtually at any time during the widow's life.

The sooner adoption is made after the husband's death the better. (a) "A widow should adopt within a year of her husband's death." (b) The non-exercise however by a widow of the right of adoption for one year after her husband's death does not entitle his next heir to sue for his share, for during the widow's life he has no right to present possession. (c)

An adoption, 15 years after the husband's death, under his authority, was held good, (d) and even an adoption 20 years after the husband's death. (e)

The presumption against adoption arising from neglect by a widow to adopt for six or seven years after the death of her husband (the Raja of Nattore) was considered not so great as the presumption in favor of the Raja's having given power to adopt. (f)

B 3 16.—ADOPTION BY WIDOW—OF HUSBAND'S NEPHEW OR OTHER SAPINDA

Religious feeling usually prompts a husband in giving authority to adopt to designate a nephew or a member of his gotra either individually or by class as the person for adoption. He may however designate a stranger as he might adopt a stranger, or he may leave the choice to his widow's

(a) *Verapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91.

(b) MS. 1734.

(c) *Ramanamall* v. *Suban Annavi*, 2 Mad H C R 399.

(d) East's Notes, Case 10, 2 Morl. Dig. 18.

(e) *Musst. Anundmoyee* v. *Sheeb Chunder Roy*, 9 M. I. A. 287; S. C. Beng. S. D. A. Rep. 1855, p. 218.

(f) *R Chundernath Roy* v. *Kooer Gobindnath Roy*, 18 C. W. R. 221.

discretion. In the last case, and in what may in Bombay be deemed the similar case of no particular intimation of his wishes having been given by the husband, the widow, like the husband, ought to adopt from amongst nephews or near kinsmen. (*a*) The Śâstris, as has been seen, have been disposed to exempt her from control if she should take a nephew, but they have shrunk from pronouncing an adoption of a stranger duly celebrated invalid. The choice therefore, though subject to control, cannot be deemed legally limited to any particular family so long as it is made within the caste, and outside the offspring of sisters and daughters of the husband. (*b*)

B. 3. 17.—ADOPTION BY WIDOW—AUTHORITY IN THE CASE OF TWO OR MORE WIDOWS.

Where there are two widows the husband may authorize both to adopt. In the absence of an order they ought both to concur in an adoption. But in case of difference the elder has the superior right; and the younger cannot, it would seem, adopt without her senior's authority, except in case of irregularity on the senior's part causing interference by the caste. (*c*) Thus the Śâstris say:—

"The eldest of several widows has the right to adopt. On her death or disqualification the right passes to the next widow in order of marriage. She is disqualified by leprosy."(*d*)

"A man having directed an adoption, the elder widow may adopt against the wish of the junior." (*e*)

"The senior widow of a Śûdra, though married by pâṭ, has a preferential right to adopt over the second though married

(*a*) Above, pp. 886, 913; Sub-sec. 3. 13

(*b*) See further on this subject in the next Section.

(*c*) Steele, L. C. 48, 187; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji* v. *Ghamau*, I. L. R. 6 Bom. at p. 503.

(*d*) MS. 1669. *See* above, p. 412, Q. 36.

(*e*) MS. 1656. An authority cannot be given to each of two widows to adopt so that there may be two adopted sons at once. See *Gosavi Shree Chundravulee* v. *Girdharajee*, 4 N. W. P. R. 226.

by 'lagna,' the one ceremony conferring in that caste the same rights as the other." (a)

"The elder of two widows may adopt though the younger has a daughter." (b)

A husband gave directions to each of his two wives to adopt. After his death they divided the property. The elder gave away her share and died. The younger then adopted a son. The Sâstri said he might recover the aliened share from the donee. (c) In this case if the two widows, as is sometimes supposed, took a joint estate inalienable and vesting on the death of one widow solely in the other, the donee could not of course have taken anything as against the surviving widow. (d) This does not however seem to have been the view of the Sâstri. The performance of the Srâddhas ought in his opinion to be provided for by adoption, and the fulfilment of the duty which was incumbent from the beginning of widowhood defeated the gift made at a later time and subject to the duty. (e)

Where the elder of two widows has assented to an adoption by the other she cannot herself adopt another boy. (f)

B. 3. 18—ADOPTION BY WIDOW—CIRCUMSTANCES IN WHICH THE CAPACITY MAY BE EXERCISED.

These are generally the same as for the husband himself. The obstacles to adoption by the husband operate equally to prevent an adoption by the widow. For instance the

(a) MS. 1655. *See* above, pp. 413, 417, 427.

(b) MS. 1734. The existence of a daughter does not in any case prevent an adoption.

(c) 2 Macn. H. L. 247, Case XL.

(d) Above, p. 103.

(e) The adoption of a son operates retrospectively as a renewal or continuance of the adoptive father's existence as to an estate held solely or jointly by the latter at the time of his death.

(f) *Ramchandra* v. *Bapu Khandu*, Bom. H. C. P. J. 1877, p. 43.

existence of a son, either begotten or adopted, or the deceased husband's having died outcast. The circumstances which bar, or are supposed to bar, adoption by a widow are more particularly considered below. Where the elder of two widows has adopted a son the other cannot during his life adopt another. (*a*) On the death of a son adopted by the senior widow under authority of her husband, the second widow may adopt a second son upon an independent authority from her husband. (*b*) The authority to make successive adoptions is considered below.

B. 3 19—ADOPTION BY A WIDOW—SON DECEASED SONLESS.

An authority to adopt is frequently conditional on the death of a son. It provides sometimes for the event of a first or second adopted son's replacement in the event of his death. In such cases, it has to be borne in mind, the husband has by no means an unlimited power of future disposition. The son, whether begotten or adopted, by his birth or adoption and initiation, acquires rights and becomes a source of rights, which are regulated and guarded by the family law so as not to be subject to indefinite modification at the will of any individual. The authority to adopt cannot be made a means of upsetting the law on which it rests. Where the husband has given power to a widow to adopt, on the death of a natural son, an adopted son, or one adopted by her, the widow can exercise the authority only when the son dies unmarried, or leaving no child or widow. (*c*)

(*a*) Steele, L. C 48. *See* p. 977 (*c*).

(*b*) *Shama Chunder et al* v. *Narain Debeah*, 1 C. S. D. A. R. 209; contra *Narainee Debeh* v. *Hurkishore Rai*, 1 C. S. D. A. R. 39.

(*c*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P C.; S. C. Beng. S. D. A. R. 1858, p. 122.

B. 3. 21.—SUCCESSIVE ADOPTIONS BY A WIDOW.

Where the son dies unmarried and without having adopted, full effect can be given to the authority to adopt son after son without the embarrassment of competing rights, which must arise from a series of adopted sons leaving widows, each perhaps entitled to adopt. The difficulty that would arise in the latter case has been perceived by the Judicial Committee. In *R. V. Venkata Krishnarao* v. *Venkata Rama Lakshmi Narasaiyya,* (a) Sir J. Colville says: "It is not necessary to consider in what way successive adoptions operate. It is sufficient to say that the law has established that they may take place."

Where a widow adopted a second son, upon the death of an adopted son, the Court rejected the suit of the deceased owner's brother with reference to the uncertainty of the law, in respect of the right of the presumptive next taker after a Hindû widow, to a decree, declaring her adoption invalid. (b)

When not expressly prohibited, a widow may make a second adoption with the sanction of the kinsmen. If some kinsmen give sanction, and others withhold it from interested motives, and both these are equally related to the deceased, the widow can adopt, acting upon the sanction of those kinsmen who gave it. (c)

A second adopted son takes the place of the first, but only if the first adopted died without issue. (d) In an authority to adopt successively the condition " if necessary" must be understood. Where an authority had been given to a wife to adopt five sons in succession, and the son first adopted lived to perform all the sacra, it was held that on his death

(a) L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 171.

(b) *Ry Brohmo Moyee* v. *R. Anand Lall Roy,* 19 C. W. R. 419.

(c) *Parasara Bhatar* v. *Rang Raja Whatar,* I. L. R. 2 Mad. 202; *see* also *Rakhmabai* v *Radhabai,* 5 Bom. H. C. R. at p. 191. This shows that the authority to give or withhold sanction is not a right of property, but simply a part of the religious and family law.

(d) *Shama Chunder* v. *Narain Debeah,* 1 C. S. D. A. R. 209.

unmarried his mother could adopt to his father. (a) This may perhaps be justified on the principle that there was no widow of the adopted son to take a jointure of the sacra, but the retrogression of the right to adopt could not be carried further without introducing confusion. (b)

B. 3. 22.—ADOPTION BY A WIDOW—SIMULTANEOUS ADOPTIONS.

As the existence of one son makes the adoption of another illegal, the attempt to adopt two sons at once has been pronounced invalid as to both. (c) It could indeed be no more regarded as generally possible than the simultaneous marriage of two or more wives under a law of monogamy.

B. 3. 23 —ADOPTION BY A WIDOW—CIRCUMSTANCES WHICH BAR ADOPTION.

It follows from the delegated or substitutionary character of the widow's authority to adopt (d) that the impediments to adoption external to the husband which affect adoption by him equally affect adoption by the widow. And as she has to perform an act of intelligence of sacred import, she must in her own person satisfy the conditions requisite to make such an act effectual. The circumstances in which the power can or cannot be exercised have already been considered. Amongst these might have been placed the existence of vested interests as viewed from the negative side, but this recently developed doctrine having been usually discussed by the Courts with reference to its positive operation as a bar to adoption or as depriving adop-

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(a) *Ram Soondur Singh* v. *Surbanee Dossee*, 22 C. W. R. 121 C. R.

(b) *See* below B. 3. 23 ; B. 3. 25.

(c) See *Gyanendro Chunder Lahiri* v. *Kalla Pahar Hajee*, I. L. R. 9 Calc. 50 ; *Monemothonauth Day* v. *Onauth Nauth Day*, Bourke's R. 189 ; *S. Siddesory Dosee* v. *Doorgachurn Sett*, Bourke 360 ; *Bhya Ram Singh* v. *Agur Singh*, 1 N. W. P. H. C. R. 203 ; *Senkol Tevan* v. *Aurlanada Ambalakaran*, M. S. D. A. R. for 1862, p. 27.

(d) *See* 2 Str. H. L. 88, 91, 92, 94.

tion of its usual consequences, will be here treated from the same point of view.

The principle now generally accepted by the Courts that a widow cannot adopt so as to defeat a vested interest (*a*) is not to be found in that form in the Hindû authorities. (*b*) It has been taken in two senses: (1) that the adoption under such circumstances is void, and (2) that though not void its regular effects are limited so as not to divest the vested estate. There has been a difference of views also as to whether the husband's authority does or does not make the rule inapplicable. It is almost inevitable that an adoption by a widow should cause some loss to kinsmen or contingent reversioners, and the principle has again been varied so as to make the consent of the parties thus interested or of a majority or of some of them necessary. (*c*) In Bengal the widow takes a life estate though not more even in an undivided family. If she adopts under a license from her husband she deprives his brethren of the succession. In Bombay she takes the succession only in a divided family, but an adoption by her defeats the estate which otherwise must go to the heirs next in succession at her death. She may have a daughter or a daughter's son taking, according to the prevailing theory, from her deceased husband. It is inconsistent with the theory of her position as not being a source whence succession is derived that she should have a power of defeating at her pleasure that succession which the law approves, but this has by the decisions been conceded to her.

(*a*) See *Rupchand* v *Rakhmâbâi*, 8 Bom. H. C. R. 114.

(*b*) A mere descent cast makes no difference except when a son has taken the estate and left a widow. A right so devolved cannot be displaced by an adoption even under an express authority from the deceased son's father by his mother. See *Bhoobunmoyee Debia's* case, 10 M. I. A. 279, quoted in *Rajah Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. at p. 9.

(*c*) See *The Collector of Madura* v. *Muttu Ramalinga Sadhupatty*, 12 M. I. A. 397; *Sri Raghunada* v. *Sri Brozo Kishoro*, L. R. 3 I. A 154, 191, 192; *Ramji* v *Ghamau*, I. L. R. 6 Bom. 498, 501.

The adoption of a son operates retrospectively. (*a*) He is looked on in the light of a posthumous son, and though a widow cannot adopt with the consequence of giving effect to a fraud, (*b*) yet there is nothing unreasonable in the loss of an estate divested by an adoption when the estate has from the first been subject to that kind of defeasance. The defeasance arises from what is in theory a deferred act of the deceased adoptive father, who could always have adopted had he lived, and whose spiritual life is continued by his widow.

In *Bhoobunmoyee Debia's* case the divesting of an estate was put forward by Lord Kingsdown rather perhaps as an illustration of the inconvenience that would arise from adoptions creating new collateral heirs than as a thing in itself impossible under the Hindû law. (*c*) In other cases the inconvenience has been made a ground for a supposed prohibition. (*d*) It is true that in many instances the supposed prohibition coincides in its operation with the actual principles of the Hindû law as drawn from the native sources, but in others it does not. It is desirable therefore that these principles and their bearing on the matter in question should, if possible, be ascertained and established. The sacra of a Hindû family are regarded as descending regularly with its estate from father to son for ever. The birth and the initiation of the son make him the joint or the sole depositary of this group

(*a*) The common statement has been adopted. Its proper sense is that an adopted son is regarded as a continuator of the adoptive father's personality as to his property and sacra whether separate or in a united family The adoption is not retrospective for the purpose of enabling the son to take back a property which his father had not, and which between the father's death and the adoption has been given by the law to some other separated relative or branch of the original family.

(*b*) *See* above, pp. 366, 367.

(*c*) See also *Sri Raghunadas's* case, L. R. 3 I. A. at p 193.

(*d*) See *The Collector of Madura's* case, 12 M. I. A. 397 ; ***Rupchand* v. *Rakhmabai***, 8 Bom. H. C. R. 114 ; *Kally Prosono Ghose* v. *Gocoolchundra Mitter*, I. L. R. 2 Calc. 307.

of connected rights and obligations. He is bound to provide for his father's śrâddhas : he is entitled to the due performance of his own. The proper celebrant is a son begotten or adopted; but if the estate passes to a remoter heir the duty goes with it. The last holder,—though no ceremonies are so effectual as those performed by a son,—yet receives such benefit as is possible from the actual successor to the property. Now by an adoption higher in the line this blessing is lost. The son adopted for instance by the mother of one deceased performs a father's śrâddhas for his ceremonial father, but not for his ceremonial brother. The latter is thus, according to Hindû sentiment, placed in a worse position than if there had been no adoption at all. If the deceased have left a widow, it is she alone who, as partner during his life of his sacra, and capable of continuing them after his death, can in accordance with theory adopt a son. The son is her son as well as her husband's. Even in his life both ought to concur in an adoption. The books say nothing of a husband, even in his life, authorizing an adoption by any one but his wife, and Sir M. Westropp was fully warranted in stating that there is no authority for any one but the widow to adopt a son to her husband after his death. (*a*) She only could legally have joined in procuring the son by birth who is replaced by the adopted son, and the imitation of nature thus points her out as solely endowed with the faculty of adoption when her husband can no longer exercise it.

There are thus strong reasons, though the Sâstris seem in a few instances not to have sufficiently adverted to them, (*b*) why adoption by a mother to her son should be disallowed, (*c*) and why an adoption by her to her deceased husband should not be allowed to supersede the right of the deceased son's

(*a*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. at pp. 257, 258.

(*b*) *See* 2 Str. H. L. 93, 94, 95. *See* below Sub-sec. 3. 26.

(*c*) *See* above, Sub-sec. 3. 13.

widow. The reasons do not at all rest on a devesting of the junior widow's estate, but the preservation of her estate is incident to her exclusive faculty of adoption. If the view here taken is correct, a mother succeeding to her son after the son's investiture (upanayana) is not the more capable of adopting a son to him because she devests no estate but her own, but a case to the contrary is referred to below.(*a*)

There are cases however in which an only son or an adopted son dies still an infant. Such a one must usually have died unmarried. If he had advanced to the saṃskâra of marriage (*b*) he must have gone through the preceding ceremonies requisite to qualify him for performing the śrâddhas of his ancestors according to the rules of the caste and the family. His competence in this respect he must, in the absence of a son, have imparted in a measure to his wife, who has taken a jointure of his ceremonial virtue. (*c*) But death before marriage is not attended with these effects. The infant dying before tonsure is not entitled even to a ceremonial funeral. Until investiture the son of a twice-born man is but once born, and needing the religious second birth ranks only as a dâs or slave entitled to subsistence and mundane benefits, but not yet sharing, or not fully sharing, the spiritual heritage of his family. (*d*) As then the sacra have never fully devolved on such a boy they may be conceived as still vested (so to speak) in his mother, whose spiritual representation of her deceased husband has not been replaced by that of his son. She may then adopt a second and a third son should the first and the second

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(*a*) *Bykant Monee Roy* v. *Kisto Soonderee Roy*, 7 C. W. R. 392 C. R. *See* the remarks of Melvill, J., in *Rûpchand* v. *Rakhmabai*, 8 Bom. H. C. R. at pp. 118, 123 A. C. J.

(*b*) *See* above, p. 873.

(*c*) See *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. at pp. 146, 148; above, pp. 90 ss.; *Vijiarangam* v. *Lakshuman*, 8 Bom. H. C. R. at p. 258.

(*d*) *See* above, p. 922.

never have attained ceremonial competence. (*a*) If the son have reached this stage it does not appear that the sacra and the faculty of adoption can revert to the mother. (*b*) Along with the spiritual capacity the responsibility also has finally centered in the son. (*c*)

When the deceased husband has died as a member of an undivided family the faculty of adoption is still peculiar to the widow. But as a consequence of her general dependence she cannot exercise this faculty without the approval of the kinsmen, (*d*) except where that approval is improperly withheld. (*e*) The sanction is not necessary where the husband has given her authority to adopt, and especially where he has himself designated the boy for adoption. In such a case the vested interests of the kinsmen are displaced by the adoption, whether they approve it or not. (*f*) This shows that the need of their sanction does not arise from their rights in the property but from their family relation to the widow. Their authority may be likened to that sometimes given to a girl's guardian under the English law to give or to withhold his sanction to her marriage. This, though its exercise may greatly affect his own fortune, is not a right of the guardian which he is at liberty to use for his personal enrichment. He is bound to use it conscientiously, and failing to do so he may be

(*a*) See *Rajah Vellanki Venkat Krishna Rao* v *Venkatrama Lakshmi Narsayya*, L. R. 4 I. A. at p. 9.

(*b*) Judic. cit.

(*c*) See *Musst. Bhoobunmoyee Debia* v. *Ramkishore Acharji Chowdhry*, 10 M. I. A. at p. 310.

(*d*) *Shri Raghunadha* v. *Shri Brozo Kishore*, L. R. 3 I. A. 191.

(*e*) See *Rakkmábai* v. *Radhabai*, 5 Bom. H. C. R. 181, 188; above pp. 864, 881.

(*f*) See *Sri Raghunada* v. *Sri Brozo Kishore*, L. R. 3 I. A 154, 173; *Dinkar Sitarám Prabhu* v. *Ganesh Shivaram Prabhu*, I. L. R. 6 Bom. 505; *Govind Soondaree Debea* v. *Jugganunda Debea*, 3 C. W. R. 66; 15 I. A. 5 Pr. Co., where the inquiry into the fact of the authority would have been needless unless it would operate if proved. St. L. C. 176.

superseded. So the Hindû kinsmen must not withhold their assent to an unobjectionable adoption merely because it will introduce another sharer of the estate. (*a*) The widow is bound (at least religiously) to seek a son within the family. When she does so the family is not in any way impoverished by the adoption, but if she is forced to go out of the family for a son the kinsmen have still not a right of property to exert or to forego, but a faculty to exercise, (*b*) which they must use to the advantage of the family at large, but especially of the deceased member. Such a sanction it has been held is sufficient as affords a reasonable guarantee that the widow has acted with moderate prudence and conscientiousness. (*c*) If the sanction were a right resting on property the infant co-members would have to be consulted through their guardians, and might have a right to disapprove at a later period what had been improvidently allowed in their infancy, but no provisions to this effect are found in the law-books.

The son united with his father may have died childless before him. His joint interest in the property and the sacra then reverts to the father, who may adopt a son and make him heir as he might have begotten a son. In such a case, as the deceased never had an independent right, being unseparated from his still living father, his widow cannot adopt without the sanction of her father-in-law. On the other hand the father-in-law, who has sanctioned an adoption by his son's widow, and thus given himself a grandson, cannot afterwards adopt a son. If he first adopts a son to himself he may still sanction an adoption to his deceased son. If he dies without either adoption having been made it might seem that the right would pass rather to his widow, should he leave one, than to his daughter-in-law. The replies of the Śâstris

(*a*) Above, pp. 861, 880, 904, 975.

(*b*) See *The Collector of Madura* v. *Moottoo Ramalinga Satthupatty*, 12 M. I. A. at p. 442.

(*c*) See *Gopal* v. *Naro*, 7 Bom. H. C. R. xxiv. App.; and *Rakhmabhai's* case, *supra*.

however favour the right of the daughter-in-law even during the father-in-law's life, giving to her adopted son rights equal or superior to those of the son adopted by the father-in-law, (*a*) according to the earlier or later adoption of the latter. On the death of the father-in-law without adoption they prefer to his widow the widow of his son, by whose adoption the manes of both father and son may be appeased. (*b*)

Where two or more united brothers have died in succession and sonless the household sacra in which they were jointly interested must have devolved solely on the one who survived the other. In such a case the widow of the last deceased as a sharer, though in a minor degree, of his ceremonial virtue, and having with him in his life a joint capacity to adopt, according to the religious view, is the proper person to adopt to her husband, and so devolve the family sacra centered in herself. The wife of the predeceased united member however had with him a joint interest in the family sacra, though this was never so developed by his separation as after his death to give efficacy to her substitutionary acts on account of a new family. (*c*) The common sacra centre on the death of one in the surviving members of the united family: the widow is spiritually and temporally dependent, and cannot adopt without the assent of the brethren. If all have died, the widow of the last has succeeded, so far as a woman can, to the sacra of the family, but she has not a superiority corresponding to that of her husband over the widow of a predeceased member, and enabling her to approve or disapprove an adoption by that widow. (*d*) Such an adoption is, according to one view, no longer

(*a*) *See* above, p. 371, Q. 13, to which the remarks in the text apply, and Sub-section B. 3. 13 of the present Section.

(*b*) *See* a decision to the same effect in Sub-sec. 3. 26.

(*c*) *See* above, p. 355.

(*d*) That a widow is subject to control only by near male relatives appears from the answer in *Thukoo Baee's* case, quoted above, p. 971

feasible when no one is left to give the requisite sanction. Though a widow has the sole faculty of adopting to the deceased husband, this faculty cannot be exercised in a united family except with the assent of the male members. On their extinction the faculty is virtually gone.

According to the other and the approved view, the widow, by the death of her husband's former co-members of the family, is merely freed from a control which they might exercise for her good during their lives. She may then adopt at her own discretion, as no controlling power is attributed to the widow of one deceased member over the acts of another. (a) Nor is she subject to the control of an infant member incapable of discrimination. This view is the one more consonant to the doctrines of the Nirṇayasindhu, the Saṃskârakaustubha, and the Dharmasindhu, admitting that any sanction at all is necessary to adoption by a widow. The Vyavahâra Mayûkha recognizes the need of a sanction while there are qualified persons present to give or withhold it but not otherwise. (b)

In a divided family the ties of mutual dependence and support are much less close than amongst united kinsmen. According to the doctrine of the Mitâksharâ the widow of a separated member takes his estate in full ownership, and becomes herself, though in her husband's family, a new source of inheritance. (c) According to the now prevailing Bengal doctrine she takes only a life interest, but still during her life the estate is completely vested in her. (d) Thus there are no immediate interests to impede her freedom as to adoption. But the division of the once united family has been necessarily attended with a separation in the performance of the

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(a) *See* the opinion of the Śâstris in *Thukoo Baee* v. *Ruma Baee*, cited above in Sub-sec. B. 3. 13.

(b) See *Bayabai* v. *Bala Venktesh Râmâkânt*, 7 Bom H. C. R. App xii.; Vyav. May. Chap. IV Sec. V. para 18

(c) *See* above, pp. 324, 325, 505, 517, 780.

(d) Above, p. 96.

daily sacrifices and the other periodical rites, community in which is the central point of family union. (*a*) The husband who has once been a celebrant of the sacra for himself alone cannot have lost the capacity and the obligation except by the process of reunion. If as usual he has died separated his sacra pass to his son, and in default of a son to his widow, (*b*) who in her turn may impart the requisite faculty by adoption. As no one shares the sacra there is no joint interest on which an interference with her discretion can properly be grounded. (*c*) A tradition of the necessary dependence of women still exacts from the widow a decent regard for the interests and wishes of the family at large notwithstanding the partition that has taken place, but as on the one hand she cannot urge her connexion as a ground for a right to maintenance in distress, (*d*) neither can the kinsmen on the other hand urge it as a ground for legal control of her faculty of adoption. (*e*)

These considerations apply to the actual estate of the deceased husband, whether joint or separate. If the deceased husband had no ownership of an estate in question, either as being individually separate or as being a member of a branch separated from the one to which the estate belonged, it is obvious that he had no sacra which that estate was bound to sustain. He might, had he survived, possibly have come in as the nearest collateral on the extinction of the proprietary branch, but when in his absence another has succeeded, that other has assumed the whole of the sacra connected with the estate he has taken. (*f*) No participation in them belongs

(*a*) *See* above, pp. 689, 851; *Sri Raghunádhá's* case, L. R. 3 I. A. at p. 191.

(*b*) Above, pp. 93, 258.

(*c*) *See* Viramitrodaya, Transl. p. 257.

(*d*) Above, pp. 236, 243.

(*e*) *Ramjee* v. *Ghamau*, I. L. R. 6 Bom. at pp. 502, 503.

(*f*) *See* the opinion in *Bamundass Mookerjia* v. *Mt. Tarinee*, 7 M. I. A. at p. 188; and above, pp. 67, 368, 590

to the widow of the predeceased which she can impart to a son by adoption. One separated collateral cannot therefore be ousted by an adoption made after his succession by another collateral's widow. Much less can any one representing the proprietary branch undivided in itself be thus superseded.

It accords with the views just stated that if a Hindû husband gives to his wife an instrument of permission to adopt, should she be left a widow, and if he has born to him a son, who survives him, and if this son dies leaving a widow in whom the estate is vested, the power of adoption given to the mother-in-law is incapable of execution and is at an end. (*a*)

B. 3. 24.—ADOPTION BY A WIDOW—CIRCUMSTANCES BARRING ADOPTION AS IN THE CASE OF A MALE.

"A widow cannot adopt while a previously adopted son is alive." (*b*)

A son by her co-wife prevents adoption by a widow equally with one born of herself. (*c*)

"The widow cannot adopt two sons, because the adoption of the first creates an immediate change of the essential condition of sonlessness." (*d*)

The existence of an adopted son is a bar to another adoption (though under power from the husband), by a widow, as well as to one by a husband himself. (*e*)

A husband abandoned his wife, who became a Moorlee. By his second wife he had a son. The first wife adopted a son. This was held invalid. (*f*)

(*a*) *Padma Kumari Debi Chowdhrani et al* v. *Jagatkishore Acharjia Chowdhri*, I. L. R. 8 Calc. 302 P. C.

(*b*) MS. 1664. *See* above, Sec. III. B. 3. 18; B. 3. 19.

(*c*) Above, p. 522.

(*d*) MS. 1671.

(*e*) *Gopee Lall* v. *Musst. Chundraolee Buhoojee*, 4 N. W. P. R. 226; S. C. in Appeal, L. R. S. I. A. 131, and 19 C. W. R. 12 C. R.

(*f*) MS. 113.

Adoption by a Hindû in concert with his senior wife, it was said, supersedes the original permission given by him to each of his two wives to adopt a son for each, unless after the adoption he expressly confirmed the permission to his junior wife to adopt. (*a*)

B. 3. 25.—ADOPTION BY A WIDOW—NOT TO DEFEAT A VESTED ESTATE.

Though the Hindû authorities do not furnish such a rule, it must now be accepted perhaps as a principle established, or at least strongly favoured by the decisions, that adoption cannot be made to devest or defeat an inheritance already vested. (*b*) The Hindû rule seems to be this, that when a deceased was an actual co-owner or sharer in interest in an estate in question, his son received in adoption whether by himself or by his widow, takes his place. When he was separated and the law has given the estate of his deceased relative to some one else, the succession having passed by his line, cannot be recovered, because there is no authority for taking the estate from the hands into which it has fallen. The same principle is applied in the case of a blind or dumb man's son. Such a man cannot be an actual coparcener. There is a rule allowing his son to take his place in a partition, but when once the partition has been made, the son subsequently born or adopted is not remitted to a right which did not subsist in his father. (*c*) The particular rule, like that giving an estate to the existing collaterals, is not accompanied by any proviso in favour of subsequently adopted sons. In a united family there is a

(*a*) *Goureepershad Raee* v. *Musst. Jymala*, 2 C. S. D. A. R. 136; Macn. Con. H. L. 181, 182; 2 Str. H. L. 61. The permission could not operate while the son actually adopted was alive.

(*b*) *Annammali* v. *Mabhu Bali Reddy*, 8 Mad. H. C. R. 108 ; *Kally Prosonno Ghose* v. *Gocool Chunder*, I. L. R. 2 Cal. 295 ; *Rupchand Hindumal* v. *Rakhmábái*, 8 Bom. H. C. R. 114 A. C. J. *See* the discussion above, Sec. III. B. 3. 23; *Gáyabái* v. *Shridharácharya*, Bom. H. C. P. J. 1881, p. 145.

(*c*) See *Bápuji Lakshman* v. *Pándurang*, I. L. R. 6 Bom. at p. 620.

remitter through the identification in interest of the son with his father who died a co-sharer.

A widow (having legal power to adopt from her husband) (*a*) cannot adopt so as to deprive or defeat an inheritance or interest already vested in a widow of a son, natural or adopted, who survived his father, (*b*) or in the son of such a son, (*c*) or in the heirs of the adoptee's grand-uncle by adoption, who had succeeded to the grand-uncle's property upon the death of his widow. (*d*) Where the estate has come down to the widow of the last male survivor of the husband's family prior to the adoption, (*e*) it might seem that an adoption by a widow of a previously deceased coparcener could not be made so as to defeat the vested estate. This however will depend on the different views discussed above. (*f*) A new line cannot be substituted by adoption to take what a natural born son would not have taken ; (*g*) but there does not seem to be anything in the Hindû law to prevent his taking what a natural born son would have taken at the moment of his birth or of his father's death. In *Bhoobun Moyee Debia's* case the adoption was in itself invalid, but if it had been made by the widow of one brother or cousin after the estate had descended to the widow of another the right of the former to adopt to her deceased husband, which had always subsisted, would not, according to the prevailing Hindû notions, be extinguished by failure of the male members. It would only be freed from a condition arising from the widow's dependence while they lived. The only theory on which the prohibitive right of the widow of the last full owner can be sustained seems to be that the sacra along

(*a*) *i. e.* where such power is essential.

(*b*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; S. C. Beng. S. D. A. R. 1858, p. 122.

(*c*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd Edn.).

(*d*) *Kally Prosonno Ghose* v. *Gocool Chunder*, I. L. R 2 Cal. 295.

(*e*) *Gobind Sooonduree Debia* v. *Juggodumba Debia*, 3 C. W. R. 66; S. C. 15 C. W. R. 5 P. C.

(*f*) Sec. III. B. 3. 23. And *see* above, p. 598.

(*g*) See *Musst. Bhoobun Moyee Debia's* case, 10 M. I. A. at p. 311.

with the estate centred in the widow's husband and have centred in her, so that she is religiously bound to continue the family by adoption, and to retain the estate for the benefit of the son to be adopted. His adoption operating retrospectively will make the estate devolve wholly upon him as his adoptive father's heir, and the adoption of a son by the widow of a predeceased member being made subject to the contingency of the adoption of a son to the last deceased may be deemed subject to the approval of the latter's adopted son as the male sapiṇḍa on whom she is dependent. The law books and the practice of the people do not however support such a theory as this: they rather allow and encourage an adoption by a widow duly authorized without sanction when there is no one to give or to withhold it, though such an adoption made by the widow of a separated collateral after the estate has passed to another collateral, will not serve to create for the adopted son an estate in possession in which his father had no more than a contingent interest. When it has passed to a collateral separated in interest it has passed for good as against a collateral who, when it passed, had no share or interest. (*a*) There is in the last case a break in the succession as contrasted with the ideal continuity of interest amongst all the members of a united family. (*b*) A right in possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united family, but a mere possibility once extinguished cannot be revived. Thus adoption in a separated branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed *unshared* to him who has it. But within a group of united brethren the widow of one may adopt so as to devest an estate wholly or in part. (*c*) Much more, it would seem, may the

(*a*) Comp. above, pp. 580, 590.

(*b*) Above, pp. 67, 600.

(*c*) See *Sri Raghunadha's* case, L. R. 3. I. A. 154. It is not regarded as devesting any more than a birth after a long gestation would be so regarded.

widow of one united in interest with the last holder adopt so as to devest the estate that has passed to a mere collateral never united with the deceased. (a) The latter will necessarily be much more completely represented by a son of a united brother than by a mere collateral, whose own right may be that of an adopted son or have descended through an adopted son. In one case it has been held that the adoption by a widow could not give to the adopted son the position of a co-sharer with a united brother of her deceased husband. (b) The adoption would certainly need the sanction of the surviving brethren unless this should be improperly withheld. In the case cited as a precedent (c) a son had died before his father but leaving a widow who adopted a son thirty-five years after her father-in-law's death. She had recognized his nephews as members with him of an undivided family, and she could not adopt without their assent unless it were improperly withheld. (d) On the death of the son before his father his proprietary right had wholly merged in his father's. (e) He had never had separate sacra, and it might perhaps be contended that therefore the widow never had a right to adopt. (f) The Sástris, however, recognizing the joint interest of the son in the estate and the sacra, and his claim to the due celebration of his Srâddhas by a son favour this right of a predeceased son's widow. They do not think it excluded by the existence of a widow or a daughter of the father-in-law, much less by the existence of remoter heirs to whom the estate has passed away from the direct line of the deceased. (g) In the case of co-sharers standing on an equal footing the

(a) This competition may arise in the case of a râj or a vatan.

(b) *Govind* v. *Lakshmibai*, Bom. H C. P. J. 1882, p. 12.

(c) *Gayabai* v. *Shridhara Charya*, Bom H C. P. J. 1881, p 145.

(d) Above, Sub-sec 3. 13.

(e) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H C. R. p. 76, 86.

(f) *See* above, B 3. 23.

(g) See above, B. 3. 13. pp. 970 ss.

Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other, (a) nor apparently would the Judicial Committee (b) countenance such a doctrine.

Though a cousin cannot sue, as next heir, to set aside an adoption, he has a right to question it if he takes under a deed such an interest as may be affected by the adoption. (c)

An estate being once vested cannot, it was said, be devested by a subsequent adoption in a collateral line (d) even when the adoption has been prevented by the fraud of him who has taken the estate through the absence of an adopted son.

B 3. 26.—ADOPTION BY A WIDOW—HER CAPACITY AS AFFECTED BY HER AGE.

Generally a widow cannot adopt until she has attained maturity. (e) This is an instance of the imitation of nature which however is in some castes not closely adhered to. (f) In these there may be an earlier taking, but the celebration is postponed until the time of possible maternity. It shows

(a) *See* above, B. 3. 13 They regard death "without male issue" (*see* p. 598) as not having occurred until the death of the widow makes adoption impossible.

(b) See *Sri Raghunadha's* case, *supra*.

(c) *Brojo Kishoree Dassee* v *Sreenath Bose*, 9 C. W R. 463 ; S. C. 8 C. W. R. 241.

(d) *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R. 7 Cal. 178, referring to *Keshuv Chunder Ghose* v *Bishun Pershad Ghose*, C S D. A. R. 1860, Pt. II. p. 340 ; *Kally Prosonno Ghose* v. *Gocool Chunder Mitter*, I. L. R. 2 Cal. 295 ; above, pp 367, 368 ; and *Sri Raghunadha's* case, L. R. 3 I. A. 154. In the last case it will be noticed that subsequent adoption deprived of an estate an undivided brother in whom it had fully vested. *See* also Sub-sec. 3. 26 below.

(e) Steele, L. C. 48.

(f) Steele, L. C. 187.

how adoption is regarded as almost exclusively the husband's affair, that under an authority from him an infant widow may adopt. "A widow of 10 years, unshorn, and not yet arrived at puberty, may, in pursuance of her husband's wish or assent, adopt from another gotra, though there be a non-assenting undivided brother of the husband surviving." (*a*) By the usages of the sect of Sarogees, adoption at the age of nine years is valid, and on the death of an adopted son without issue, during the lifetime of the adoptive mother, the father's right of adoption vests in the widow and not in the mother. (*b*)

"A mother-in-law cannot legally compel her daughter-in-law under age to adopt against her will. If she has compelled an adoption by undue pressure the daughter-in-law can adopt again." (*c*) Undue influence indeed invalidates an adoption in every case. (*d*)

B 3. 27.—ADOPTION BY WIDOW—CAPACITY AS AFFECTED BY INTELLIGENCE.

Where the husband has given an express direction the cases immediately preceding seem to show that his wishes may be carried out by a child widow. When a discretion has to be exercised general principles would require that a certain degree of understanding should have been attained before the duty is performed, but it does not seem that any precise rule on this point has been laid down in the case of adoption. Where a mental capacity is attained for religious functions in general it seems to be gained for adoption. Such restrictions as are recognized may be referred rather to other grounds than mere

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(*a*) MS. 1648. A widow under age it was said might adopt under a direction from her husband, though his brothers survived; *Haradhan Roy* v. *Biswanath Roy*, 2 Macn. H. L. 180.

(*b*) *Musst. Chimnee Baee* v. *Musst. Guttoo Baee*, 8 N. W. P. S. D. R. 1853, p. 636.

(*c*) MS. 1675.

(*d*) *Somasekhara Raja* v. *Subhadramaji*, I. L. R. 6 Bom. 524, 527.

defect of understanding unless this should amount to positive lunacy.

B. 3. 28.—ADOPTION BY A WIDOW—HER CAPACITY AS AFFECTED BY HER STATE AS TO BODY, MIND, RELIGION AND CASTE.

"Leprosy disqualifies a widow for adopting though otherwise competent." (*a*)

A woman's want of chasity deprives her acts of all religious efficacy. (*b*) An unchaste woman, pregnant in concubinage, is incompetent to adopt (*c*); but after removal of the sin by penance she can adopt. (*d*)

A widow under puberty cannot adopt, (*e*) except in some castes with the consent of her husband's kinsmen, or of the caste, or of both. But even when the adoption is made by an immature girl the ceremonies should be deferred till after her "shanee" (*f*) or attainment of puberty.

"Widows of Brahmâns and of others amongst whom the custom obtains are deemed impure after the attainment of puberty until they undergo tonsure. They cannot till then adopt." (*g*)

"A widow who has attained puberty cannot perform any religious act and therefore cannot adopt until she has undergone tonsure." (*h*)

(*a*) *See* B. 3 17, p. 977, as to misconduct

(*b*) See *Moniram Kolita* v *Kerry Kolitany*, L R. 7 I A. at p 125

(*c*) *Sayamalal Dutt* v *Saudamini Dasi*, 5 B. L R 362.

(*d*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd Edn)

(*e*) Steele, L. C. 48.

(*f*) *Ib.* 187.

(*g*) MS. 1672 A widow must have attained maturity and have undergone tonsure to give her the qualification. *See* above, B. 3 26. The Śâstris have however in some instances allowed immature widows to adopt. See *ibid*, above, p. 997.

(*h*) MS. 1615.

B. 3. 29.—ADOPTION BY A WIDOW—CAPACITY ANNULLED BY HER REMARRIAGE.

Re-marriage is not recognized amongst the higher castes. (*a*) Any association called by such a name is a cause of impurity disabling the subject of it from performing religious acts. But even amongst Śûdras re-marriage entirely severs the previous family connexion and prevents adoption by the widow who has formed a new alliance.

"A Śûdra's widow having married another person cannot adopt a son to the deceased husband." (*b*)

B. 3. 31.—ADOPTION BY A WIDOW—CONSENT REQUIRED.

The widow's right to adopt under an express authority from her husband is unqualified by any absolute necessity for the consent of relatives. (*c*) In the absence of such authority she may, as a junior widow, require the consent of her co-widow, and as a member of her husband's family the consent of his near relatives, provided it be not improperly withheld. (*d*)

B. 3. 32.—CONSENT OF CO-WIDOW.

Where there are two widows they ought regularly to concur in an adoption. In case of disagreement the right belongs, as we have seen, to the elder. (*e*) "But a second widow may adopt with the consent of the elder." (*f*)

(*a*) *See* Act XV. of 1856, already several times referred to.

(*b*) MS. 1749.

(*c*) *See* above B. 3. 1 and B. 3. 2.

(*d*) See *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu*, I. L. R. 6 Bom. 505.

(*e*) Sec. III B. 3. 17.

(*f*) MS. 1658. The assent was in one case pronounced unnecessary MS. 1663. *See* 2 Str. H. L. 94.

B. 3. 33.—CONSENT OF MOTHER-IN-LAW.

The consent of a mother-in-law to an adoption by her adoptive son's widow seems to have been thought necessary, but was inferred from the absence of a prohibition in *Thukoo Baee Bhide* v. *Rumâ Baee Bhide.* (a) The necessity for this consent could not, probably, be maintained on the authorities.

B. 3. 34.—ADOPTION BY A WIDOW—CONSENT REQUIRED OF HUSBAND'S KINSMEN OR SAPIṆḌAS.

This subject has been much discussed in the judgments in recent years. The law varies in Bengal, Madras and Bombay. It differs according as the deceased husband was undivided or separated from his brethren. In the former case the dependence of the widow and the necessity for the sanction of the kinsmen is recognized by all the systems; in the latter case the Bengal law is still strict in requiring the husband's sanction, (b) the Madras law requires some sanction of the relatives, the Bombay law practically dispenses with it. (c)

"A woman cannot adopt without the consent of her husband. If the husband be dead he should have expressed his intentions which the widow may carry out. Failing this she must obtain his father's permission. Failing him she must obtain the assent of the relatives (or caste fellows). Without this the adoption is invalid. A deed transferring her property inherited from the husband to the adopted son is

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(a) 2 Borr. R. 488, 495. Perhaps the śâstris were influenced by the prevailing idea in Gujarâth of the mother's superiority to the wife. A similar opinion will be found below.

(b) *Raja Himun Chull Sing* v. *Koomer Gunsheam Sing*, 2 Kn. P. C. C. 203, 222. The case was one from Etawah in the N. W. Provinces.

(c) Jud. Cit. at p. 221. *Râmji* v. *Ghamâu*, I. L. R. 6 Bom. at p. 502.

invalid unless countersigned by the relatives." (*a*) "A widow must have her husband's permission; or that of her father-in-law; or of his widow her mother-in-law." (*b*) The Vyavahâra Mayûkha dispenses with the assent of the deceased husband of a widow on the ground that the text limiting a woman's power rests on her essential dependence during coverture, and expressly mentions only the assent of a husband to the act of the wife as necessary. (*c*) From the same text the Dattaka Mîmâṃsâ deduces that the husband's express authority is indispensable. The middle doctrine of the assent of the kinsmen being necessary and sufficient is favoured by the Mayûkha, (*d*) and this may be considered to have prevailed over both the extremes, (*e*) at least in the case of a united family. A Hindû widow, who has not the family estate vested in her, and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners. (*f*)

As to what assent is sufficient, in default of authority from the husband, in case of adoptions in divided and undivided

(*a*) MS. 1652 The law here enunciated does not give the widow unbounded discretion. It rather resembles the law prevailing in Madras. See *Appa Aiyangar* v. *Alemalu Ammâl*, M S. D A. R. for 1858, p. 5, Smr. Chand. Chap. I. paras 31, 32; 2 Str. H L 92.

(*b*) MS 1672. "Among the Brahmins &c....... the widow may adopt if ordered to do so by her husband before his death," even where on his decease his share is absorbed in the shares of his brothers. Steele, L. C. 176.

(*c*) Vyav. May Chap. IV. Sec. V. paras 16-18.

(*d*) *Loc. cit.* para 17

(*e*) *See* above, B. 3. 13

(*f*) *Ramji* v. *Ghamâu*, I L. R. 6 Bom. 498; *Dinkar Sitâram Prabhu et al* v. *Ganesh Shivram Prabhu*, I. L. R. 6 Bom. p. 505. Above, p. 997 note (*a*).

families, reference may be made to the cases below. (*a*) In the first of these it was ruled that what constitutes the consent of kinsmen must depend on circumstances. In a united family a widow adopting without her husband's authority must have the permission of her father-in-law if he is alive; if he is dead the consent of all her husband's surviving brothers. (*b*) Where however the widow succeeds to her husband as owner of a separated estate the consent of her husband's nearest kinsmen is sufficient.

In the second case the High Court of Madras held that the assent of a single sapiṇḍa replaced what under the older

(*a*) *Collector of Madura* v. *Muttu Ramalinga Sathupatty*, 1 Beng. L. R. 1 P C.; S. C. 12 M. I. A. 397; S. C. 2 Mad. H. C R. 206; *Sri Varada Pratapa Sri Raghunadha* v. *Sri Brozo Kishoro Patta Deo*, 25 C. W. R. 291 C. R; 7 Mad. H. C. R. 301; L. R. 3 I. A. 154; I. L. R. 1 Mad. 69; *Sooburnomonee Debia* v. *Petumber Dobey*, 1 Marshall 221; *R. V. Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*, L. R. 4 I A. 1; S. C. I L. R 1 Mad 174. In this case it was said that limitation as against one disputing an adoption is to be computed from the time when he became aware of the adoption.

(*b*) "The authority of a father-in-law would probably be sufficient to a widow. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family All that can be said is that there should be such evidence of the assent of kinsmen as is sufficient to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive." Privy Council in the *Ramnad* case (12 M. I. A. 442), on which Sir J. Colville observes (I. L R. 1 Mad. 190):—

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapiṇḍas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapiṇḍa, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

law would have been a procreation by him, (*a*) but from this the Judicial Committee dissent. The law of Madras, their Lordships say (*b*): " in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay," and by that law "a widow not having her husband's permission may adopt a son to him if duly authorized by his kindred." "The requisite authority," they thought, "is in the case of an undivided family to be sought within that family." (*c*) In the particular case the property was an impartible zamindary, and Holloway, J., having held that in such a case, though the family was undivided, the principles applicable to a divided family and a separated estate ought to govern succession and adoption, the Judicial Committee take occasion to intimate their doubt whether such a doctrine is tenable.(*d*) It is obviously inconsistent with the principle that " the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it."

The wider law of Bombay referred to by the Judicial Committee is that allowing a widow of a Hindû separated from his family to adopt without the sanction of any one in any case in which the husband has not intimated a wish to the contrary. (*e*)

(*a*) 7 Mad. H. C. R. at p. 305.

(*b*) L. R 3 I A. at p. 191

(*c*) In earlier Madras cases it had been ruled that the relations whom a widow is to consult for adoption may be her father-in-law or other elders of the family (*Ramasashien* v *Akyalandumal*, M. S. D. A. R. 1849, p. 115), or her husband's nephew (*Appaniengar* v. *Alemalu Ammál*, M. S. D. A. R 1858, p. 5). The consent of his nephew as nearest male representative was held sufficient in *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270.

(*d*) *See* L. R. 3 I. A. at pp. 191, 192.

(*e*) *Ramji* v. *Ghamáu*, I. L. R. 6 Bom. at p. 503. *See* above, pp. 864, 881.

In *Raja V. V. Krishnarao's* case, (*a*) reference is made to the *Râmnâd* case (*b*) to show that where the deceased had been separate in estate such "assent of kinsmen suffices [as will] show that the act is done by the widow in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." As to this "their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow." Where, as in Bombay, the widow's authority in a divided family is greater, it would obviously be still more dangerous to scrutinize her motives too closely in the light cast on them by the suggestions of interested relatives. The difficulty is removed by dispensing with their sanction. The opinions of the Sastris on this subject have varied somewhat according to the authorities on which they have relied, but the doctrine of the Saṃskára Kaustubha has generally prevailed. (*c*)

The assent of separated kinsmen will by no means replace that of the deceased husband's undivided brother. (*d*) Where the husband of a Hindû widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of her husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred. (*e*)

In one Bombay case it was held that the consent of a single sapiṇḍa in a family apparently undivided was suffi-

(*a*) L. R. 4 I. A. 1; S C I. L. R. 1 Mad. 174.

(*b*) 12 M I. A 397

(*c*) *See* above, pp. 864, 881.

(*d*) *Sri V P. Raghunadha* v. *Sri Brozo Kishore*, L. R. 3 I. A. at p. 189.

(*e*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji* v. *Ghamáu*, I. L. R. 6 Bom. p. 498.

cient to validate an adoption by a widow, (*a*) but this cannot now be considered as the received law. (*b*) Where assent is needed it is the assent of the father or of all the male members of the undivided family. Still, however, the right to give or refuse assent cannot be regarded as absolute. "The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption." (*c*) A widow refused permission without reasonable grounds might on Hindû principles properly apply to a Civil Court for a declaration of her right to adopt even against the will of one or more of the sapiṇḍas of the husband. (*d*)

B 3 35—ADOPTION BY A WIDOW—WITH CONSENT OF THE CASTE

A woman may adopt for her deceased husband if she has permission of the caste(*e*) according to some interpretations.

In *Sree Brijbhookunji's* case, (*f*) the Sâstris are made to say that a widow not having a written permission from her

(*a*) *Gopal Shridhar* v. *Naro Vinayak*, 7 Bom. H. C. R App. xxiv., approved in *Rakhmabai's* case, 5 Bom. H C. R at p. 190.

(*b*) See *Ramji* v. *Ghamáu*, I. L. R 6 Bom at p 503.

(*c*) *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12 M. I. A. at p. 442. This agrees with the Nirnaya Sindhu and the Vyav. Mayûkha.

(*d*) *See* above, Sub-sec. B. 3. 26, p. 997, note (*a*).

(*e*) *Narayan* v. *Nana*, 7 Bom H. C. R. 153 A. C. J.; Vyav. May. Chap. IV. Sec. V. 17, 18; Steele, L. C. 48, 188; *Sree Brijbhookunjee Maharaj* v. *Sree Gakoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.); *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd Edn.) *See* above, p. 971.

(*f*) 1 Borr. R. at p. 214.

husband may adopt with the sanction of the caste and the cognizance of the Government. The jñâti are more properly the kinsmen, the gentile relatives, and so Colebrooke translates the word, (a) but the Sâstris insist on the approval of the caste unless indeed members of it be not within reach for consultation. (b) They therefore must have taken jñâti in the sense of caste fellows.

Many castes at Poona said a widow could adopt with the consent of the caste. (c) They probably took the ambiguous "jñâti" in a sense supporting this rule.

B. 3. 36.—ADOPTION BY A WIDOW—CONSENT OF PERSONS WHOSE INTERESTS ARE AFFECTED BY THE ADOPTION.

It has been shown above, B. 3. 25, that according to some decisions a vested interest cannot generally be devested by means of an adoption. According to the same decisions however the person whose estate is to be devested may assent to the adoption and thus give it validity. This doctrine agrees with that of the Hindû lawyers in so far as it gives weight to an assent which must be disinterested. It is opposed to the Hindû law if it is applied so as to make the widow's right to adopt absolutely dependent on the assent of one who is interested in refusing it. A separated relative on whom the widow is not spiritually dependent does not acquire a right to control her by taking the estate for which it is her religious duty to provide a better heir. The mother of the deceased is hardly less bound than his widow to secure his eternal peace; she can have no right to deprive him of it, merely because she may have succeeded to the estate. The doctrine as thus far developed takes no account of the joint right even in the case of collateral

(a) *See* Mit. Chap. I. Sec. XI. para. 9, note.

(b) *Brijbhookunjee's* case, 1 Borr. 216.

(c) Steele, L. C. 187.

succession according to some jurists (*a*) which the son of the man in whom the estate has vested has forthwith acquired in that estate. The sons' assent to an adoption, if the need for assent rests on proprietary right, ought to be as essential as their father's, but the law has not been pushed to this logical conclusion. Nor has the vested interest as yet been held to involve a right to defeat an express authority to adopt given by the deceased owner to his widow. Such an effect indeed would be entirely opposed to the decisions. (*b*) But as the widow's capacity rests on a presumed assent there seems to be no good reason where this principle is admitted for allowing an interested relative merely on the ground of his interest to annul the presumed authority. The necessity for sanction is really a consequence of the widow's dependence. (*c*) According to the Bombay law she cannot adopt to take away an estate from collaterals without their assent except when she herself has a right superior to theirs. In an undivided family she has to obtain their sanction ; in a divided family she herself represents the line failing other representatives, that would be represented by her adopted son. (*d*) When she ends one collateral line she cannot take away the estate from another by adoption. (*e*)

It is desirable that the actual decisions should, if possible, be brought into harmony with the principles thus deduced

(*a*) *See* above, pp. 710-712.

(*b*) *See* above, B. 3. 13, B. 3. 23, B. 3. 25; above, p. 1001.

(*c*) Above, B. 3. 23; pp. 230 ss, and 1005.

It is inconsistent with the consent of relatives, being in them a right of property that, if they refuse it, it may generally be replaced by that of representative members of the caste. Steele, S. C. 394. A question which the caste cannot settle may be referred to the ordinary Courts. *Ib.* 185, 186.

(*d*) See *Lulloobhoy* v. *Cassibai*, L. R. 7 I. A. 212.

(*e*) *See* above, Sub-secs. B. 3. 23, B. 3. 25, B. 3. 34.

from the Hindû law itself. These decisions are in themselves somewhat contradictory, and as the Courts in India have built on a few dicta of the Judicial Committee a theory which they seem too narrow to support, a return to the guidance of native authority may be the course attended with least disturbance of precedents.

In the Marâthâ country, it was maintained, by Sir R. Couch on a very complete review of the authorities that a conscientious adoption by a widow without the consent of kinsmen or co-widow may be legal. (*a*) In a later case, (*b*) this was qualified by a statement that the consent of a kinsman would be material if an interest in property is vested in him, and he would be devested of it by the adoption. (*c*) This prohibitive power was even placed in the hands of a kinsman's widow. Thus a widow of the husband's brother who died in possession, (*d*) or a widow of a son who died after his father, (*e*) are not, it is said, to be devested by an adoption which would give to the adopted son a place prior to them in the line of inheritance. The deceased husband was the last full owner in these cases. Where the deceased was a member of a joint family the

(*a*) *Rakhmabai* v *Radhabai*, 5 Bom. H. C. R 181 A C. J.

(*b*) *Rûpchand Hindumal* v. *Rakhmabai*, 8 Bom. H. C. R. 114. In this case one of two co-widows it is said must submit to an adoption by another for her husband's beatitude, while to the widow of a united brother such an adoption would work "manifest injustice." But as the adoption could be made to the prejudice of the surviving brother, why not to the prejudice of his widow, who at most continues his existence? The widow of the first deceased similarly continues his existence, and the Hindû law contemplates an adoption by the widow of each brother so as to reproduce the united family

(*c*) *Annammali* v. *Mabhu Bali Reddy*, 8 Mad. H. C R. 108; *Kally Prosono Ghose* v *Gocool Chunder*, I. L. R. 2 Cal. 295.

(*d*) *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. R. 114 A. C. J.

(*e*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A R. 1858, p. 122.

widow of a predeceased coparcener may, on the principles above stated, adopt after the death of the last deceased as she could before it, and with a similar effect. (*a*) Where he was separated no right can be acquired against his own line by adoption in another. Where on failure of his own line and of united coparceners the estate has passed to a separated branch it cannot be taken away by another by means of a subsequent adoption; but the failure of his own line is not definitive until his widow has died without adopting.

B. 3. 37.—ADOPTION BY A WIDOW—CONSENT OF GOVERNMENT.

It has been shown (A. 4. 4) that the consent or at least the acquiescence of the Government has sometimes been thought requisite to a valid adoption. The same idea has prevailed still more with respect to adoption by widows. It does not seem to be better founded in the one case than in the other. Some intimation to the Government might be desirable for publicity, and where an estate supporting a public office was to be taken there were obvious reasons why the sovereign should insist on adoptions being made only with his approval, but so far as the Hindû law is concerned such a sanction was not needed any more for the adoption than for the procreation of a son. (*b*) Each is in its place a religious duty, superior to the will of the temporal ruler. Yet according to the Śâstri—

(*a*) A partition and distribution after a coparcener's death seem to prevent a recovery by a son afterwards adopted by his widow. *See* below, Sec. VII.

(*b*) "In contemplation of law such (adopted) child is begotten by the father . . . . . . on behalf of whom he is adopted." Per Willes, J., in the *Tagore* case, L. R. Suppt. I. A., at p 67.

"The assent of relatives and of the Government is requisite to the validity of an adoption by a widow." (*a*)

"The sanction of Government is necessary to an adoption by a widow." (*b*)

Except when her husband is alive a woman may adopt (*c*) with the sanction of the ruling power. (*d*)

(*a*) MS. 1644. The assent of the Government is not now deemed necessary, *Rangoobai* v. *Bhagirthibai*, I. L R 2 Bom. 377; *Narhar Govind Kulkarni* v. *Narayan Vithal*, I L. R. 1 Bom. 607; 2 Str. H. L. 88.

(*b*) MS. 1644. But as to this *see* A. 4. 4. In the *Mankars'* case the following replies were given by the Śâstris:—

1. "That a woman, whether Brâhman or Shoodr, was permitted to adopt a son, without her husband's order, after his death."

2. "That the widow could adopt a son after her husband's death."

3. "A woman is permitted to take a son in adoption according to the Mayookha."

4. "From political motives Bajee Rao declared the adoption of a son by a widow, without the orders of her husband, to be illegal, though he permitted two or three exceptions."

5. "The widow is permitted by the Shastr to adopt any one as her son."

6. "An elderly widow is allowed, of her own accord, to do that which will insure her happiness in the next world, and as adopting a son is one means of attaining it, she may adopt a son."

(*c*) *Narayan* v. *Nana*, 7 Bom. H. C. R. 153 A. C. J ; Steele, L. C. 45, 47, 187.

(*d*) *Sree Brijbhookunjee Maharaj* v. *Gokolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.).

In this case the Śâstri said:—"A widow, notwithstanding she has no written permission from her husband, may, if she be desirous of adopting a son, do so legally by obtaining the sanction of the gentiles, and informing the ruling authorities."

"A woman . . . . in the event of her receiving no order (from her deceased husband) must send for her relations . . . and

When the Government has sanctioned and confirmed an adoption, gift, or bequest, the defectiveness thereof need not be inquired into. (*a*) Its non-interference entitles the adopted son to succeed to a vatan. (*b*)

B. 3. 38.—ADOPTION BY A WIDOW—OMISSION OR POSTPONEMENT OF ADOPTION.

Though it is a religious duty on the widow's part to give effect to any express direction left by her husband she cannot be constrained to perform it. Without good will indeed the reception could hardly be religiously perfect. The cases collected under B. 3. 15 will serve to illustrate this subdivision also along with those which follow.

The right of inheritance is not suspended by pregnancy or until adoption. (*c*)

Authority to adopt, upon death of the natural son, does not prevent the widow from succeeding to the son, the authority not being imperative. (*d*)

A widow having permission to adopt three sons in succession cannot be compelled to act on that permission before she is

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after acquainting the ruling authorities, may adopt a son according to the ceremonies laid down in the Vedas."

(*a*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2 Edn.); *Rakhmábái* v. *Rádhabai*, 5 Bom. H. C. R. at p. 187 A. C. J. The importance attached to confirmation by the sovereign where a public trust was concerned may be seen from pp. 206, 209 of the report of Borradaile.

(*b*) *Ramachandra Vasudev* v. *Nanajee Timajee*, 7 Bom. H. C. R. 26 A. C. J., in which references were made to *Bhasker Buchajee* v. *Narro Raghunath*, Select Cases p. 25; *Virbudru Hurrybudru* v. *Baee Ranee*, Morris, Pt. II. p. 1; *Trimbak Baji Joshi* v. *Narayan Vinayak Joshi*, 3 Morris's S. D. A. R. p. 19; *Vishram Baboorow* v. *Narainrow Kassee*, 4 *ibid.* 26; *Chenbasawa* v. *Pampangowda*, S. A. No. 655 of 1864; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. A. C. J. 181.

(*c*) *Dukhina Dossee* v. *Rash Beharee Mojoomdar*, 6 C. W. R. 221.

(*d*) *Dino Moyee Chowdhrain*, v. *A. D. C. Rehling*, 2 C. W. R. 25 Mis. Rulings.

allowed to take her contingent estate on the death of the adopted son. (a) A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon. (b)

B 3. 39.—ADOPTION BY A WIDOW—PRETENDED ADOPTION.

Some instances of pretended adoption have occurred and have been dealt with by the Courts on the ordinary principle of avoiding fraudulent transactions. As a pretended adoption is not an adoption, the subject does not require detailed treatment.

B. 4.—ADOPTION BY FEMALES—ANOMALOUS ADOPTIONS

As the husband and wife must be joint parents of the legitimate begotten son, and ought to join in adopting a boy to replace him, so the widow alone can in strictness be qualified to adopt after her husband's death a son who, becoming his son, becomes hers also. And so long as the widow exists it is quite opposed to principle that she should be supplanted in the performance of this duty by any one else. But in the case of boys dying as infants the right of the mother to adopt has gained recognition by a kind of necessity, and this right has in some instances been allowed an extension even to cases in which the deceased son had left a widow. Where a son has died before his father the sacra have never wholly devolved upon him, and adoption by the father may be conceived as not depriving the daughter-in-law of any distinct spiritual jointure; where she is ousted

(a) *Deeno Moyee Dossee* v. *Doorgapershad Mitter*, 3 C. W. R. 6 Mis. App. *See* above, pp. 903, 904.

(b) *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. p. 288.

by her mother-in-law, it must rather be ascribed to confusion of thought or to the predominance allowed in many ways to a mother by caste custom, some instances of which have already been noticed. (*a*)

B. 4. 1.—ANOMALOUS ADOPTIONS—ADOPTION BY MOTHER.

A widow, after succeeding to her natural born son as his heiress, may adopt a boy to her own husband, (*b*) or, it is said, to the son himself, (*c*) so as to devest her own interest.

"If a daughter-in-law has made an invalid adoption contrary to the wish of the mother-in-law the latter may adopt an eligible person." (*d*) "If she make an illegal adoption her mother-in-law may make one." (*e*)

A widow having, against the wish of her mother-in-law, who wanted a boy of her own gotra, adopted one of a different gotra, this was pronounced invalid. The mother-in-law adopted a boy of her gotra. The Śâstri pronounced this, too, illegal, as the right vested in the daughter-in-law. But of the two the preference was, he said, to be given to the adopted of the mother-in-law as being of the same gotra. (*f*)

(*a*) *See* above, pp. 99, 100, 157, 392.

(*b*) *Bykant Mony Roy* v. *Kristo Soondery Roy*, 7 C. W. R. 392.

(*c*) *R. V. Venkata Krishna Rao* v. *Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

"A widow succeeding as heir to her own son does not lose the right to exercise the power of adoption. By making an adoption she divests her own estate only." The adoption by a mother on account of her deceased son is questionable. It is impossible that the same boy should have been her son and her son's son. Her adoption should be of a son to her husband, in place of the one deceased without son or widow. *See* B. 3. 13; 2 Str. H. L. 94.

(*d*) MS. 1672. But *see* 2 Str. H. L. 91 ss.

(*e*) MS. 1632.

(*f*) MS. 1744. *See* above, p. 100 Note (*a*).

In a case at 2 Str. H. L. 93 the Śâstri said a mother directed to do so by her dying son could adopt for him. Mr. Ellis treated this as a case of delegation, and thought she might act as her son's deputy, as "the Hindû law and religion allows of vicarious substitution in almost every possible case." The mother could not act as "deputy" for a son deceased, but during his life he might perhaps commission her to act for him, in a simply ceremonial act, (*a*) though this is not certain. Colebrooke in the case in question seems to have thought that a mother might complete, on behalf of her son, an adoption begun by the latter but interrupted by his death. Sutherland thought that notwithstanding the son's request the mother could not, after his death, adopt for him. (*b*) Adoption by a mother to her own husband after her son's death is, as we have seen, under some circumstances permissible. An adoption by her to her son cannot be regarded as otherwise than grossly anomalous. It is only his wife or his widow who can adopt for a man (*c*) and at the same time for herself, the adoption taking the place of procreation, in which a son and a mother could not possibly join. (*d*)

B. 4. 2.—ANOMALOUS ADOPTIONS BY FEMALES—BY A DAUGHTER-IN-LAW.

The case discussed above under A. 2. 3 may, from one point of view, be regarded as falling under this section.

(*a*) See *Vijiarangam* v. *Lukshman*, 8 Bom. H. C. R. at p. 256 O. C. J.

(*b*) So per Westropp, C. J., in *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. at p. 265.

(*c*) *Bhagvándas* v. *Rájmal*, 10 Bom. H. C. R. 241.

(*d*) An adoption invalid on account of an intervening holder of an estate is not set up by the death of that person. See *Bykant Moonee Roy* v. *Kisto Soonder Roy*, 7 C. W R. 392, as compared with the explanation of *Bhoobun Moyee's* case, in *Pudma Coomari* v. *Court of Wards*, L. R. 8 I. A. 229.

The validity of such an adoption would hardly now be admitted. (*a*)

C. 1.—*QUASI* ADOPTIONS—BY MALES.

"Of the twelve enumerated sons two only—the lawfully begotten and the adopted—are allowed in the Kaliyuga. (*b*)

The Kritrima adoption by a male to himself alone or by a husband and wife to both conjointly, is still recognized in Maithila, (*c*) but it is of little or no importance for other districts.

The pâlak putra has no right as such. (*d*)

"A foster-son may be heir by custom." (*e*) In such a case the "adoption" must, so far as is known, be made by the foster father himself.

C. 2.—*QUASI* ADOPTIONS BY FEMALES—KṚITRIMA ADOPTIONS.

"In Maithila the widow is as of right at liberty to adopt without special authority for the purpose (a Kṛitrima son); the adopted in this case succeeding to her exclusive property only, not to that of her deceased husband to whom he is not considered in any way related." (*f*) He acquires no relationship save to the adopting mother. (*g*)

(*a*) In *Dinkar Sitaram* v. *Ganesh Shivram Prabhu*, I. L R. 6 Bom. 505, the authorization of a father-in-law seems to have been thought of some importance. But no part of the ultimate decision rests on this point. At p 508 line 5, a seeming error is caused by the omission of the word "of" before "Krishna."

(*b*) MS. 1633.

(*c*) *See* below, Sec. VII.

(*d*) Steele, L. C. 184. As to the pâlak putra *see* above, p. 925.

(*e*) MS. 1707. As to the fosterage or *quasi* adoption prevalent amongst the lower castes *see* above, p. 924.

(*f*) 2 Str. H. L. 204, quoting Sutherland's Synopsis.

(*g*) *Boolee Singh* v. *Musst. Busunt Koveree*, 8 C. W. R. 155. With the Kṛitrima adoption may be compared that allowed in the later ages of the Roman law. *See* above, pp. 905, 936.

SECTION IV.

FITNESS FOR ADOPTION.

When a substitutionary son is needed the man seeking him is not at liberty to adopt any child indiscriminately. There are conditions as to sex, (*a*) caste, family and personal qualities, which must be satisfied in order to constitute a fit subject for adoption. Some of these afford no more than a ground of preference, but others are indispensable. They go to the root of the capacity to render the desired benefits, or rest on the duties due to the family of birth, which must not be thrown off even in the lower castes. The statement that "an adoption once made cannot be set aside" (*b*) cannot be sustained in the sense that a mere performance of the ceremonies gives validity to an adoption of a disqualified person, (*c*) or one given by a person not competent to make the gift. Sir M. Westropp denied that the *factum valet* principle could be applied to such a case (*d*) where a widow without express authority had given an only son in adoption.

1.—FITNESS FOR ADOPTION AS AFFECTED BY CASTE.

The rule which requires that a boy who is to be adopted shall be of equal class with the adoptive father, has already been considered. (*e*) It is implied in several of the texts

(*a*) The ancient institution of the putrika-putra makes the mention of "sex" not superfluous. *See* Vyav. May. Chap. IV. Sec. V. para. 6.

"The substituting of a daughter for a son is also prohibited, being included amongst those rejected in the Kaliyuga." 2 Str. H. L. 152.

(*b*) *Raje Vyankatrao* v. *Jayavantrao*, 4 Bom. H. C. R. at p. 195.

(*c*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 389, and the cases there quoted.

(*d*) *Ib.* p. 397. So Colebrooke at 2 Str. H. L. 178.

(*e*) Above, p. 928. *See* Vyav. May. Chap. IV. Sec. V. para. 4.

quoted below. The instances of a breach or attempted breach of this rule are, as might be expected, very few. In two cases the following answers were given :—

"No adoption is permitted from a different caste." (*a*)

An adoption was pronounced illegal on the grounds that the adopted was of a different caste from the adopting widow, and was an only son. (*b*)

2 1—CONNEXION IN FAMILY GENERALLY.

By the birth of a son to one of several brothers, says the Smṛiti, (*c*) all become fathers of male offspring. The probable origin of this notion has already been discussed. (*d*) In the more recent developments of the law we have seen that a brother might properly be called in to supply a brother's failure to procure offspring. (*e*) In this state of the scripture and of custom it was natural that as adoption gradually supplanted the other methods of recruiting a family the brother's son should seem the fittest for adoption. In his case there was a kind of sonship already, so much so that some writers contended against the necessity of any adoption at all when there was a brother's son. (*f*) There could be no question in his case as to an effective change of gotra seeing that no change was needed. He would of necessity

(*a*) MS 1637. An adoption is annulled if it be discovered that the boy adopted was of a lower caste than the adoptive father, Steele, L. C. 185 This means that the adoption is declared to have been null from the first. *See* Datt. Mîm II. 25, 27.

(*b*) MS. 1750. It may seem strange that such a question should have arisen, but the Vîramitrodaya, Tr. p 117, admits a Śûdra son by adoption to one of higher caste. *See* above, p. 928.

(*c*) Manu IX. 182; Mit. Chap. I. Sec. XI. para. 36 ; Vyav. May. Chap. IV. Sec. V. para. 19.

(*d*) Above, p. 419.

(*e*) Above, pp. 879, 880.

(*f*) *See* Datt. Mîm. Sec. II. 73

sacrifice to the same remote ancestors with the same formulas as would a begotten son of the adoptive father. Besides these considerations the preference of a brother's son found a natural basis in family affection, (*a*) and when the brethren were united, as in early times they usually were, the interest of all, and of the children of those who had sons, were better preserved by adopting a son from amongst the necessary participators of the estate than by introducing a stranger who would take a part from all the other members of the family. (*b*) Amongst remoter relatives these reasons could not operate with the same force. But it was inevitable that next to a brother's son, a cousin, or a cousin's son should be sought as the fittest for adoption, and that the order in point of proximity should become that of practical preference in selection. (*c*) A man, Vasishṭha says, is to adopt the son of the nearest relative who can and will give one; (*d*) but of two persons equally nearly related, either is eligible. (*e*) Genealogies carefully preserved indicated

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(*a*) The Datt Mîm. Sec. II, 29, says a half-brother's son is not to be taken while a whole brother's son is available. There is almost a repulsion between sons of rival wives. But *see* below, p. 1024.

(*b*) The nearness which is generally understood as nearness of family connexion is by some construed as nearness in locality of residence. *See* Vîram. Tr. p. 117. This view seems to be favoured by the Mit., *see* Chap. I. Sec. XI. paras, 13, 14, and Notes. The Vyav. Mayûkha says the nearest by blood is to be taken, *see* Chap. IV. Sec. V. para. 19, and Datt. Mim. II. 16; V. 36, 38.

(*c*) *See* above, p. 913, as to the superior claims of the nearer relatives.

(*d*) Vasishṭha, Chap. XV. 6.

(*e*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*. 1 Borr. 181, 202 (2nd Edn.).

The Paṇḍits said, "it is written in the Mayûkh that it is necessary that the person to be adopted be of a virtuous disposition, learned, beloved by him who adopts him, and also be the nearest of kin to him, adding verbally, that if there were two persons equally near, Mahârânee would be at liberty to adopt either." *See* Datt. Chand. I. 10; Vyav. May. Chap. IV. Sec. IV. para 19.

at once whence wives might not, and sons, if need were, might be had; the gotra invocations were the same; and the higher deities were worshipped under the same names and conceptions. It is not surprising that the limitation of choice which was thus induced in practice should have come to be regarded by many as necessitated by the law; (a) but the sources do not afford any authority for such a restriction. What they exact is nearness and likeness, so far as these can be secured, identity of caste, according to the best interpretations, and also, but not indispensably, of family or gotra Amongst the Śûdras the distinctions of gotra in the Brâhminical sense cannot exist. (b) Their quasi-gotras mark the more distant family connexions, but there is no objection to a Śûdra adopting from a gotra different from his own. (c)

The question being as to the existence of a legal objection to the adoption of a son from a remote branch the Śâstri answered only: "The Śâstra is in favour of the adoption of a boy belonging to the near branch." (d) Colebrooke says that only a preference is to be given to a brother's son, not so exclusive a preference as to shut out the exercise of discretion. (e) The prohibition against an adoption of an asagotra is of a moral rather than legal character, (f) and in one case a Śâstri expressed the opinion that "if a Brâhman cannot find a person fit for adoption in his own gotra he may adopt from another gotra a man of 30 having children." (g)

(a) *See* Mit. Chap. I. Sec. XI. paras. 13, 36, Note; Vyav. May. Chap. IV. Sec. V. para. 19; Datt. Mîm. Sec. II. paras. 2, 13.

(b) *See* Datt. Mîm. II. 5 ss. 80.

(c) *Rangamma* v. *Atchamma,* 4 M. I. A. 1.

(d) MS. 1640. See Datt. Mîm. II. 18.

(e) 2 Str. H. L. 103.

(f) *Durma Samoodhany Ummal* v. *Comara Venkatachella Redayar,* M. S. A. R. 1852, p. 111; 1 Str. H. L. 85; 2 *ib.* 98, 103, 106.

(g) MS. 1639.

In another case amongst Brâhmans, a question having been put as to the adoption by a widow of a boy whose upanayana (*a*) had been performed, the answer was merely that if a boy of her own gotra could not be obtained she might take one of another gotra. (*b*)

The general rule of propinquity giving a preference for adoption is illustrated by the following cases. A few of them admit the adoption of a younger by an elder brother. Bâlchandra Śâstri gathered a support for this adoption by inference from the elder brother's being "in place of a father," (*c*) but the Smṛiti had in view merely the nurture and protection of the family by its head. The castes do not seem to have admitted this adoption, and it is opposed to the principle of imitating nature. (*d*) It can hardly be regarded, therefore, as allowed by the law.

In *Brijbhukhan's* case (*e*) the Śâstris say that the person to be adopted must be the nearest of kin who can be obtained. But then they add that what has been done conformably to the Vedas cannot be undone, and that a son taken, not from amongst the gentiles, even by a widow, is not a mere dharm-putra but a datta-putra with the full rights of that relation. (*f*) It follows that the preference of the nearest is not a matter of legal obligation.

A widow, on the death of her son, adopted a remoter kinsman than one who was available, and on his behalf applied for a certificate of guardianship, which was refused, as the adoption was prejudicial to rights of nearer heirs, and their consent was not shown to have been obtained to rebut the

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(*a*) Thread ceremony.

(*b*) MS. 1617.

(*c*) Steele, L. C. 44.

(*d*) *See* Datt. Mîm. Sec. III. 30.

(*e*) 1 Borr. R. at p. 214.

(*f*) 1 Borr. 218.

presumption of caprice arising from the facts. She was referred to a regular suit to establish a valid adoption, and directed to renew the application for guardianship under Act XX. of 1864. (*a*)

In the following case the Śâstri in approving the adoption to a man of his brother by birth put the permission on the ground of a total severance of natural ties by the adoption of the deceased into another family. (*b*) "Adoption," he said, "severs the connection with the natural relatives so completely that the adopted son's widow may adopt his younger brother. (*c*) But consanguinity, according to the general opinion, is not to be over-looked in adoption any more than in marriage.

Though the adopting brother has been adopted into another family, several decisions have settled that he cannot adopt his natural brother, on the ground that consanguinity does not cease with adoption. (*d*) Thus it has been ruled that a brother cannot adopt his brother in Maithila, (*e*) or in the Andra country, Madras. (*f*)

A Maratha, a widow, having adopted her husband's illegitimate son, his right to inherit was put on his position as a bastard son of a Śûdra. (*g*)

(*a*) *Bhagubai* v. *Kalo Venkaji*, Bom. H. C. P. J. 1875, p. 45.

(*b*) Above, p. 934.

(*c*) MS. 1625.

(*d*) *Moottia Mudalli* v. *Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. *See* below, Sec. VII.

(*e*) *B. Runjeet Singh* v. *Obhye Narain Singh*, 2 C. S. D. A. R. 245.

(*f*) *Ramanamall* v. *Suban Annavi*, 2 Mad. H. C. R. 399; *Muttusawmy Naidu* v. *Lutchmeedevumma*, M. S. D. A. Dec. 1852, p. 96; *Moottia Mudalli* v. *Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. Not even his half-brother, *see* below, Sub-Sec. 2. 4.

(*g*) MS. 1691.

2. 2.—RELATION BETWEEN THE BOY TO BE ADOPTED AND THE ADOPTIVE FATHER THROUGH THE NATURAL FATHER.

This connexion affords, as we have seen, the strongest ground of preference, but it does not, according to the decisions, give to the nearer relatives a legal right to impose a son on a person about to adopt. This would indeed be inconsistent with the affectionate relations which it is an object of the law to foster between those connected by adoption. (*a*) The limitation of choice has been thought somewhat stricter in the case of a widow, and there are some obvious reasons why this should be so, but in a united family her necessary dependence secures the desired end, and it cannot be said that apart from this she is confined to the family or gotra of her husband by any strictly legal restraint. (*b*)

A near relative of the same gotra, a nephew if possible, (*c*) is the first choice. Failing such, a distant gotraja. Failing him, a bhinna gotra-sapiṇḍa. (*d*) Failing him a non-sapiṇḍa of not more than five years, and whose tonsure (chaula, chûḍâ) has not been performed. If such an one cannot be obtained then one of greater age may be taken. (*e*) Steele gives the order of choice in adoption according to the customary law of the Dekhan as follows (*f*):—Any brother's son should be the first selected for adoption; should there be none, or should the boy's parents, &c., refuse consent, his place is to be supplied by—(2nd), Any boy of the same

(*a*) *See* the texts quoted below.

(*b*) *Srimati Uma Deyi* v. *Gokoolanand Das Mahpatra*, L. R. 5 I. A. 40.

(*c*) Datt. Mîm. II. 67, 73.

(*d*) As to these terms *see* above, pp. 114, 133.

(*e*) MS. 1672. In the Punjab amongst many tribes there is no limit, but the adoption must preferably be from amongst near kinsmen and must be from the gotra or tribe. Punjab Customary Law II. 155.

(*f*) Steele, L. C. 44.

gotra, and descended from a common ancestor within three generations (sanghit, sagotra, sapiṇḍa); (3rd) Any boy connected with the family by the female line of connexions, for whom funeral cakes are offered (usagotra sapiṇḍa), such are the mother's brother's son, or the father's sister's son; (4th) Any boy of the same gotra, descended from a common ancestor within seven generations, within which degree marriage is prohibited (wirudh sumbhand)—these relations are called the sagotra dushantil; (5th) Any boy of the same gotra, the genealogy of whose relationship is otherwise unknown (sagotramâtra); (6th) A boy of a different gotra, but of the same caste (pargotra)—such are the sister's son and daughter's son, who are adoptible in default of the preceding. A paternal uncle cannot be adopted, being in place of his father. Nor a maternal uncle, for "an elder relation" (without regard to the relative age of the parties) "cannot be adopted."

The castes at Poona answered more simply:—(a)

The following relations are to be selected in order:— 1, brother's son; 2, paternal first cousin; 3 paternal second cousin; 4, one of the same gotra; 5, one of the same caste, P. Should the party first in order be refused by his immediate family, the caste may advise, and if they fail to persuade the party, another boy is, with their concurrence, to be adopted.

From Khandesh a still simpler answer was received:—(b) "The son of the nearest relation is to be adopted; but should his father not consent, a stranger may be adopted with the consent of several respectable persons."

"The son of a half brother may be adopted in preference to the son of a full brother."(c)

(a) Steele, L. C. 182.

(b) Steele, L. C. 182.

(c) MS. 1627. This is opposed to the Datt. Mîm. Sec. II. 29.

The existence of a brother's son does not deprive the uncle of power to adopt another boy, the selection being a matter of conscience and not of absolute prescription. (*a*)

"A man may adopt the son of a distant, instead of the son of a near, kinsman." (*b*)

"The widow. . . . . is enjoined to give preference to the nearest relation who is eligible. But the validity of an adoption actually made does not rest on the rigid observance of that rule of selection: the choice of him to be adopted being a matter of discretion." (*c*) The Śâstris have expressed the rule more strictly. A husband's brother's son, they said, can be adopted by a widow, even without the injunction of the husband. (*d*) When such nephew exists, she cannot adopt another without her husband's injunction. (*e*)

(*a*) *Gokoolanund Doss* v. *Musst. Wooma Daee*, 15 Beng. L. R. 405; S. C. 23 C. W. R. 340; S. C. in App. to P. C. L. R. 5 I. A. 40; contra *Ooman Dutt* v. *Kunhia Singh*, 3 C. S. D. A. R. 144, on an adoption in the kṛitrima form. *See* Suth. Syn. Head II. and the comment by the Judicial Committee, L. R. 5 I. A. at p. 53; 1 Macn. H. L. 68; 1 Str. H. L. 85.

(*b*) MS. 1628.

(*c*) Coleb. in 2 Str. H. L 98. *See* above p 887, Note (*a*).

(*d*) *Huebatrav Mankar* v. *Govindrav Mankar*, 2 Borr. 75. (83 2nd Edn.) *See* Vyav. May. Chap. IV. Sec. V. paras. 17, 18, 19; Datt Mîm. Chap. II. 29, 73; Datt Chand. Chap. I. 20, 27, 28; Manu. XI. 182; Mit. Chap. I. Sec. XI. paras. 36 ss.

(*e*) . . . . . . "They (the Śhâstrees) said, a widow can, by her husband's injunction, adopt a son, but not without it, but the prohibition is meant against her taking any other person when the son of her husband's brother exists, whom she may adopt even without such injunction; for from the words (of Manu, Chap 9th, v. 182, quoted by the Zillah Śhâstrees) found in the Mitâksharâ, book second, leaf 55th, page 1st, line 3rd, it appears, that even without the injunction of her husband, a widow may adopt the son, either of her husband's eldest, or youngest, brother." 2 Borr. 99.

Even amongst the lower castes a Śâstri said—

"The deceased husband's brother's son should be adopted by a Śûdra widow. Failing him she may take any one of the caste junior to the adopter." (*a*)

"Though the deceased husband desired that the son of his brother should be adopted, and the brother is willing to give his son—which the Vyavahâra Mayûkha allows, though sinful, (*b*)—yet the widow is not under such circumstances obliged to take such a son. In taking the son of some other relative however she must have the assent of the relatives." (*c*)

In one case the Śâstri said that a widow cannot adopt her deceased husband's first cousin. (*d*) But this was founded on his notion that the adoption of a brother's son was obligatory. In himself a first cousin of the deceased is a proper person to adopt in the absence of a nearer relative, *i.e.* a nephew. (*e*) In Bengal it was said that whatever the preference due to a brother's son it did not prevent a resort elsewhere if that son were refused. (*f*) The same is the law of several Poona castes. (*g*)

2. 3.—RELATION BETWEEN THE SON TO BE ADOPTED AND THE ADOPTIVE FATHER THROUGH THE SON'S NATURAL MOTHER.

Contrary to the rule by which the connexion with the adoptive through the natural father gives at least a religious claim to preference to the boy thus related, a near connexion through

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(*a*) MS. 1675.

(*b*) *i. e.* the only or eldest son. It does not condemn the gift generally. *See* Vyav. May. Chap. IV. Sec. V. 9, 19.

(*c*) MS. 1644.

(*d*) MS. 1703.

(*e*) MS. 1660.

(*f*) *Gokoolanund Doss* v. *Musst. Wooma Daee*, 15 B. L. R. 405, 416; S. C. 23 C. W. R. 340, 341; S. C. L. R. 5 I. A. 40.

(*g*) Steele, L. C. 189.

the boy's mother usually makes adoption impossible. The doctrine of the imitation of nature prevents a man's standing in the relation of adoptive father to a son whom he could not have begotten without incest according to the religious law. The prohibited degrees however, though observed with strictness by the higher castes, have been little regarded by the Śûdras. The unions of the latter have not been looked on as having any sacred character, and the means seldom exist amongst them of tracing quasi-gotra relationships to any considerable distance. The aboriginal custom of making a sister's son heir (*a*) was thus readily moulded to the needs of a system of adoption, while the daughter's son growing up in the grandfather's house naturally took the place of the appointed daughter's son and became recognized, when some inclusion within the law of adoption was felt necessary, as a fit subject for adoption. (*b*)

The opinion of the Śâstris in the case of *Haebut Rao Mankar* v. *Govindrao Bulwantrao Mankar* (*c*) declares a son of a daughter, a sister, or a mother, ineligible for adoption, except amongst Śûdras. (*d*) Three at least of the nine Paṇḍits consulted in the case (*e*) pronounce expressly against the adoption of a daughter's or a sister's son. The other six

(*a*) *See* above, pp. 289, 421, and the *Mânkars'* case, 2 Borr. at pp. 95, 96, 106, 107.

(*b*) " Adoption of a sister's son is strictly prohibited unless in the case of Śûdras." Ellis, who refers to the Datta Kaustubha,—but this allows such an adoption in case of necessity, *see* below. He says the Datta Mîmâṃsa of Sri Ram admits this in case of necessity, and that in practice it is not uncommon in all castes. 2 Str. H. L. 100, and Stokes, H. L. B. 553. "Not regarding the putrika-putra as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age." Sutherland, 2 Str. H. L. 201. *See* also Sutherland's Syn. Note I.

(*c*) 2 Borr. 106.

(*d*) Macn. Cons. H. L. 149, 154; 1 Str. H. L. 71; 2 *ib.* 77. *See* above, pp. 886, 887.

(*e*) 2 Borr. R. at p. 106.

give no opinion on this particular point. A similar opinion to that of the three is expressed by the Śâstri above, p. 434, Q. 6.

The general principle has been recognized in many decisions of the Courts that adoption is prohibited where the adopter could not marry the mother of the boy proposed for adoption in her maiden state. (*a*) It has equally been recognized that the rule is not binding on Śûdras. Thus it has been held that a Lingâyat (as being a Śûdra) may adopt a sister's or a daughter's son, but a member of a higher caste may not, in the absence of a special custom. The doctrine of *factum valet* does not validate such an adoption. (*b*)

The adoption of a brother was disallowed in Madras. (*c*)

The adoption of a sister's son is invalid, according to the decisions, as it imports incest not only among Brahmins, (*d*) but generally in the three regenerate classes, except perhaps the Vaiśyas (*e*); in the Dravida country (*f*); in the Andra country (*g*); in the North-Western Provinces. (*h*)

(*a*) *Shrinivas Timaji* v. *Chintaman Shivaji*, S. A. 587 of 1866; *Jivanee Bhayee* v. *Jivu Bhayee*, 2 M. H. C. R. 462; *Sriramulu* v. *Ramayya*, I. L. R. 3 Mad. 15.

(*b*) *Gopal N. Safray* v. *H G. Safray*, I. L. R. 3 Bom 273, 298.

(*c*) *Muthuswamy Naidu* v. *Latchmeedavamma*, M. S. D. A. R. for 1852, p. 96. *See* above, p. 968.

(*d*) Datt. Mîm. II 91-93; Datt. Chand. I. 17; 2 Str. H. L. 100; *Doe dem Kora Shunko Takoor* v. *Bebee Munnee*, East's Notes, Case 20; 2 Morl. Dig. p. 32; *Nursing Narain* v. *Bhutton Loll*, Sp No. C. W. R. 194. This case pronounces against the legality of the putrika-putra in the present day

(*e*) *Ramalinga Pillay* v. *Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C. The Vaiśyas are only partially recognized. *See* Steele, L. C. 90.

(*f*) *Gopalayyan* v. *Raghupatiayyan*, 7 M. H. C. R. 250.

(*g*) *Narasammal* v. *Balaramacharloo*, 1 M. H. C. R. 420.

(*h*) *Luchmeenath Rav* v. *Musst. Bhima Baee*, 7 N. W. P. R. 441, 443.

In the Punjab the objection to sisters' or daughters' sons arises from their taking the property into another got. The consent of the male relatives therefore is required. Punjab Customary Law, II. 156.

"If a Prabhu cannot obtain a son of his own gotra he may take from another, except the son of a sister or daughter."(*a*)

The husband's brother's grandson (grand-nephew) may be adopted, as the adoptive father could have married the nephew's wife in her maiden state. (*b*)

The adoption of a first cousin's daughter's son having been recognized for a long time, was upheld. (*c*)

An adoption by a Brâhman of his daughter's son was pronounced invalid, though it was strongly asserted in the particular case to be in accordance with the custom which prevailed among the caste. A few instances to the contrary, adduced to prove a special custom holding such adoptions valid, were set aside as insufficient by the Bombay High Court. (*d*) A special custom, favouring adoption of a sister's son in the Dravida country by Brâhmans, was similarly refused recognition by the Court. (*e*) The subordination of particular usages to the general customary law is discussed in the *Naikins'* case. (*f*)

(*a*) MS. 1613. As to the Parbhus, see Steele, L. C. 89, 94.

(*b*) *Morun Moyee Debia* v. *Bejoykisto Gossamee*, Cal. F. B. R. 121.

(*c*) *Lakshmapya* v. *Ramapa*, Bom. H. C. P. J. F. for 1873, p. 59. This case, from the Southern Maratha Country, was disposed of conformably to the laxness of the law there as to prohibited degrees already noticed.

The legality of marriage between an uncle and niece was denied in *Ramanagavda* v. *Shivaji*, Bom. H. C. P. J. 1876, p. 73 (the parties being apparently Lingayats of the Southern Maratha Country), but an application for review (*ib.* p. 154) was dismissed on the ground that the suit was barred by limitation.

(*d*) *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, I. L. R. 6 Bom. 109. This case illustrates the difficulty of establishing a particular custom of a caste or sect diverging from the general law. It will be seen below that there is considerable authority for the practice.

(*e*) *Gopalayyan* v. *Raghupatiyyan*, 7 M. H. C. R. 250.

In the Panjab, it may be noticed, adoption may be made of a relative through a female. See Tupper, Panj. Customary Law, vol. II., p. 111.

(*f*) I. L. R. 4 Bom. at p. 557 ss.

"A (Śûdra) widow may adopt her husband's sister's son," (a) as the husband himself could have done.

A sister's son is incompetent to question an invalid or illegal adoption on the part of his maternal uncle in Benares (b) and in Maithila. (c)

As to the daughter's son the Śastris have said: "A Brâhman cannot adopt his daughter's son;" (d) and "The adoption of a daughter's son is invalid. Though Paṇḍits differ, the texts do not differ." (e) Again, to a question whether a daughter's only son could be adopted by her father in pursuance of an agreement with her husband at the time of marriage, the Śâstri says only "the adoption of a daughter's son is forbidden." (f)

On the other hand the Paṇḍits of the Poona College on the authority of the Saṃskâra Kaustubha and the Nirṇaya Sindhu admitted the adoption of a daughter's or a sister's son in default of boys available within the adoptive father's own gotra. (g)

In the South Marâtha country the customary law allows the adoption of a daughter's son with the consent of the kindred of the adopter. (h)

(a) MSS. 1622, 1706. The parties, though the caste is not explicitly stated, must have been Śûdras.

(b) *Thakoorain Saluba* v. *Mohun Lall*, 11 M. I. A. 386.

(c) *Musst. Mooneea* v. *Dhurma*, 11 M. I. A. 393.

(d) MS. 1638.

(e) *Jivanee Bhayee* v. *Jivu Bhayee*, 2 M. H. C. R. 462; *Nursing Narain* v. *Bhutton Lall*, Sp. No. C. W. R. 194.

(f) MS. 1633. This question indicates a clinging to the ancient institution of the putrika-putra. *See* above, pp. 877, 886, 888.

(g) Steele, L. C. 44. *See* above, p. 887; 2 Borr. 95, 96.

(h) Steele, L. C. 183.

The fitness of a daughter's son for adoption, where it is recognized by the higher castes, may be traced either to the institution of the appointed daughter (*see* above, pp. 886, 887) or to the imitation of their low caste neighbours at the prompting of natural affection.

It is valid in Saraogi Agarvali caste, which is a sect of the Jains. (*a*)

The son of a woman adopted by her paternal uncle was pronounced entitled to the management of business as Muttadar Patel, while the widow of the deceased nephew was pronounced heir to his property. (*b*)

In *Somasekhara* v. *Subhadrâmâji* (*c*) the Court declined to express an opinion on the validity of an adoption of a son whose mother was second cousin of the adoptive father. As a marriage would have been impossible between the real mother and the adoptive father the adoption would be invalid judged by that test. Where the adoption of a sister's or a daughter's son is allowed the test seems inapplicable. In the South, whence the case came, marriage with a sister's daughter is common even amongst Brâhmans, and custom is, to say the least, lax in restricting adoptions. It would seem therefore that the adoption in question was not open to objection on the ground of prior family connexion between the parties.

In one case (*d*) the opinion seemed to be held that a man could adopt his wife's sister's son, but that this had been invalid in the particular case as tending to deprive the heirs of their right of succession. (*e*)

There is of course less objection to the adoption of a father's brother's son or a mother's brother's son than to adopting a father's sister's son or a mother's sister's son. (*f*)

(*a*) *Sheo Singh Rai* v. *Musst. Dakho*, N. W. P. H. C. R. 382.

(*b*) MS. 5. Nothing is said of the caste, or of division or non-division. Division and Śûdra caste seem to be assumed. If the widow of the nephew had adopted a contest might have arisen such as is referred to at p. 995 note (*a*).

(*c*) I. L. R. 6 Bom. 524.

(*d*) *Baee Gunga* v *Baee Sheoshunkur*, Bom. Sel. R. 73.

(*e*) This case is discussed above, p. 942.

(*f*) *Shrinivas Timaji* v. *Chintaman Shivaji*, S. A. 587 of 1866. *See* Datt. Mîm. II. 107, 108.

2. 4.—RELATION BETWEEN THE SON TO BE ADOPTED AND THE ADOPTIVE MOTHER.

The principle of an imitation of nature operates, though less conspicuously, in the case of a blood connexion between the proposed adoptive mother and son as between the adoptive father and son.

In the earlier form of the law as the relation of the adopted son to his adoptive mother was merely incidental, the doctrine of a possibility of union between her and the real father seems not to have been developed. It grew up as natural feeling gradually gave to the adoptive mother, as compared with the adoptive father, a more and more important relation to the child whom they brought up as their own. Then as the condition was accepted of a possible union of the real mother with the ideal father to produce the adopted son, a corresponding notion was suggested of a similar necessary relation between the ideal mother and the real father. (a) Thus it came to be admitted, though not at all universally, that where the real father and the adoptive mother could not, without incest, have joined in procreating the boy, he is not a fit subject for adoption. (b) Such at least is the rule followed by most of the authorities. Others are more indulgent. A deceased wife's connexion with the family whence the boy is to be taken is not recognized as an obstacle to his adoption. This may be taken as a sign of the imitative character of the doctrine. The relation of a deceased adoptive father to the real mother is an obstacle in the same cases as if he were alive, but on the other side the imitation has not proceeded beyond the relation of an adoptive mother still living.

(a) See above, p. 881. In a footnote at 1 M. H. C. R. p. 427 to *Narsarammal* v. *Balarama Charlu*, *ib.* 420, several cases are quoted to show that there must have been a possibility of legal union between the adoptive father and the real mother. One is cited from Macn. Cons. H. L. 170, to show the need of a similar relation between the adoptive mother and the real father.

(b) Datt. Mîm. Sec. II. 32, 33. The living wife must (religiously) join in an adoption. As a widow she adopts to her husband, but he surviving does not adopt to her.

The following responses of the Śâstris illustrate what has just been said:—

"A Brâhman widow cannot adopt her own brother's son." (*a*)

"The adoption by a widow of her brother's son is illegal, either before or after investiture." (*b*)

"A widow is not allowed by the Vyavahára Mayûkha and the Kaustubha to adopt her brother's son"; but the Śâstri pronounced the adoption valid on the authority of the Dvaitta Nirṇaya. (*c*)

"A wife's brother cannot be adopted, as he would become her adoptive son as well as the adoptive father's." (*d*)

The adoption by a widow [Brâhman] of her own uncle's son is not valid. (*e*)

In several instances the fitness for adoption has been pronounced on solely by reference to the connexion between the boy's real mother and his adoptive father, when the only question under the Hindû law was whether the relation between the real father and the adoptive mother prevented a valid adoption. The Dharmadvaitta Nirṇaya allows the adoption of the wife's blood relatives, but this is opposed to the general sense of the authorities (*f*) as regards the higher castes. The two following cases will serve for further illustrations.

(*a*) MS 1635.

(*b*) MS. 1615.

(*c*) MS 1761. Above, p. 862.

(*d*) MS. 1619.

It is plain that the real father and his daughter, the proposed adoptive mother, could not legally have been parents of the boy. *See* above, p. 883.

(*e*) *Dagumbaree Dabee* v. *Taramony Dabee*, 1818; Macn. Con. H. L. 171.

(*f*) *See* Datt. Mîm. Sec. II. 33, 34

In the first it was ruled that the adoption of a wife's brother is valid, (a) as the adopter could have legally married adoptee's mother in her maiden state. (b)

In the second it was laid down that—

1. The son of a wife's brother may be adopted.

2. The rule of Hindû law that a legal marriage must have been possible between the adopter and mother of the adoptee refers to relationship prior to marriage.

3. This rule has nothing to do with the case of a step-mother in her virgin state, accordingly a half-brother cannot be adopted. (c)

When the connexion between the propositus and the intended adoptive mother arises through the boy's mother, such a relation creates no obstacle to adoption. Two sisters or two female cousins could not possibly be parents of the same boy, so that the ceremonial relation does not in this case imitate anything legally impossible.

Thus a man may adopt his wife's sister's son. (d)

"A widow may adopt her sister's son if this be consistent with the custom of the caste." (e)

2. 5.—FAMILY CONNEXION WITH THE ADOPTIVE PARENTS AMONGST ŚÚDRAS.

It has been pointed out (f) that the practice of adoption amongst the lower castes is probably a mere graft of Brâhmanical usage upon a primitive stem of a very different kind.

(a) *Runganaigum* v. *Namasevoya Pillai*, M. S. D. A. Dec 1857, p. 94.

(b) *Kristniengar* v. *Venamamalai Jyengar*, M S. D A. Dec. 1856, p. 213.

(c) *Śriramulu* v. *Ramaya*, I. L. R 3 Mad. 15. The sense of this is that though the particular restriction would not operate, another one does, which prevents an allowance of adoption which would otherwise follow.

(d) 2 Str. H. L. 106.

(e) MS. 1708.

(f) Above, pp. 922 ss.

The result shows signs of this composite origin. The aboriginal tribes had a family system of their own, which in some form they must retain. The marriage of first cousins, marriage of an uncle and niece, heirship of a sister's son, reception of a daughter's husband as quasi-son when there was no real son in the way; for all those and other customs room had to be found in the Brâhmanical system before the uncivilized converts could be subdued to it. (a) Similarly in the case of adoption the practice of succession of a sister's and of a daughter's son had to be admitted; it was brought within the general system by widening the gateway of adoption in the case of Śûdras, who in their turn were so far influenced by the ideas of their more intellectual neighbours, that in most cases they gradually accepted adoption as necessary to fully constitute the heritable right. (b) Concurrently with these changes vicarious sacrifices were allowed (c) for those who, under the antique scheme of religion, were wholly excluded from spiritual benefits. (d) Adoption became ceremonial, yet not so essentially ceremonial but that a giving and taking might be effectual without symbolical acts, or sacrifices, or recitation of sacred formulas. (e) The customs springing from natural loathing of incestuous unions were referred to the principle of the family and gotra as conceived by the twice-born; and even spiritual benefits, it became dimly recognized, might be secured through the proper ministers by the low-caste son for his low-caste father. Still the marriage and the adoption of a Śûdra could never be regarded by the depositaries of the sacred traditions but with a kind of contempt. It was of little consequence in their eyes whether purity from physical or spiritual conta-

(a) *See* above, pp 886, 888.

(b) Comp p. 919

(c) Comp. Manu X. 126, 127.

(d) Above. pp. 901, 919, 929; 2 Str. H. L. 263.

(e) *See* above, pp 920 ss.

mination was preserved amongst people who had no devolution of sacra as contemplated in the Veda, (*a*) and with whom there was no association on the part of the higher classes that would not honour them. Thus the disdain inspired by caste feeling joined with the desire of gain and of importance to make the Brâhmans admit Śûdra adoption with the peculiarities that it still presents. Whether in those cases in which the Brâhmans themselves follow usages generally peculiar to the lower castes this is to be ascribed to a special development of their own original system or to the mere influence of a majority rising gradually in the social scale (*b*) is a question which cannot at present be answered very decisively. It seems likely that in some cases at least there has been a mixture of classes and of customs which descendants aiming at a higher rank have set themselves to forget as completely as possible. (*c*)

Some instances have already been given of the relaxation of the ordinary rules of adoption in favour of Śûdras as contrasted with the higher castes. Several other points are brought out by the opinions and the decisions, the chief of which are the following :—

Consanguinity does not invalidate an adoption where the parties involved do not belong to any of the three regenerate castes. (*d*)

(*a*) Datt. Mîm. II 80.

(*b*) *See* above, p 922.

(*c*) *See* above, p. 895. It is not a very unusual thing for a man of dubious caste position, who has got up in the world, to assume the sacred thread which he never wore before. A story is got up of his connexion with a regenerate caste much as a pedigree is made to order in Europe, and Brâhmans are not wanting to perform the rites of investiture. It has sometimes even been a matter of discussion in a caste whether though hitherto uninvested they might not assume the thread and claim rank at least as Vaiśyas. The expense of the ceremonies stands in the way. *See* further below, Sec. VI D. 1. 2.

(*d*) *Nunkoo Singh* v *Purm Dhun Singh*, 12 C. W. R. 356.

"A Śûdra may adopt a sister's son." (*a*)

"A Śûdra only may adopt a sister's or daughter's son." (*b*)

"A brother's or sister's son may be adopted by a sister or brother amongst Śûdras only." (*c*)

"A Lingâyat may adopt his daughter's son." (*d*)

In the Bombay presidency it might seem from the case quoted below that the adoption of a sister's son by a Vaiśya was allowed, (*e*) and the language of the judgment is so general as to extend to all classes, but the parties were in fact Lingâyats, and Lingâyats are Śûdras, (*f*) amongst whom no doubt the sister's or the daughter's son is the most proper for adoption. (*g*) The Śûdra is bound to adopt a daughter's or a sister's son according to the Mayûkha if one is available. (*h*) This obligation however cannot probably be ranked higher than the ordinary one to adopt the son of a near sapiṇḍa which has been pronounced to be merely religious or discretional. (*i*)

In a Madras case it was said in argument before the Judicial Committee that the parties were Vaiśyas. (*j*) If they were the decision is an authority for the legality of a Vaiśya's adopting a sister's son in that province, but it would be desirable to have had the caste more satisfactorily established.

(*a*) MS. 1749

(*b*) MS. 1636.

(*c*) MS. 1672.

(*d*) MS. 1611. The Śâstri quotes Vyav May. Chap. IV. Sec. V. 9, which relates to Śûdras.

(*e*) See *Ganpatrao* v. *Vithoba*, 4 Bom H. C. R. 130 A. C. J.

(*f*) *See* below, and I. L. R. 3 Bom. 273.

(*g*) Above, p. 920.

(*h*) Above, pp 919, 920; Datt. Mîm II. 74 ss.

(*i*) Above, p. 887, Note (*a*); Datt. Mîm Sec. II

(*j*) *Ramalinga* v *Sadasiva Pillai*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

It is allowed amongst Jains as a law of the caste. (a)

The adoption of a sister's son allowed in Bengal in a case noted below (b) was afterwards pronounced invalid there (c) though allowed in Maithila. (d)

A Śûdra's widow having adopted her daughter's illegitimate son, the latter was pronounced heir both as grandson and as adopted son. (e)

"A Wâni, being a Śûdra, may adopt his sister's son." (f)

"Adoption of a first cousin is forbidden among Śûdras" (there having been apparently a sister's or a daughter's son available). (g)

The adoption of a mother's sister's son is valid among Śûdras. (h)

Apart from the indulgence conceded as to the adoption of sons of female blood relatives, the rules of adoption amongst the Sûdras as to the choice of a boy do not differ essentially from those of the other castes. The necessity, whether legal or religious, of taking the nearest relative in preference to the more remote, or to a stranger, is hardly dwelt on by the Sâstris, and is treated in practice merely as a counsel of perfection, which may be followed or disregarded. Many castes, which are really sub-divisions of the Śûdra class, decline to recognize this, and affect in some particulars the customs of the twice-born, as in the case of the closer relations which prevent adoption. The remoter

(a) *Hasan Ali* v. *Naga Mal*, I. L R. 1 All. 288.

(b) Macn. Consid. II. L. p. 167.

(c) *Doe dem Kora Shunker* v. *Bebee Munnee*, East's Notes, Case XX.; 2 Morl. Dig. p. 32

(d) *Chowdree Purmessur* v. *Hunooman Dutt*, 6 C. S D. A. R. 192.

(e) MS. 236.

(f) MS. 1624.

(g) MS. 1618.

(h) *Chinna Nagayya* v. *Pedda Nagayya*, I. L. R 1 Mad. 62.

relations are hardly recognized, but adoptions seem to be generally forbidden (*a*) which would involve a kind of absurdity, as *ex. gr.* the adoption of an uncle or one older than the adopter. (*b*)

"A Mhar may adopt a cousin's son in preference to a brother's son."(*c*)

A Hindû may adopt an asagotra among the Śûdras. (*d*)

"A Śûdra may adopt from an illegitimate branch of his family, though there be eligibles of a legitimate branch." (*e*)

3.—RELATION OF THE SON TO BE ADOPTED TO HIS FAMILY OF BIRTH.

The considerations which make it unlawful to give an only son in adoption have already been dwelt on. (*f*) The case of the eldest son also has been discussed. (*g*) The decisions and opinions are given below. The relation next to these in practical importance is that of the orphan. (*h*) The svayamdatta or son self-given is, as we have seen, (*i*) not recognized in the present age, and the Śâstris have disallowed the adoption of a man otherwise eligible, because his parents having died there was no one who could give him in adoption. (*j*) The giving by an eldest brother as head of the family,

(*a*) Steele, L C. 184.

(*b*) *Op. cit.* 388.

(*c*) MS. 1630.

(*d*) *Rungamah* v. *Atchummah et al,* 4 M I. A. 1; S. C. 7 C. W. R. 57, P. C.; *Lakshmappa* v. *Ramava,* Bom. H. C. P. J. 1875, p. 394; S. C.; 12 Bom. H. C. R 364. *See* above, p 920, and 2 Str. H. L. 89.

(*e*) MS. 1646.

(*f*) Above, p. 912.

(*g*) Above, p. 915.

(*h*) Above, p. 894.

(*i*) Above, p. 895.

(*j*) P. 930; *Balvantrao* v. *Bayabai,* 6 Bom. H. C. R. 83 O. C. J.; *Bashetiappa* v. *Shivalingappa,* 10 Bom. H. C. R. 268.

though there is some authority for it (*a*) amongst the castes, is not contemplated by the sacred formulas, and has been condemned by high authorities. (*b*)

The ceremonies of adoption are equally unadapted to the gift of an adopted son, and such a gift is not contemplated by the Hindû law. The adopted son must generally be an only son, but even when a son has been born there is no formula adapted to the purpose of transferring the adopted son (*c*) to another family. There is none even for restoring him to his family of birth. (*d*)

3. 1.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—AN ONLY SON.

An only son, an eldest or a youngest son, ought not to be given in adoption. (*e*) An exception is made where the adoption is made by a paternal uncle or his widow, the children of brothers being considered as one family. (*f*)

An only son desiring to be adopted it was answered that this was prohibited. (*g*) And again "adoption of an only

(*a*) *Veerapermal* v. *Narain Pillai*, 1 Str. R 91.

(*b*) *See* p. 930. Macn Cons. II. L. 207, 228; 1 Morl. Dig. p. 19.

(*c*) *See* above, p. 896.

(*d*) *See* above, p. 930, Note (*g*), and below, Sec. VII.

(*e*) Above, p. 909; and below, Sub-sec. 3. 2.

(*f*) Steele, L. C. 45; Manu IX. 182 goes equally to show the needlessness of any adoption when a brother has sons, and with this many caste customs agree, but a different application has been given to it. *See* above, pp. 897, 909, 912. "The Smṛiti writers and great commentators . . . all seem to be of one accord on the incapacity of a father to give his only son in adoption." Per Sir M. Westropp, C. J., in *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 380. For the exception made by the Datt. Mîm. *see* above, p. 913; Datt. Chand. I. 28-30.

(*g*) MS. 1614. *See* above, p. 909.

son is invalid," (a) and "the Smṛitis prohibit the adoption of an only son." (b) "A man cannot give his only son in adoption and replace him by adopting another." (c)

The adoption of an only son is invalid generally (d) in Bengal, (e) the prohibition extending to all clasess, Śûdras inclusive. (f) An only son may be given as a dvyâmushyâyana, but not on any other terms of filiation. (g)

The adoption of an only son was similarly pronounced invalid in Behar. (h)

(a) MSS. 1623, 1626. The Vivâda Chintâmani, asserting the general right of parents to sell, give, or desert a son, excepts the only son, who it says, relying on Vasishṭha, must neither be given nor taken. Transl p 74

(b) MS 1631 So the Mit. and the Datt. Mîm according to Coleb. 2 Sr. H L. 88. He excepts a brother's son taken as a dvyâmushyâyana, p. 107. *See* Datt. Mîm II. 38; IV. 1 ss.

(c) MS. 1632.

(d) *R. Shumshere Mull* v. *Ry. Dilraj Konwar*, 2 C. S. D.A. R. 169.

(e) *R. Upendra Lal Roy* v. *Sy Ry Prasannamayi*, 1 Beng. L. R. 221 A. C. J.; S C 10 C. W. R. 347; *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R P. C. 29; S. C. 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(f) *Manick Chunder Dutt* v. *Bhuggobutty Dossee*, I. L. R. 3 Calc. 443; 2 Macn H. L. 179. The adoption of an only son, it was said, is valid, but the giver and receiver incur sin (*Sy Joymony Dossee* v. *Sy. Sibosoondry Dossee*, 1 Fult. 75; *Tanjore Raja's* case, 1 Str. Rep. 126; *Vishram Babooray* v. *Narrain Raw Kasee*, 4 Morris 26), unless he be given as a dvyâmushyâyana. This however cannot be regarded as the Hindû law of Bengal or Benares., *Dabee Dial et al* v. *Hurhar Sing*, 4 C. S. D. A R. 320; see *Lakshmappa* v. *Ramava*, 12 Bom H. C R. at p. 393. *See* above, pp. 910, 911, for the cases in which the gift of an only son has been allowed.

(g) *Raja Shumshere Mul* v. *Ranee Dilraj Koer*, 2 C. S. D. A. R. 169.

(h) *Nundram* v. *Kashee Pande*, 3 C. S. D. A R. 232; 4 C. S. D. A. R. 70; 2 Macn, H. L. 179. *See* above, pp. 909—912.

In Madras however such an adoption has been held valid,(a) and also in the North-West Provinces. (b) The principle was applied in these cases of *factum valet.* (c) The Sâstris in the N. W. Provinces held a different opinion: they pronounced the adoption of an only or an eldest son invalid. (d)

When two or more sons have been reduced to one by death or gift in adoption that one ranks as an only son. (e) The only surviving son cannot be given though he be not the firstborn.

The caste laws in Bombay are almost without exception opposed to the adoption of an only son. The only exceptions allowed, save in a few castes, are to provide a childless uncle with a son to inherit his self-acquired property or to succeed to his vatan. In about six castes the adoption is allowed as a means of preserving the family property, an object substantially the same as in the preceding case. In only four or five castes is the adoption of an only son allowed at the discretion of the parties; and these are castes of no importance. (f)

Among Śûdras of the Lingâyat caste, an only son cannot be given in adoption. (g) The husband's authority is not to be presumed to such a gift by a widow.

(a) *Chinna Gaundan* v. *Kumara Gaundan,* 1 Mad. H. C. R. 54.

(b) *See* above, p. 910.

(c) *Hanuman Tiwari* v. *Chirai et al,* I. L. R. 2 All. 164.

(d) Vyavasṭha, Agra 1861.

(e) 2 Macn. H. L. 178, *Lakshmappa's* case, 12 Bom. H. C. R. at p. 381.

(f) Steele, L. C. 385.

(g) *Somasekhara Rája* v. *Subha Drámaji,* I. L. R. 6 Bom. 524, referring to *Lakshmappa* v. *Ramava,* 12 Bom. H. C R. 364. At p. 909 Note (b) the case of *Bayabai* v. *Bala Venkatesh,* 7 Bom. H. C. R. App. i. has been mentioned by mistake for *Mhalsabai* v. *Vithoba, Ib.* xxvi. as overruled by *Somasekhara's* case, I. L. R. 6 Bom. 524.

There have been a few cases in which the adoption of an only son has been recognized even in Bombay. (*a*) But these must now, it seems, be regarded as overruled, and the adoption as impossible save by an uncle, except by special caste custom. (*b*) A Sâstri said—

"Caste custom will authorize the giving of an only son in adoption." (*c*) And another answered—

"An only son cannot be given in adoption; but there is no express provision for setting aside an adoption made with the due ceremonies." (*d*) "The Vyavahâra Mayûkha and Vîramitrodaya," the Sâstri says on another occasion, "forbid the adoption of an only son, but Nagoji Bhaṭ's treatise allows it in case of necessity." (*e*)

The doctrine of *factum valet* has, in some few instances, been supposed to give efficacy even in Bengal (*f*) to an adoption wholly condemned by the law of that Province. The adoption of an only son, though criminal, cannot perhaps be set aside, (*g*) it was said. But the castes in Bombay set aside invalid adoptions, and where the transaction was essentially void the mere ceremony cannot make it

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(*a*) *Abaji Dinkar* v. *Gungadhur Wasoodev*, 3 Morris S. D. A. R. 420, 423; *R. Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. 191 A. C. J.

(*b*) Above, p. 909, 911; 1 Str. H. L. 85; 2 Macn. 179, 182, 195.

(*c*) MS. 1620. *See* above, p. 909.

(*d*) MS. 1695. As to this *see* above, pp. 911, 912, and the observations of Sir M. Westropp, C. J., in *Lakshmappa's* case, 12 Bom. H. C. R. at p. 397.

(*e*) MS. 1633. *See* above, p. 912.

(*f*) Coleb. Dig. Bk. V. T. 273 Com. sub. init.; above, pp. 909, 912.

(*g*) *Nundram et al* v. *Kashee Pande et al*, 3 C. S. D. A. R. 232; S. C. 4 C. S. D. A. R. 70; 1 Str. H. L. 87. The effect of the case is given as stated in *Chinna* v. *Kumara Gaundan*, 1 M. H. C. R. at p. 57, but the point was not really decided so as to support the decision in Fulton's Reports, I. 75.

effectual. (*a*) Sir M. Westropp, C.J., pointed out in *Lakshmappâ's* case that there was no necessity to set aside that which was in itself essentially invalid. (*b*) If an only son cannot be given the affected gift of him is a mere pretence.

The gift of an only son, even to a brother of his father, (*c*) has been condemned by some of the Sâstris, as in the following answers, but the taking in this way of a dvyâmushyâyana does not seem to be really objectionable. (*d*)

"An only son cannot," it was said, "be given in adoption to a brother." (*e*) "Both the giving and taking of an only son of a brother are prohibited by the Sâstras. The giving of an eldest is prohibited, but not the taking."(*f*)

In Madras it was at one time held that it was not lawful for a brother to adopt the only son of a brother in preference to his uncle's son; but in the sense that such an adoption involves both the giver and the receiver in sin, not that it is legally invalid. (*g*) In other cases it has been said that—

The adoption of an eldest or only son, though alien to the principles of Hindû law, is sustainable if made by a paternal uncle, (*h*) though not if made by another. He would generally be taken as a dvyâmushyâyana.

(*a*) *See* Steele, L. C. 184; Coleb. in 2 Str. H L. 178.

(*b*) Above, pp. 911, 912.

(*c*) Above, pp. 896, 913.

(*d*) Above, p 914, 1 Str. H. L. 86; 1 Macn. H. L. 71.

(*e*) MS. 1677.

(*f*) MS. 1684; 2 Str. H. L. 106, 107; comp. the Datt. Chand. Sec. I., paras. 27, 28.

(*g*) *Arnachellum Pillay* v. *Jyasami Pillay*, 1 M. S. D. A. R. 154.

(*h*) *Perumal Nayker* v. *Potteeammal*, M. S. D. A. Dec. 1851, p. 234; *Gocoolanund Doss* v. *Musst. Wooma Daee*, 15 Beng. L. R. 405; S. C. 23 C. W. R. 340; *Chinna Gaundan* v. *Kumara Gaundan*, 1 Mad. H. C. R. 54 (reviewing *Perumal Nayker* v. *Potteeammal*).

A dvyâmushyâyana is not recognized in the present age, (*a*) according to the late Sadr Court of Madras. The legality of the dvyâmushyâyana however has been recognized by the Judicial Committee, (*b*) and, as the cases show this form of adoption is not at all uncommon in some districts of the Bombay Presidency. The following are two instances—

"An agreement may be made at the time of adoption that the son shall represent both fathers, but without this he cannot succeed to his natural father's property." (*c*)

"If a Brâhman adopts a boy of a different gotra the presumption is that he has taken him as a dvyâmushyâyana."(*d*)

The decisions seem to show that this kind of adoption is generally legal. (*e*) Thus:—

The only son of a brother may be adopted in Maithila.(*f*)

The only son of a person may be adopted by another, on condition that he becomes a son of both of them. (*g*) It is presumed from such an adoption (*h*) that the son became a dvyâmushyâyana.

(*a*) *Annamala Auchy* v. *Mungalum*, M. S. D. A. R. 1859, p. 81.

(*b*) *See* above, p. 897, 914.

(*c*) MS. 1692.

(*d*) MS. 1675. A similar presumption arises where an only son or eldest son has been given to his uncle. *Nilmadhab Dass* v. *Biswambhar Dass*, 13 M. I. A 85, 101. *See* Datt. Mîm. Sec. IV. 32. In *Chinna Gaundan's* case, 1 M. H. C. R. at p. 55, Scotland, C. J., refers to *Sy. Joymony Dossee's* case, Fult. 75, as establishing that a condition of double sonship will be presumed after adoption in every case, but that could not be so where a dvyâmushyâyana is not admitted, *see* above p 898.

(*e*) *See* p. 1044, Note (*g*).

(*f*) 2 Macn. H L. 197. The adoption was in the Kṛitrima form. As to which *see* below, and 7 C. W. R. 700.

(*g*) *R. Shumshere Mull* v. *Ry. Dilraj Konwar*, 2 C. S. D. A. R. 169.

(*h*) *Sy. Joymony Dossee* v. *Sy. Sibosoondry Dossee*, 1 Fult. 75; *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R. P. C. 29; 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85. The presumption extended to

3. 2.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—ELDEST SON.

The grounds of distinction between the cases of the eldest son and the only son have been discussed in a preceding section. (*a*) The Mitâksharâ is distinctly opposed to the gift of an eldest equally as to that of an only son, (*b*) but the Dattaka Mîmâṃsa (*c*) and Dattaka Chandrika, (*d*) though they prohibit the gift of an only son are silent as to the eldest son. This may be taken as a tacit allowance of the adoption of such a son on the principle frequently repeated that "when there is no prohibition there is assent." (*e*)

The Vyavahâra Mayûkha (*f*) assumes that the Mitâksharâ allows the legality while it asserts the sinfulness of the gift of an only or an eldest son. It then goes on to refute the supposed permission and maintain that neither an only son nor an eldest son can be given. (*g*) Now it is true no doubt that Vijñâneśvara in his disquisition on the nature of property (*h*) dwells on its secular character and the possibility of acquiring it without reference to the ceremonial rules provided for spiritual purposes. (*i*) But he does not admit that acquisi-

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cases other than those of adoption of a brother's son tends to nullify the general rule, but an only son can properly be given only to his uncle as a dvyâmushyâyana. *See* above, pp. 896 ss.

(*a*) Above, pp. 914, 915.

(*b*) Mit. Chap. I. Sec. XI. paras. 11, 12.

(*c*) Sec. IV.

(*d*) Sec. I.

(*e*) Datt. Chand. Sec. I. para. 32; Vyav. May. Chap. IV. Sec. V. para. 18.

(*f*) Chap. IV. Sec. V. paras. 4, 5.

(*g*) Chap. IV. *loc. cit.* and para. 36.

(*h*) Mit. Chap. I. Sec I. para. 8 ss.

(*i*) Comp. the Sarasvati Vilâsa, Sec. 472. And for the special character of religious gifts, Mit. Chap. I. Sec. VIII. para. 8.

tion without regard to the means produces property. (*a*) He regards what is unfit to be given as incapable of being taken by gift (*b*) and could not apparently, (*c*) any more than Nilkaṇṭha himself, hold the adoption of an eldest son valid. (*d*) The legal possibility of this adoption must rest on the absence of any distinct condemnation of it in the older sources of the law, and on the allowance, though a grudging allowance of it by custom, (*e*) and at least by implication in some writers of high authority. For the Bombay Presidency the matter may perhaps be considered closed by the recent case of *Kâshibâi* v. *Tâtia*, (*f*) which gave effect to the adoption of an eldest son.

In *Bomlingappa's* case it was held that the adoption of an eldest son was invalid in the Southern Marâtha Country. (*g*) The Subordinate Judge, after consulting the Śâstri, had found this adoption good, as being that of a nephew,

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(*a*) *Loc. cit.* para. 11.

(*b*) *See* above, p. 909. 2 Str. H. L. 433; Colebrooke *loc. cit.* shows that the Smṛiti Chandrika and the Madhaviya agree with the Mitâksharâ in regarding a forbidden gift as invalid. Compare the passage quoted Vyav. May. Chap. IX. para. 3.

(*c*) The sin, he says, is the parents' who give without necessity; an only son or an eldest son is not to be given at all. *See* Mit. Chap. I. Sec. XI. paras. 11, 12.

(*d*) The Vîramitrodaya (Transl. pp. 115, 117) is opposed to the gift of an only and of an eldest son; but says nothing of the allowance of either by Vijñâneśvara.

(*e*) *See* Steele, L. C. 183, where the gift of the eldest is disapproved, while the gift of the only son is forbidden.

(*f*) I. L. R. 7 Bom. 225. It was ruled that the adoption of an eldest son was permissible though not approved, the authorities against such an adoption being much less numerous and emphatic than those condemning the adoption of an only son. This was followed in *Jamunabai* v. *Raychand*, *ib*. 229; *see* 2 Str. H. L 105.

(*g*) *See* 12 Bom. H. C. R. at p. 383.

and this seems to have been approved by the Sadr Court in a later case. (a)

In Bengal an adoption of the eldest of several sons is allowable. (b)

Where the adoption of an only son is allowed it follows *à fortiori* that an eldest son may be adopted, as in Madras. (c) In Bombay the opinions of the Sâstris have not been uniform. Thus it was said "an adoptive son should not be the only or the eldest son of his father." (d) "The eldest surviving son must not be given in adoption." (e) And again, "the giving of an eldest son is a sin: some hold that an only son can neither be given nor taken." (f) But on the other hand—"Though a man's eldest son be dead, the next may be given in adoption." (g) And "the eldest of several sons may be given in adoption." (h) In another case the Sâstri said "the eldest son may be given in adoption to a widow." (i)

The case of *Mhalsabai* v. *Vithoba*, (j) upholding the gift by a widow of her eldest son, was dissented from by Sir M. Westropp, C. J., in *Lakshmappa* v. *Ramava*. (k) The adoption of an eldest son is undoubtedly disapproved by

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(a) *Ib.* pp. 387, 388.

(b) *Janokee Debea* v. *Gopaul Acharjea et al*, I. L. R 2. Calc. 365.

(c) *See* above, p. 1042.

(d) MS. 1672.

(e) MS. 1647.

(f) MS. 1682.

(g) MS. 1685.

(h) MS. 1621.

(i) MS. 1612.

(j) 7 Bom. H. C. R. xxvi. App.

(k) 12 Bom. H. C. R. at p. 394.

Hindû law, (*a*) but all that it seems safe to say on the authorities is that the adoption of an eldest son is improper, not that it is invalid, (*b*) as is the adoption of an only son. (*c*)

Even by those who object to the gift of an eldest son it is admitted that if a person has by his first wife a son, and by his second wife several sons, the eldest of the latter may be given or received in adoption. (*d*) It is also recognized that the subsequent death of the elder son does not render invalid an adoption of a second son in the lifetime of the elder son. (*e*)

3. 3.—RELATION OF SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—YOUNGEST SON.

The Dakhan castes disapproved the gift of the youngest son out of three or more, (*f*) and a doubt seems sometimes

(*a*) *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R. P. C. 29 ; S. C. 3 Beng. L. R. P C. 25 ; S. C. 13 M. I. A. 85 ; *Jugbundoo Bun Sing* v. *Radasham Narendro*, C. S. D. A. R. for 1859, p. 1556. An eldest son cannot be given in adoption according to Mit. Chap. I. Sec. XI. p. 21 ; Coleb 2 Str. H. L. 105. So Ellis, *ib.*, who says some authorities make exceptions. The eldest son of a brother, however, may be adopted (1 Str. H. L. 85) as an adult.

(*b*) *Debee Dial et al* v. *Hurhor Singh*, 4 C. S. D. A. R. 320; *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. R. 91 ; Coleb. Dig. Bk. V. T. 273 Com. ; Mit Chap. I. Sec. XI. para. 12 ; 2 Str. H. L. 81, 105 ; Vyav. May. Chap. IV. Sec. V. para. 4.

(*c*) Datt. Mîm. Sec. IV. 1 ss. ; Datt. Chand. Sec. I. 29, Sec. III. 17 ; Steele, L. C. 183 ; 2 Macn. H. L. 182, 195 ; Macn. Cons. H. L. 126, 146, 147 ; 2 Str. H. L. 105.

The references show a general condemnation of the giving of an eldest son, but less decisive and unanimous than in the case of an only son.

(*d*) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. R. 91.

(*e*) *Musst. Dullabh De* v. *Manee Bibi*, 5 C. S. D A. R. 50 ; *Nilmadhab Dass* v. *Biswambhar Dass*, 12. C. W. R. P. C. 29 ; S. C. 3. Beng. L. R. P. C. 27 ; S. C. 13 M. I. A. 85.

(*f*) Steele, L. C. 183, 384.

to have been felt as to the lawfulness of such a gift. It is not however condemned by any recognized authority. A Śâstri's response on a case submitted to him was "The youngest son may properly be given in adoption to a man of a different gotra. The Sâstras forbid giving an eldest but not a youngest son." (*a*)

3. 4.—RELATION OF THE SON TO BE ADOPTED TO HIS FAMILY OF BIRTH—AMONGST ŚÛDRAS.

Although the gotra relation in its stricter sense does not subsist amongst Śûdras, yet propinquity is recognized as giving rise to certain connexions and restrictions which coincide in a measure with those that prevail amongst the higher castes. (*b*) Through the gradual attraction and reception of the Śûdras within the Brâhminical religious system (*c*) the relation of a son to his father has with many come to be regarded as involving a position and duties analogous at least to those of the Brâhman. (*d*) The father being thus concerned in the rites to be celebrated by his son (*e*) the same rules which guard against the loss of those benefits amongst the other classes ought equally or almost equally to operate amongst Śûdras. (*f*) This may be thought to have been secured for Bombay by the most recent decision on the point. "There is not in the books any ground for drawing any distinction between Śûdras and other classes on

(*a*) MS. 1677. In the *Mankars'* case, 2 Borr. R. at p. 95, the Śâstris say a father is bound to keep his eldest and youngest sons, but for the latter part of the rule no authority is cited.

(*b*) Datt. Mîm. Sec. II. 80.

(*c*) Above, p. 924.

(*d*) *See* above, pp. 921, 922.

(*e*) *See* Steele, L. C. 225. The Jains do not celebrate the kṛiya ceremonies, and amongst them adoption must be referred to a different basis. *See* Steele, L C. 416; above, pp. 922.

(*f*) *See* Steele, L. C. 413, 414.

the question of the legality of the adoption of an eldest or only son." (a) The Śâstris hold the same view. Thus one replied " an adoption of an only son (Lingâyat) must be set aside." (b)

The adoption by a Śûdra of an only son as a kartâ putra is allowed by the Hindû law (c) in Bengal. A similar view was taken in Bombay by Sir M. Sausse, C. J., (d) but it was opposed to the opinion of the Śâstri (e) and has not been followed.

(a) Per Sir M. Westropp, C J., in *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 390.

(b) MS. 1747. *See* above, pp. 886—888.

(c) *Musst. Tikdey* v. *Lalla Hureelal*, Suth. R. for 1864, p. 133. The term kartâ putra is used as a synonym for kṛitrima **putra.**

(d) *Mhalsabai* v. *Vithoba*, 7 Bom. H. C. R. xxvi. App.

(e) " In Mayûkha, a Smṛiti (recollection) of (the sage) Vasishṭha is thus (given) :—

'One, meaning perhaps an "only" son, is neither to be given nor received.' The meaning of this Smṛiti is written by the author of Mitâksharâ thus :—'The prohibition regarding one (only) son applies only to the giver. Nevertheless this meaning of the author of the Mitâksharâ is not consistent with what is the plain meaning of the Smṛiti passage. Therefore, the giving of one (only) son seems to be prohibited. Now among Śûdras, if a mother gives her son, of age, to her brother to be adopted, there is no objection So it is stated in Mayûkha May this be known to the Khudâvans (divine personages).

" AUTHORITIES.—Mayûkha p. 107, line 7 :—' One (only) son should neither be given nor received, (because) he saves persons.' (The Shâstra meaning.) : One son should not be given and received, because he saves his foreborn (*i.e.* predeceased.) [That is, by performing their funeral rites, the Shráddhs at Gaya, &c., he conveys his foreborn upwards (to heaven)].

" Mitákshará Vyavahârâdhyâya, leaf 54, side 1, line 3 :—' From the use, of poverty (it follows that) in prosperity (the son) should not be given.' This prohibition is the giver's (*i. e.* applies to him).

4.—FITNESS FOR ADOPTION AS AFFECTED BY PERSONAL QUALITIES—SEX.

There is no instance in Hindû law of an adoption of a daughter to inherit. (*a*)

In the Dattaka Mîmâṃsa a section (VII.) is devoted to the attempt to establish the adoption of daughters as an institution of the Hindû law. Great learning and ingenuity were expended on this effort, but it has failed to gain acceptance for the proposed doctrine. (*b*) The Vyavahâra Mayûkha (*c*) rejects it, and no Śâstri has maintained it except as a possible variance justified by caste custom. As when one said—"An adoption by a woman of a daughter given by her mother may be recognized if conformable to the caste rules." (*d*) The only custom allowing it is that of the dissolute women whose imitations of adoption have already been considered. (*e*)

Meaning: Because it is said that in adverse time the son should be given, in the absence of adverse time (the son) should not be given. This prohibition applies to the giver. So the prohibition that one (only) son should not be given (also) applies to the giver alone.

"Mayûkha, p. 109, line 3:—'He who is married, and even he who has a child (or children), can become an adopted son.' Meaning: He who is married, or even he who has a son, (can) become an adopted son. (From this there seems to be no objection to a grown-up son being an adopted son)

"Mayûkha, page 102, line 4:—'Let the mother or father give.' Meaning: Either the mother or father should give the son to be adopted.

"Mayûkha, page 105, line 8:—'A daughter's son and a sister's son should be given to a Śûdra only.' Meaning: A daughter's son and a sister's son should be given to a Śûdra."

(*a*) *Doe dem Hencover Bye et al* v. *Hanscover Bye et al*, East's Notes, Case 75. Daughters cannot be adopted, 2 Str H. L 217. *See* above, p. 1015, C. 2. 2, as to a quasi-adoption by a dancer.

(*b*) *See* above, pp. 873, 932.

(*c*) Chap. IV. Sec. V. para. 6.

(*d*) MS 1681.

(*e*) Above, pp. 932, 933.

In *Hencower's* case (*a*) the paṇḍit denied that the adoption of a daughter was consistent with the Hindû law. Yet in another case the adoption of a niece in order that she might become the mother of a putrikâ-putra was allowed. (*b*) The adoption, it was said, should be prior to marriage. This decision seems never to have been followed, and like Nanda Paṇḍitta's doctrine stands outside the living law. (*c*) The validity of any such adoption of a daughter must rest on a special custom.

The adoption of a sister, it was ruled, is illegal to the prejudice of legal heirs. (*d*)

A sister's daughter, or her son, cannot become a putrikâ-putra. (*e*) The institution is in fact no longer recognized, (*f*) though in the case quoted below it was only questioned by the Judicial Committee whether the old rule of Hindû law still exists, namely, whether a daughter may be specially appointed to raise a son, and the son of such daughter be preferred to more distant male relatives. If so, it was said, inasmuch as the rule breaks in upon general rules of succession whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it. (*g*)

4 1.—FITNESS FOR ADOPTION—AGE

The proper age of the son to be adopted is stated in widely different ways by different castes. (*h*) It is generally

(*a*) Above, p. 1052 (*a*)

(*b*) *Nawab Rai* v *Buggawuttee Koowur*, 6 C. S D. A. R. 5.

(*c*) 1 Macn. H L. 102.

(*d*) *Tooloovoya Shetty* v. *Coraga Shellaty*, M. S. D. A. R. 1848, p. 75. The adoption of a sister is wholly illegal; she could not have been begotten by the adoptive father without incest.

(*e*) *Nursing Narain* v. *Bhutton Lall*, Sp. No. C. W. R. 194.

(*f*) *See* above, pp. 886, 890, 894.

(*g*) *Thakoor Jibnath Singh* v. *The Court of Wards*, 23 C. W. R. 409. For the law as now received, *see* above, pp. 886, 890, 895, 932; 1 Macn. H. L. 102.

(*h*) Steele, L. C. 383. *See* above, p. 929.

agreed that the child ought to be young in order that he may become united by affection to his adoptive parents, (*a*) but this is rather a maxim of prudence than of law. Some castes fix the limit of age at five years; many at twenty-five; a few at fifty. The last indeed do not recognize a legal limit of mere age, though, with the others, they require that the adopted son should be younger than his adoptive father. (*b*)

The proper age for adoption is not uniform even for the same district in every caste. A boy may generally be adopted from the twelfth day after birth to his upanâyana, which is eight years for Brâhmans, eleven years for Kshatriyas, twelve for Vaiśyas. Śûdras may be adopted till the sixteenth year. (*c*) This is however simply the age of majority according to Hindû law. The statement must be taken as rather of what is recognized as right than of what is obligatory.

The native lawyers have written very elaborately on the subject of the boy's age as connected with his Saṃskâras. These views are considered below. (*d*) In the North-West Provinces it was ruled conformably to the Dattaka Mîmâṃsa, that adoption in the Dattaka form ought to be within six years of age of the adoptee. (*e*) In Bombay on the other hand a person of whatever age is eligible for adoption. (*f*) Even—

(*a*) *See* above, p 932.

(*b*) Steele, L. C. 182.

(*c*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. R. 101. *See* 1 Morl. Dig. p. 22, Notes 8 and 9. The authorities quoted in 2 Macn. H L. 175, 178, give five years as the age within which a boy ought to be adopted. *See* Datt. Mîm. Sec. IV. 32, 33, 43, and the Datt. Chand. Sec. II. 30, which gives eight years of age as the usual limit amongst Brâhmans.

(*d*) Sub.-sec. 4. 7.

(*e*) *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 2 Agra Rep. p. 103.

(*f*) *R. Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R 191 A. C. J.; *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom H. C R. App. xxvi.

"A man of 50 and having children, may be adopted if he has parents to give him away, but not otherwise." (*a*)

"A fatherless person of 30 years of age," it was said, "may be adopted with the consent of his mother or elder brother." (*b*)

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4. 2.—JUNIORITY OF ADOPTED SON TO ADOPTIVE FATHER.

It has been noticed that the son adopted must be junior to the adoptive father. On an extension of the same principle he should be junior to his adoptive mother, when she, as a widow, adopts him. (*c*) Thus the Śâstri says generally. "The adopted should be junior to the adopter." (*d*)

4. 3.—BIRTH DURING ADOPTIVE FATHER'S LIFE.

The imitation of nature is not carried so far as to disqualify a boy who, from the time of his birth, could not have been begotten by a deceased adoptive father. When authority to adopt is given to widow, she may adopt a boy not born at her husband's death. (*e*)

4. 4.—IDENTITY OR DIFFERENCE OF FAMILY OR GOTRA.

This subject has been considered in the preceding Section. (*f*) When members of the lower castes are concerned, the term "gotra" is used in a second intention, but though this part of the subject is rather obscure it would probably

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(*a*) MS. 1755.

(*b*) MS. 1645. The competence of the elder brother to give in adoption is denied. *See* above, p. 930, and below, Sec. V.

(*c*) Above, p. 884; Steele, L. C. 182, 184.

(*d*) MS. 1673.

(*e*) East's Notes, Case 10; 2 Morl. Dig. p. 16.

(*f*) Above, p 928 ss, and Sub-sec. 2. 2. of the present Section. In the *Mankars'* case, 2 Borr. at p. 95, the Śâstris say that a brother's or a daughter's son may be adopted without any ceremonies but an oral gift and acceptance.

be held that the same degree of propinquity which makes mere age a matter of indifference in the higher castes has the same effect amongst Sûdras. (a) Whether the absence of a true gotraship enables a Śûdra to adopt indiscriminately any son younger than himself is a point that still awaits determination. The opinions of the Śâstris would probably be opposed to such a license except on the ground of the Sûdras being below the operation of the religious family law, but no obstacle or preference probably would be recognized by the Courts as arising from consanguinity—none that is of an obligatory character. In case of difference of gotra the adoptee should be under five years of age; in case of identity the age of the adoptee is not restricted. (b)

(a) *See* Datt. Mim. II. 5, 80.

(b) Steele, L. C. 43. *Extract from the Dharmasindhu,—Who may or may not be adopted* (*see* 12 Bom. H. C. R 373) :—

Amongst Bráhmans the son of a uterine brother, because preferable, is to be taken first.

In his absence any Sagotra-Sapiṇḍa, or the son of a half-brother.

In the absence of such, an Asagotra-Sapiṇḍa, one produced in the family of the maternal uncle or in that of the father's sister, &c.

In the absence of such, an Asapiṇḍa of the same gotra.

In the absence of such, even an Asapiṇḍa of a different gotra.

Of the Asagotra-Sapiṇḍas the sister's son and the daughter's son are prohibited.* * * But by a Śûdra even a sister's son and a daughter's son are receivable. * * * The adopter having adopted should perform the ceremonies commencing with the jâtakarma or those commencing with the chûdâkarana for the boy adopted. This is the preferable doctrine ; but if a boy for whom they can be so performed is not procurable, then from amongst the Sagotra-Sapiṇḍas, one whose upanayâna ceremony has been performed, or even whose marriage has taken place, may become an adopted son ; but in the latter case, only if he has not produced a son. So it seems to me. If adoption is to be (=can be) made from amongst Asapiṇḍa-Sagotras only he whose upanâyana ceremony has been performed is to be (may be) taken. This appears also. As to a Bhinna-gotra

Difference of gotra makes it important that the Saṃskâras should not have been performed in the family of birth. Identity of gotra makes this a matter of comparative indifference. (*a*) Hence the following opinions :—

"The person adopting may select whom he likes, without the assent of his relatives. If of a different gotra the boy should be adopted before tonsure." (*b*) On the other hand—

"A man of 50, and having children, may be adopted if of the gotra of the adoptive father. The latter should invite his kinsmen, but their assent is not essential." (*c*)

A married sagotra may be adopted by a widow in the Dekhan. A gift made by the widow, prior to the adoption, may be set aside by the adopted son, in this as in other cases. (*d*)

Some decisions recognize that limitation of age becomes material if the adoptee is taken from a line of strangers, (*e*) agreeing with the Sâstri, who says—

(one of a different gotra), he whose upanâyana has not been performed is alone to be received. Some authors, however, say that a Bhinnagotra, whose upanâyana has been performed, may also be received.

(*a*) Above, p 928

(*b*) MS. 1683 Before upanâyana, 2 Str. H. L 104.

Colebrooke says :—" See Mitâksh on Inh. Chap I Sec. XI. 13; A difference of opinion prevails in regard to adoption of adults, or persons for whom certain ceremonies termed Saṃskâra (marriage of Śûdras, and tonsure of the higher tribes) have been performed, the prevalent doctrine, in most parts of India, being adverse to it. The objections are less forcible in the instance of a relation of the male side, than in the case of a stranger." 2 Str. H L 109.

(*c*) MS 1634. *See* Sub-sec 4 9

(*d*) *Nathaji* v. *Hari*, 8 Bom. H. C R. 67 A. C. J., quoting—(1) ***Raja Vyankatrâv Anandrâv Nimbâlkar*** v. ***Jayavantrâv bin Malhârrâv Raṇadivé***, 4 Bom. H. C. R. A C J. 191; (2) ***Rakhmâbâi*** v. ***Râdhâbâi***, 5 Bom H. C. R. A. C. J. 181; (3) Steele, pp. 44, 182; (4) ***Ranee Kishen*** v. ***Raj Oodwunt Singh et al***, 3 C. S. D. A. R. 228; (5) ***Bamundoss Mookerjea et al*** v. ***Musst. Tarinee***, 7 M. I. A. 169.

(*e*) ***Verapermal Pillay*** v. ***Narrain Pillay***, 1 Str. R. 91.

"The adoption of a boy of eight years old, belonging to another gotra, and whose chaul and munj have been performed, is invalid," (*a*) but this rigour cannot probably be maintained in the present day. (*b*)

4. 5—BODILY QUALITIES.

The same qualities are required in an adopted son as in a son who is to inherit. Thus leprosy (*c*) or congenital blindness would disqualify, as making it impossible that the sufferer should discharge the ceremonial obligations of a son to his ancestors. (*d*)

4. 6—MENTAL QUALITIES.

Idiotcy or insanity disqualifying for inheritance disqualifies for adoption also, (*e*) and for the same reason. Cases are wanting, as in practice no one seeks to adopt a boy known to be disqualified. When the boy has reached a stage of intelligence his own assent must be obtained, which at an earlier stage may be replaced by that of his parents. (*f*) Sadriśam, (*g*) properly understood, includes a kindly feeling between the adoptive father and son, and a disposition to obedience on the part of the latter not amenable to strict legal rules. (*h*)

4. 7.—RELIGIOUS AND CEREMONIAL QUALITIES.

Great differences of opinion are found amongst the authorities as to the precise stage of progress in the Saṃskâras or family sacra at which a boy becomes indissolubly united to

(*a*) MS. 1629
(*b*) See below, Sub-sec 4. 7
(*c*) A cripple. Steele, L. C. 184.
(*d*) *See* above, p. 575 ss.
(*e*) *See* above, p. 580 ss; Steele, L. C 184.
(*f*) Above, p. 931; Datt. Mîm. Sec. IV. 47.
(*g*) Above, p. 928.
(*h*) Steele, L. C. 182.

his family of birth.(*a*) Some maintain that a severance may be made at any stage such as to fit the subject for initiation in another family. (*b*) The Dattaka Mîmâṃsa seems to allow adoption after tonsure to six years of age. (*c*) The Dattaka Chandrika gives eight years of age as the limit of age of a tonsured boy. (*d*) But both seem to allow a dissolution of the filial bond even after initiation by a repetition of the ceremony of initiation. (*e*) The Vyavahâra Mayûkha expressly allows the adoption of a married man, (*f*) though marriage is the limit set forth by other authorities as that at which adoption even of a Śûdra becomes impossible. It concurs with the Dattaka Chandrika in doubting the genuineness of a passage on which the limitation to five years of age is founded. Sutherland, in his Synopsis, gives it as "the most general and consistent rule that 'any person on whom the adopter may legally perform the upanâyana rite (*g*) is capable of being affiliated as a dattaka son.'" (*h*) Macnaghten states very decidedly that no adoption is possible after the upanâyana has united a boy to his family by a second birth. (*i*)

The Nirṇaya Sindhu, which is frequently followed by the Sâstris, calls that son anitya datta, who before adoption has proceeded in the Saṃskâras even so far as tonsure, but on this point the people have rather taken the Saṃskâra-kaustubha for their guide, which allows adoption after initiation, as the Vyavahâra Mayûkha allows it after marriage. (*j*)

(*a*) As to these, *see* the Note Coleb. Dig. Bk. V. T. 134; Datt. Mîm. IV. 23; and Manu. II. 27—68.

(*b*) Above, p. 928 ss.

(*c*) Datt. Mîm. Sec. IV. 48—54.

(*d*) Datt. Chand Sec II. 30

(*e*) Datt. Chand. Sec. II. 25—28; Datt. Mîm. Sec. IV. 51, 52.

(*f*) Vyav. May. Chap. IV. Sec. V. para. 19.

(*g*) Investiture with the sacred thread.

(*h*) Suth. Synops. Head II. *ad fin.* *See* Notes XI. and XII. to the same.

(*i*) 1 Macn. H. L. 73.

(*j*) *See* above, p. 896.

The authorities being so obscure and inconsistent the guidance afforded by custom and by the Śâstris becomes of peculiar importance. Here again however there are considerable differences, the caste rules being much more indulgent than the learned Brâhmans.

In the opinion of the Śâstri "the adopted boy should be under five years old, and his chuda (a) and other sacraments should be performed assigning him the adoptive father's gotra." (b) Some of the native authorities moreover and several decisions allow that the effect of tonsure as barring adoption (c) may be undone by an appropriate sacrifice even in the case of an only son. But on the other hand however much the age of adoptee may be above five years, his adoption will be valid if tonsure was not performed in the natural family. (d)

Connexion in gotra makes a new initiation unimportant, and thus the adoption of (1) a sagotra, (2) or of one descended directly from a common male ancestor, (3) or of a near relative of adopter on the paternal side is good, though he is

(a) Tonsure.

(b) MS. 1673 *See* above, p 929.

(c) *Sy Joymony Dossee* v. *Sy Sibosoondry Dossee*, 1 Fult. 75, 28th March 1837, 1 Macn. H L. 72 ss; 1 Coleb Dig Bk. V. T. 182, 183, 273; Macn. Con. H L 111, 116, 192, 205; 1 Str. H L. 91; 2 Str. H. L 87, where the Śâstri gives the upanâyana, or marriage as the limit beyond which a transfer to another family becomes impossible. The caste laws do not in Bombay make tonsure a limitation, though they, in some cases, give this effect to investiture and marriage, Steele, L C. 182 Even as to these the practice is lax. *See* Sub-sec 4 9.

(d) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str R. 91; *Musst Dullabh Dai* v. *Manee Bibi*, 5 C. S. D.A.R. 50; *see* Datt. Chand. Sec. II. 20—33; Datt. Mim. Sec. IV. 22—51, and the notes to the preceding case. At 2 Str. H. L. 123 Ellis says that a boy adopted after tonsure becomes an anitya datta, whose son belongs to the original family of his father. Colebrooke says the son belongs to the family of his father's munj (investiture)

It has indeed been said that there is not in strictness any authority for the adoption of a boy whose munj or upanâyana has been performed. (a) And also that—

"A boy (Brâhman) cannot be adopted after his munj. The form of adoption gone through confers no right of heirship on him." (b)

In other cases the Śâstris answered—

"A boy of a different gotra should not be married or have been invested with the thread." (c)

"A boy adopted from another gotra should be taken before his thread investiture and marriage. In the same gotra this is not essential. In the former case the adopted acquires no rights of inheritance." (d) A boy whose upanâyana had been performed would in Madras become but temporarily attached to the adoptive family. (e) In Bombay on the other hand

formed is not possible upon the strength of the Purânâ passages, because the authority of the Vêdas to overrule contrary passages from the Smṛitis (and Purânâs) is well established by the rule of commentators to determine the relative authority of texts, and the above passages of the Purânâ are in opposition to the Bahvricha Brâhmana. Thus it is indisputable that the expression 'the son given and the rest' includes 'the son made and the rest.' Hence it follows that one on whom the Saṃskâras have been performed in his natural family cannot become a self-given son either. But in the Brâhmana it is plainly stated that Shunashepa himself became the son of Vishvâmitra, and it is not to be supposed his upanâyana had not been performed in his natural family."

(a) *P. Venkatesaiya* v. *M. Venkata Chârlu et al*, 3 Mad. H. C. R. 28.

(b) MS. 1751. See above, pp 898, 899.

(c) MS. 1616. The question was as to son of father's brother's daughter's son, who would be unfit for adoption on account of his mother's consanguinity with the adoptive father according to the stricter rules as to the prohibited degrees. *See* above, p. 937.

(d) MS. 1615.

(e) *P. Venkatesaiya* v. *M. Venkata Chârlu*, 3 Mad. H. C. R. 28; 1 Str. H. L. 88, 89, 90. The anitya datta, whose son returns to the family of the father's original gotra is nowhere recognized by the Bombay Śâstris, *see* above, p. 899.

the adoption by a Brâhman of a boy of a different gotra, whose munj had been performed, was pronounced quite legal and effectual; (*a*) and a similar answer was grounded on an instance of such an adoption said to be given in the Vêda. (*b*)

In *Lakshmappa* v. *Ramava* (*c*) it is laid down by Nanabhai Haridâs, J., consistently with the replies just quoted, that the performance of the chuḍakarana (*d*) and the upanâyana (*e*) in the family of his birth does not disqualify even a Brâhman for adoption, as the effect of these ceremonies may be annulled.

In Bengal the adoption of a boy, eight years old, was held to prevail over a daughter's claim to inheritance, the boy not having been initiated in the natural father's family. (*f*) But a contrary rule would prevail where even the chûḍa had been performed.

The father of a boy after agreeing to give him in adoption performed his tonsure under his own family name. Afterwards the adoption was carried out and the *homam* performed. The Paṇḍit pronounced such an adoption invalid. (*g*)

4. 9.—FITNESS FOR ADOPTION—AS AFFECTED BY MARRIAGE.

Strange (*h*) gives marriage in the fourth class as a ceremony after which adoption becomes impossible. This is

(*a*) MS 1719.

(*b*) MS. 1717. *The reference is to the story of Śanaḥśepa* (above, p. 896) *on which the* Saṃskârakaustubha *founds the doctrine here* followed by the Śâstri.

(*c*) 12 Bom. H. C. R. at p. 370.

(*d*) Tonsure.

(*e*) Investiture.

(*f*) *Keerut Nuraen* v *Musst. Bhobinsree*, 1 C. S. D A. R. 161; *Sreenevassien* v. *Sashyummal*, M S. D. A. Dec. 1859, p. 118; *see* 1 Str. H. L. 89, 90.

(*g*) 2 Macn. H. L 181.

(*h*) 1 Str. H. L. 91.

confirmed by a Madras Śâstri, (a) and the same appears to have been the opinion of Jagannâtha. (b)

"The Poona Śâstris do not however recognize the necessity that adoption should precede munj and marriage. The passage so interpreting the law is said by the author of the Mayûkha to be an interpolation." (c) It is only the question of marriage that could be raised in the majority of cases, as for Śûdras there is no other (initiatory) ceremony but marriage. (d) Thus it was answered:—

"The son of a sister-in-law may be adopted by a Brâhman. But a married man of the same gotra only can be adopted." (e)

This condition being satisfied the adoption of a married man is admissible, though of the mature age of 45 years, and though he has a family, and his natural father prohibited adoption. (f)

(a) 2 Str. H. L. 87.

(b) Coleb. Dig. Bk V T. 183, 273 Comm. "The investiture and other ceremonies . . concern men of the twice-born classes: marriage is the only sacrament for a man of the servile class." Coleb Dig. Bk. V T. 121 Comm "A man of the servile class universally obtains marriage as his only sacrament (Saṃskára)" *Ib.* T. 122.

(c) Steele, L. C. 44. *See* above, p. 929.

(d) *Sy Joymony Dossee* v. *Sy Sibosoondry Dossee*, 1 Fult 75.

(e) MSS. 1642, 1643.

(f) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.); *Lakshmappa* v. *Ramava et al*, 12 Bom. H. C. R. 364; Vyav. May. Chap IV Sec V. 19. The Śâstris in reply to a question put to them said:—In the commencement of the Shastr it is written, A woman who has lost her husband must obtain the sanction of her father previous to adopting a son, and if she have no father then that of the caste. Again it is written, that a woman who has reached years of discretion may of herself perform religious duties So she may adopt a son without permission, if none of the caste are at the time to be found. It is also stated that a boy under five years of age should be adopted in order that he may be brought up in

The more recent decisions also say that the adoption of a married boy is admissible, if he is a sagotra, though he has children, amongst Śûdras. (*a*) And generally it may be said that by the law of Bombay the adoption of a married Śûdra is not invalid, (*b*) as in *Lakshmappa* v. *Ramava,* (*c*) it is ruled that a married sagotra may be adopted, sagotra meaning one in a relation of natural propinquity.

Whether upanâyana and marriage in the natural family are a bar to adoption in another family among Brâhmans, was a question raised in the case referred to below. (*d*) The Court refused to consider it, holding the defendant bound by estoppel from disputing the adoption as he had taken part in the ceremony. Elsewhere than in the Bombay Presidency a married man does not seem to be eligible for adoption, even amongst the lower castes. Thus in Bengal the adoption of a Śûdra, if otherwise eligible, is permissible at any age prior to marriage, (*e*) not after it.

the religious tenets of his adoptive father. This relates to cases where no relationship subsists, but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him. However, if the father of the person to be adopted be seriously averse to it, declaring that his son shall not be given in adoption, the ceremony cannot be performed, since the Shastr ordains that the free consent of the father is necessary to the adoption of his son by another person.

(*a*) *Nathaji* v. *Hari*, 8 Bom. H. C. R 67 A. C. J.; *Lakshmappa* v. *Ramava*, Bom. H. C. J. F. for 1875, p. 394 ; Vyav. May. Chap. IV. Sec. V. 19.

(*b*) *Lakshmappa* v. *Ramava*, Bom. H. C. J. F. for 1875, p. 394; *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. Appx. xxvi.

(*c*) 12 Bom. H. C. R. at pp. 372, 373.

(*d*) *Sadáshiv Moreshwar* v. *Hari Moreshwar*, 11 Bom. H. C. R. 190.

(*e*) *Ry. Nitradaye* v. *Bholanath Doss*, Beng. S. D. A. R. 1853, p. 553.

In Madras too the adoption of a married boy is illegal. (*a*) It is illegal though the adopted is a Sûdra (28 years old.) (*b*)

4. 11.—FITNESS FOR ADOPTION—PLACE IN CASTE OF THE ADOPTED SON.

According to the customary law of the Dekhan exclusion from caste annuls an adoption. (*c*) It must *à fortiori* prevent it, as no benefit, or at least not the benefit chiefly regarded, can be had from an outcaste son.

5.—FITNESS FOR ADOPTION—IN CASE OF ANOMALOUS ADOPTIONS

In the case of an adoption anomalous, as made by a mother instead of a widow, if such an adoption can be allowed, no variance, so far as is known, arises in the choice of the boy to be adopted. The dvyâmushyâyana has been considered under the head of "Only son" and of "Relation through the natural father." (*d*) As the connexion of a dvyâmushyâyana with his own family is not severed there is no fulness of the filial relation between him and his quasi-adoptive father; consequently the restrictions arising from ideal physical relations between the adoptive parents and the real ones do not apply to this case. In practice, however, the adoption of a sister's or a daughter's son as a dvyâmushyâyana is not known to occur. Where the adoption is allowed at all it is allowed in the fullest sense. (*e*)

We have above seen one instance (*f*) in which a reminiscence of the ancient institution of the putrikâ putra seems

(*a*) *Ry. Sevagamy Nachiar* v *Heraniah Gurbah*, 1 M. S. D. A. R. 101.

(*b*) *Virakumara Servai* v. *Gopalu Servai*, M. S. D. A. R. 1861, p. 147.

(*c*) Steele, L. C. 185; comp. above, pp. 944, 946.

(*d*) *See* pp. 897 ss, 1023, 1040.

(*e*) Above, p. 887.

(*f*) p. 1030.

to have been preserved in practice though opposed to the law of to-day. (*a*) In such a case should the practice be authorized by caste custom, there can be no room for choice of the son. (*b*)

According to usage in Malabar, adoption is necessary among the Chetty caste, to constitute the sons of daughters lawful heirs on failure of sons. (*c*)

6—FITNESS FOR ADOPTION—IN CASE OF QUASI-ADOPTIONS.

As the kṛitrima form of adoption (*d*) is not recognized in Bombay no extended notice of it is called for in the present connexion. No restriction seems to be placed on the choice of the son (*e*) adopted by a man or a woman. He must expressly consent to the adoption, and he contracts no family relation with the cognates of the adoptive father or mother. (*f*) This is adoption with all the original significance taken out if it, as in the last stages of the Roman law, or rather perhaps an inartistic inclusion within the law of adoption of an aboriginal local custom which could not be moulded exactly to the Brâhminical scheme. (*g*)

(*a*) Above, pp. 877, 886.

(*b*) The putrikâ putra who in some lists (Yâjñavalkya, Devala) stands second, has no place in Manu's list. This some explain by saying that he stands on exactly the same footing as an aurasa. By a laxity of expression the daughter herself might be called putrikâ putra, and being appointed by her father might perform his obsequies. Suth. in 2 Str. H. L. 199. *See* above, pp. 877, 885, 888, 894.

(*c*) 1 Mad S. D A. R 157

(*d*) *See* above, p. 894

(*e*) *Ooman Dutt* v. *Kunhia Singh*, 3 C. S. D. A. R. 144, is discredited by the observations in *Srimati Uma Deyi's* case, L. R. 5 I. A. at pp. 51, 52.

(*f*) 1 Macn. H. L. 75, 76. Hence the adoption of an only son generally disallowed is lawful where the kṛitima adoption is recognized. *Musst. Tikdey* v. *Lalla Hurylal*, C. W. R. Sp. No. p. 133.

(*g*) *See* above, pp. 155, 869, 879 Note (*e*), 888.

In the natural adoptions in use amongst the tribes in Gujarâth (a) which from the orthodox Hindû stand-point must be regarded as mere quasi-adoptions, no restriction is known to exist on the choice of the boy. Nor is it known that a girl is recognized as a fit subject for adoption.(b) The son of a near relative, male or female, is taken as the foster son (pâlak putra) with such doubtful rights as have already been described.

The adoption of her own brother's daughter by a widow, governed by the Mitâksharâ, can be regarded only as an adoption in the popular not in the legal sense. (c)

A man cannot be adopted into a family governed by Alya Santâna law. (d)

" Adoption amongst Kalavântins is to be governed entirely by the custom of the class. The Sâstra gives no rules." (e) So far as an adoption can be recognized at all it seems to be a matter of the freest choice, as in the following case:—

A dancing woman brought up a son of her servant as her own. On her death his daughter was put into her place to draw the temple allowance. The Sâstri declared the foster son heir by caste custom, not his daughter. (f)

(a) Above, p. 925.

(b) A foster-daughter is mentioned above, p. 454 Q. 1; but she is not recognized as a subject of any right of inheritance. The Gujarâth castes who admit a foster-son do not allow him to be replaced by a daughter.

(c) *Musst. Thakoor Dayhee* v. *Rai Balack Ram*, 10 C. W. R. 3 P. C. *See* above, p. 933.

(d) *Munda Chetty* v. *Timmaju Hensu*, 1 Mad. H. C. R. 381 Note.

(e) The case was one of a sister's son's son adopted by a Kalavântin. MS. 1651. As to the pâlak kanya of a dancer, *see* above, pp. 925, 1015.

(f) MS. 1707.

SECTION V.

THE CAPACITY TO GIVE IN ADOPTION AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

THE CAPACITY LIMITED TO THE PARENTS.

It is plain that from the religious point of view the gift of a son in adoption ought not to be made without the concurrence of both his natural parents. (*a*) Besides his first duty to his father, the son owes ceremonial services to his mother and her father. (*b*) Even a step-mother shares the benefit of his sacrifices. In the sphere of positive law the natural connexion between the mother and her son has not been able to contend against the authority of the husband and father. The sources of the Hindû law give, in some places, a rather uncertain sound, but the general result is that the mother has no real control over a proposed gift by her husband, and can herself act alone in giving away a son during her husband's life only on a real or assumed permission from him. This will be evident from the following examination of the authorities.

It will be seen too that the capacity of the widow to give in adoption without an authority from her husband is more generally recognized than her capacity to take in adoption, though even in giving she has not an unlimited right. The principal text is in Vasishṭha, but with slight variances it is found in other Smṛitis.

" The father and mother may give, sell, or abandon their son. But an only son is not to be given or received, as he must continue the line of his ancestors. And a woman shall

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(*a*) Above, p. 910. Datt. Mîm. Sec. IV. 14, 15.

(*b*) The subordinate character of the Śrâddhas celebrated for a mother and her ancestors may be seen from the discussion. Datt. Chand. I. 24. *See* also Datt. Mîm. II. 72, Note.

neither give nor receive a son except with her husband's permission."—Vasishṭha XV., 2—5. (*a*)

The Dattaka Mîmâṃsa says:—"The capacity to give consists in having a plurality of sons, and the assent of the wife" and so forth. (*b*) But the most perfect gift, from the religious point of view, must here have been intended, not one legally sufficient. At another place in the same work (*c*) it is laid down that "the husband singly even, and independent of his wife, is competent to give a son, for in the two passages cited (*d*) the father is mentioned singly and unassociated with the mother." The reason rests in part on a grammatical subtlety which it is hard to appreciate, both father and mother being mentioned apparently without any intention to assign a superiority to either; (*e*) but reliance is placed also on the greater part of a father in his son, (*f*) and on the generally subordinate place of the wife. Whatever may be thought of the reasoning the conclusion is perfectly clear. The Dattaka Mîmâṃsa however allows the gift as it allows the acceptance of a son by a wife under a delegation from her husband still living. (*g*) When he is dead his authority or assent can no longer be had, and an adoption is impossible, but the widow may give away her son under the authority

(*a*) Amongst the Saxons the right of a father to sell his children was recognized, and it continued for some time after they had embraced Christianity.—Kemble's Saxons in England, vol I. p. 1.

The passsges in the Smṛitis coupling gift with sale and limiting both to a time of distress point back to a stage at which the doctrine of adoption had not been developed to anything like the extent which now makes it so important. *See* above, p. 876; Colebr. Dig Bk. II. Ch. IV. T. 7.

(*b*) Sec. V. 11

(*c*) Sec. IV. 13.

(*d*) *i.e.* Manu IX. 168; Yâjñavalkya II. 130.

(*e*) Vasishṭha *does* subordinate the mother as shown above.

(*f*) Above, p. 885.

(*g*) Datt. Mîm. Sec. I. 16, 17, 18.

of the Smriti, which says: "The father or the mother (both) may give." (*a*) While the husband is alive she must not give without his assent; when he is dead she may use her discretion in the exigencies which would warrant a gift by the father.

The Dattaka Chandrika, after quoting Manu and Atri to the effect that a man destitute of male offspring may adopt a son, (*b*) cites the familiar text of Vasishtha, "Let not a woman either give or receive a son in adoption unless with the assent of her husband." (*c*) Hence he gathers that with this assent a woman may adopt. The case of adoption by a widow is not specifically dealt with, but a woman may give in adoption "with her husband's sanction if he be alive, or even without it if he be dead, or have emigrated or entered a religious order." (*d*) The author construes the passage of Yâjñavalkya in its natural sense as giving authority to father and mother alike, (*e*) a construction which obviously involves the competence of a widow to adopt also without special authority for the purpose from her deceased husband.

The Mitâkshará limits the mother's authority to give thus:— (*f*)

"He who is given by his mother with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares." Balambhat's commentary adds "incapable" to "absent," and "without his assent" to "decease," conformably to a general tendency to favour females found in this author. If the mother is

(*a*) Datt. Mîm. Sec IV. 10, 11, 12.
(*b*) Sec. I. 3.
(*c*) Sec. I. 7.
(*d*) Sec. I. 31.
(*e*) Sec. I. 32.
(*f*) Mit. Chap 1 Sec. XI. para. 9.

present her assent is deemed as necessary it would seem as the father's. (*a*) Caste custom, however, though it recognizes the mother's assent as desirable, does not regard it as indispensable. (*b*)

The Vyavahâra Mayûkha, (*c*) referring to Manu, says that where both parents are alive the gift ought to be made by both, if the father be dead by the mother, if the mother be even absent by the father. The ceremonial prescribed in the same work (*d*) presupposes that the giver and receiver are both males. Vasishṭha however is quoted as authorizing a woman's gift or acceptance of a son with the assent of her husband, (*e*) and the necessity of assent being limited by inference to the woman under coverture, it is said that the widow's authority is unrestricted. (*f*) The author had the taking of a boy in adoption more immediately in view, (*g*) but his argument applies with at least equal force to giving.

The Vîramitrodaya (*h*) says the mother may give with her husband's assent, the father on his own authority. It relies, like the other treatises, on Vasishṭha, and maintains, contrary to the Dattaka Mîmâṃsa and other works, not only that the assent of a living husband is unnecessary, but that no assent at all is necessary for a widow adopting. As to the giving of a son the Vîramitrodaya is not explicit, and the reason given for allowing an adoption without the husband's assent, that otherwise his spiritual interest may suffer, does not apply to the gift of a son. When however there is no

(*a*) *See* Colebrooke's Note, *ad loc.*

(*b*) Steele, L. C. 183.

(*c*) Chap. IV. Sec. V. para. 1.

(*d*) Para. 8, 37 ss.

(*e*) Para. 16

(*f*) Para. 18.

(*g*) *See* para. 36.

(*h*) Transl. p. 115

danger to these the widow's authority to give seems to be placed on the same level as her power to take: it is subject only in case of her dependence to the approval of the near relatives.

Questions relating to the capacity to give in adoption have naturally been far less frequent than those relating to the power to adopt. By a gift in adoption no one in the family of the child given loses any thing, while the introduction of a child often takes away a succession or an estate from him who holds or expects it. The following responses show that a gift by the parents is essential to adoption but without drawing any distinction amongst the several cases of gift by the husband, the wife, and the widow.

"A boy cannot be given in adoption by any one except his parents." (a)

"The father or mother should give a boy in adoption." (b)

The decisions of the Courts are to the same effect. No one but the natural father or mother can give in adoption. (c) The grandfather for instance, (d) or the brother, has not the requisite authority. (e)

An orphan cannot be adopted because there are no parents to make the requisite ceremonial gift. (f) This principle excludes the svyamdatta or self-given. (g)

(a) MS 1643.

(b) MS. 1675.

(c) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 376, and cases there quoted

(d) *The Collector of Surat* v. *Dhirsingji Vaghbaji*, 10 Bom H. C. R. 235.

(e) *Bashettiappa* v *Shivalingappa*, 10 Bom. H. C. R. at pp 271, 272.

(f) *Balvantrao* v *Bayabai*, 6 Bom. H. C. R. 83 O. C. J.; *Bashettiappa* v *Shivalingappa*, 10 Bom. H. C R. 268

(g) So *Veeraperumal* v. *Narain Pillay*, 2 Mad. H. C. R. 129; and *Muttusawmy Naidu* v. *Lutchmeedevumma*, M. S D. A R. Dec. 1852 p. 96

CAPACITY TO GIVE IN ADOPTION.

A.—GIFT BY THE FATHER.

A. 1.—FATHER'S PERSONAL COMPETENCE.

A leper, according to a Bengal case, can give his son in adoption (*a*) unless perhaps he has the disease in a severe and disabling form. Leprosy, as it disqualifies for the performance of religious acts, (*b*) might, on that account, be held amongst the higher castes to prevent the gift by a father afflicted with it. The son in fact takes the place of a father thus disqualified in a Hindû family. In Bombay the gift, if made at all, would probably be made by the wife with the assent of relations. (*c*)

A 2.—CIRCUMSTANCES IN WHICH THE GIFT MAY BE MADE.

The Dattaka Mîmâṃsa quotes Manu and Kâtyâyana to prove that a gift of a son may be made only in a season of distress. (*d*) In famine a son may be given or even sold, and the stress of necessity justifies a widow in thus parting with her son. (*e*) The author gives a strained interpretation to the passage by making it refer to the distress of him who has no son, (*f*) but he cannot but accept the natural sense. (*g*) The Mitâksharâ says the condition relates to the giver not to the taker. (*h*) The Vyavahâra Mayûkha (*i*)

(*a*) *Anund Mohun* v. *Gobind Chunder*, W. R. 1864, p 173.

(*b*) *See* above, pp 576, 579, 585; Viram. Transl. 256; Vyav. May. Chap. IV. Sec XI. para. 10; Dâya Bhâga Chap. IV paras 4, 18; Mit. Chap. II. Sec. X. para. 10.

(*c*) *See* Steele, L. C. 182; Mit. Chap I. Sec. XI. para 9 Note.

(*d*) Sec. I. 7. The original passage of Manu. (IX 168) is quoted. I. L. R. 2 Bom. at p. 380; Kâtyâyana at Coleb. Dig. Bk. II Chap. IV. TT. 6, 7.

(*e*) Sec. IV. 12.

(*f*) Datt. Mîm, Sec. IV. 21.

(*g*) Datt. Mîm. Sec. I. 8; Sec. IV. 18, 19.

(*h*) Chap. I. Sec. XI. para. 10.

(*i*) Chap. IV. Sec V. para. 2. *See* above, p. 1046.

finds fault with this doctrine of Vijñaneśvara and contends that where the gift has not been justified by need, the desired religious state has not been induced by the form of adoption. This seems a rather cavilling objection; it is, at any rate, not one of any practical importance in the law. A gift made by a competent parent is universally admitted to be effectual, whether made under the pressure of want or not. Very few adoptions are made from pauper families, and the gifts or sales made during famine are not usually attended with any ceremonies of adoption.

A Śâstri says—"Parents in indigent circumstances may give a son in adoption" (*a*) but no instance occurs of a gift pronounced invalid through want of a poverty qualification.

A. 3.—QUALIFICATIONS OF THE POWER.

The free consent of the mother is said to be necessary if she is living with her husband, (*b*) but "desirable" would be the proper word (*c*) save in a quite exceptional instance. The restrictions arising from the condition of the boy as an only son or an eldest son have been discussed in the previous Section. The only substantial qualification of the parents' power arises in the case of a boy sufficiently old to have intelligence and a will of his own. The assent of such a boy (or man) is necessary. (*d*) Without it the desired adaptation of character (*e*) is not in such a case to be hoped for, and the son is not a mere chattel. (*f*) His assent may be safely inferred from his going through the ceremonies.

(*a*) MS. 1683, but the condition is a purely moral one, and one that is very lightly regarded.

(*b*) Steele, L. C. 45.

(*c*) Steele, L. C. 183, 385.

(*d*) Steele, L. C. 385.

(*e*) Above, p. 928.

(*f*) *See* above, pp. 930—932; Vayv. May. Chap. IV Sec. I. para. 11; Chap. IX. para. 2. The limitation of the right of disposal over children to the parents originated no doubt in religious feeling, but it has pro-

Relatives should be informed of an intended gift in adoption, but their consent and the consent of the caste are desirable rather than necessary. It is most nearly essential, where, owing to the refusal of near relatives to give a son, it becomes necessary to have recourse to distant connexions or to strangers. (a)

The Poona castes seem to have thought, when questioned by Mr. Steele, that the consent of the Government was necessary in the case of Sarinjâmdârs and the like, not only to an adoption, but to the particular choice made in each instance. (b)

B.—GIFT BY THE MOTHER.

B. I.—AS A WIFE—BY EXPRESS PERMISSION OF THE HUSBAND.

The Dattaka Kaustubha prohibits the giving equally with the receiving of a son in adoption by a wife without her husband's permission. (c)

The express permission of her husband is necessary to validate a gift in adoption by a wife of their son, though the Smṛiti Chandrika is not to be construed as placing adoption and giving in adoption by a wife on the same level. (d)

bably been maintained in a measure at least by a sense of its being a necessary safeguard for the children Their interests were least likely to be sacrificed by their parents. The removal of the child from the class of mere chattels is important with respect to the illegality of giving in adoption subject to terms injurious to the child as a son in the family of adoption. Such terms the Śâstris have in some instances pronounced void, as will be seen in the next Section.

(a) Steele, L. C. 183.

(b) Steele, L. C. 182.

(c) Leaf 44, p. 1, l. 6 (Bom. Shakê 1783).

(d) *Narayen* v. *Nana*, 7 Bom H. C. R. 153, 162, 167, 172; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at pp. 386, 397.

B. 1. 2.—WITH IMPLIED ASSENT OF THE HUSBAND.

An express permission does not seem absolutely necessary. The law was stated thus. A wife is not competent to give her son in adoption against the will of her husband, expressed or implied, or gathered from the circumstances of the case. (*a*)

It was held also that where the natural father permitted the adoption of his boy under certain conditions, one of which was imposed in consequence of a mistake as to the necessity of an assent of Government to an adoption, non-fulfilment of the condition rendered the adoption invalid. (*b*)

When the father is insane and unable to give his consent, the mother alone can give her son in adoption. (*c*)

B. 2.—GIFT BY THE MOTHER—AS A WIDOW.

Jagannâtha says, a gift by the mother alone is void; by the father alone valid, though religiously defective. (*d*) After the death of one of the parents he regards the father's power as complete, but the mother's as dependent on authority given by her husband, (*e*) which will also validate a gift by a wife. (*f*) He is thus less liberal to the widow than the authorities quoted in the beginning of this Section. It would seem that the true view is that of a joint interest in the son with a discretional power of acting in the widow after her husband's death, except in cases plainly injurious to his spiritual welfare or opposed to his known wishes.

(*a*) *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. at p. 397.

(*b*) I. L. R. 2 Bom. at p. 383.

(*c*) *Hurosoondree Dossee* v. *Chundermoney Dossey*, Sev. R. 938. *See* above, Sub-sec. A. 1.

(*d*) Coleb Dig, Bk. V. T. 273, 274 Com.

(*e*) *Ib.* T. 275, Comm.

(*f*) *Ibid.*

The Nirṇaya Sindhu, (*a*) quoting from Vatsa and Vyâsa "The son given by the father or the mother is a given son" (dattrima), maintains that the restrictions on the mother's capacity, either to give or to take, endure only while the father lives. The Smṛiti is obviously a much more direct authority for freedom in giving than in taking. "The Hindû law clearly points to the mother as the person who can give in adoption when the natural father is dead." (*b*)

The narrower view of the widow's capacity is illustrated by the following two cases, both in Bengal, where generally the widow's rights are most restricted.

Though the natural father consented to the adoption of his boy, he not having lived to make the gift, the adoption, it was held, could not be made. (*c*) A mother indeed, it was said, cannot give her only son in adoption even as a dvyâmushyâyana without authority previously obtained from her deceased husband. (*d*)

In a later Bengal case, however, it was said that the assent of the father to the gift of a son might be presumed where no dissent had been expressed, on the authority of the Datt. Chandrika, (*e*) though this did not extend to the taking of a son in adoption. (*f*)

The principle of the widow's dependence has been brought to bear in Madras as a means of controlling her right to give in adoption. It was ruled that in the absence of con-

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(*a*) Bom. Edn. Shaké 1784; Parichheda III. fol. 9, 1, ll. 3, 4.

(*b*) *The Collector of Surat* v. *Dhirsingji Vaghbaji*, 10 Bom. H. C. R. at p. 237.

(*c*) *Gourbullab* v. *Jugernatpersaud Mitter*, Macn. Con. H. L. 217.

(*d*) *Debee Dial et al* v. *Hurhor Singh*, 4 C. S. D. A. R. 320. His being the only son was material.

(*e*) Sec. I. paras. 31, 32.

(*f*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. 145 A. C. J.; S. C. 11 C. W. R. 468.

sent from her deceased husband, but with the consent of his father, brother, &c., a mother may give her younger son in adoption. (*a*)

In Bombay on the other hand a Śâstri said that "when either of the parents has given a son by pouring water on the hands the gift is complete. The parents need not consult their relatives." (*b*) The gift in the particular case however had been made by the father, and the Śâstri did not probably contemplate the case of a gift by the mother without the consent of the father. Where a father has indicated that he does not wish his son to be given in adoption, his widow has not authority to make the gift. In any case in which he may probably have desired the retention of the son the gift is invalid if made without an express authority from him. Such authority is specially necessary where the gift will leave the deceased father spiritually destitute. (*c*)

Even amongst the Lingâyats, though they are Sûdras, (*d*) permission will not be presumed for a widow to give away an only son or an eldest son in adoption. (*e*) Where a mother, however, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself (being ill), attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid. (*f*)

In one case at Madras it was held that the consent of a brother, as representing his deceased father, to the adoption

(*a*) *Arnachellum Pillay* v. *Jyasamy Pillay*, 1 Mad. S. D. A. R. 154; Coleb. Dig. Bk. V. TT. 273—275.

(*b*) MS. 1677.

(*c*) *Somasekhara Râja* v. *Subhadrâmâji*, I. L. R. 6 Bom. 524.

(*d*) *Gopal* v. *Hanmant*, I. L. R. 3 Bom. 373.

(*e*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 364; *Somasekhara* v. *Subhadramaji*, I. L. R. 6 Bom. 524.

(*f*) *Vijiârangam* v. *Lakshuman*, 8 Bom. H. C. R. O. C. J. 244; see 2 Str. H. L. 94 as to the delegation of ceremonial functions.

of his brother was sufficient. The mother not attending, her consent was presumed. (*a*) But this ruling has not been approved. It is inconsistent with several subsequent cases, (*b*) and though not entirely unsupported by native authority (*c*) cannot be considered good law.

The concurrence of an eldest son may properly be required to the gift in adoption of a younger son by the widow. (*d*) She is legally and religiously dependent on him as head of the family, and this authority may well be recognized where it can be exercised only in restraint of a parting with a brother. (*e*)

C.—GIFT BY PERSONS INCOMPETENT.
C. 1.—BY ADOPTIVE PARENTS

The texts do not warrant a gift by adoptive parents. (*f*) The prescribed ceremonies imply a gift by the boy's real father to another taking him as his son. (*g*)

C. 2.—PERSONS COMMISSIONED BY THE PARENTS.

The parents cannot delegate to any other person the authority to give in adoption after their decease. (*h*)

(*a*) *Veerapermal Pillay* v. *Narrain Pillay*; 1 Str. R. 91; *see* M. cn. Cons. H. L. p. 220; Steele, L. C. 48, Note.

(*b*) See *Bashettiappa's* case, 10 Bom. H. C. R. at p. 272. Below, Sub-sec. C. 3.

(*c*) *See* above, p. 910.

(*d*) Steele, L. C. 48

(*e*) "A gift made by a dependent person without the consent of the principal owner (*i. e.* the 'head' or 'lord') is void." Colcb. Dig. Bk. V. T. 273, Comm

(*f*) Above, p. 896; *see* 2 Str. H. L. 142. The Roman law specially guarded against an adoptive father giving away his adopted son without good cause, while it allowed the son injured by adoption to claim emancipation on reaching his majority. Inst. Bk. I. T. XI. § 3, and Ortolan *ad. loc.*

(*g*) *See* 2 Str. H. L. 218; Datt. Chand. Sec. II. 16; Datt. Mîm. V. 13; Vyav. May. Chap. IV. Sec. V. para. 8.

(*h*) *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268.

C. 3.—BY GRANDFATHER, BROTHER, &c.

When the father is dead, and the mother living, the grandfather cannot give away a boy in adoption.(*a*)

The adoption of a boy, delivered by his brother, but not by either of the parents, and in which the adoptive mother did not obtain her husband's consent, was not upheld by the Court. (*b*)

One brother cannot give another in adoption on account of their equality in position, (*c*) more especially when the parents are dead; and even though the father had previously consented to such an adoption. (*d*)

C. 4.—SELF-GIFT.

"The only son of one deceased cannot give himself in adoption." (*e*)

"The svyamdatta," or son self-given, is not to be recognized in the Kali yug." (*f*)

The kṛitrima or karta putra in the Maithila district is an exception. But this mode of adoption, as already noticed, is not allowed elsewhere.

(*a*) *Collector of Surat* v. *Dhirsungji Waghbâji*, 10 Bom. H. C. R. 235.

(*b*) *Musst. Tara Munee Dibea* v. *Deb Narain et al*, 3 C. S. D. A. R. 387 ; Coleb. Dig. Bk. V. T. 275. Amongst some tribes in the Panjâb a man may give his brother in adoption, but not his only son. Amongst some he may not give his eldest son. In some tribes he may gave his only son to a brother or near relative. *See* Tupper, Panj. Cust. Law, vol. II. p. 155.

(*c*) *Muttusawmy Naidu* v. *Lutchmeedevamma*, M. S. D. A. Dec. 1852, p. 96.

(*d*) *Bashettiappa* v. *Shivlingappa*, 10 Bom. H. C. R. 268.

(*e*) MS. 1746. *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268 ; *Lakshmappa* v. *Rámavá*, 12 Bom. H. C. R. at p. 390.

(*f*) MS. 1755. *See* above, p. 895.

SECTION VI.

A.—THE ACT OF ADOPTION (*a*)—ITS CHARACTER AND ESSENTIALS.

Adoption amongst the Aryan Hindûs, as it was amongst the Greeks and Romans, is essentially a religious act. (*b*) Its purpose and the ideas connected with it have been discussed in Section II. It follows almost necessarily from the view of the subject taken by the Bráhmans and by those classes who have inherited or adopted Brâhminical institutions that the sacrifices and invocations by which a boy is transferred from association with one line of manes to another should be deemed indispensable to a true adoption. (*c*) And as the rights of property are under the Brâhminical system indissolubly connected with spiritual union (*d*) the succession to a member's place in the united family, or to the aggregate of rights and duties centered in him alone as the sole representative of a family, or as the source by separation of a new one, (*e*) must needs pass to him who has the sacra. To the begotten son the sacra pass of right and of necessity (*f*) to the adopted son, they can pass only by means of the sacred rites supposed to be efficacious in bringing him under the same tutelary divinities as his adoptive father, and imparting to him the father's ceremonial virtue. Such ceremonies as the *putreshti*, and especially the *datta-homa*, are not there-

(*a*) This Section has once or twice been referred to under the title of the "METHOD OF ADOPTION," but on a review of the materials a more comprehensive title seemed preferable.

(*b*) Above, pp. 947, 948; Smith's Dict. Ant. Tit. Adoptio. Cic. Pro. Domo Sua, Chap. 13.

(*c*) *See* above, p. 930; Datt. Mîm. Sec. V. 56; Vyav. May. Chap. IV. Sec. V. paras. 8, 37, 38.

(*d*) Manu IX. 126, 141, 142, 169.

(*e*) Above, p. 77.

(*f*) Comp. pp. 67, 873, 984, 995, above; Datt. Mîm. IV. 27 ss.

fore to be looked on as mere excrescences. (*a*) In theory at least they are as important as the gift and acceptance, since without them the reception is defective and the spiritual end cannot be attained. (*b*) Men of the mixed and lower castes, as they became imbued with the Brâhminical doctrines, (*c*) conceived that for them too as for the pure twice-born, there might be a future of beatitude secured by religious services performed in this world by sons duly adopted, (*d*) but this adoption, according to the same set of ideas, involved a dedication to the manes of the adoptive family, and the acquisition of spiritual fitness for its sacra. Thus amongst most of the classes aspiring to spiritual and social rank the religious ceremonies have grown to be regarded as at least religiously essential. (*e*) It is a mark of inferiority and remoteness from Brâhminical connexion that they should be superfluous or simply optional in any caste.

But while this continued extension of the Brâhminical ceremonies has been favoured by caste ambition other causes have worked in the contrary direction. The excessive multiplication of ceremonies, natural to the sacerdotal class, made it impossible in many cases through poverty and other causes to fulfil them all, (*f*) and as some had to be dispensed with, the idea gained ground that perhaps none were absolutely indispensable. The ancient and probably indigenous system of adoption or fosterage (*g*) required no

(*a*) Datt Mîm. V 56.

(*b*) Datt. Mîm. IV. 33, 36, 41.

(*c*) Above, pp. 924, 926.

(*d*) *See* above, p. 922.

(*e*) *See* above, p. 909. The state of things in Gujarâth where Brahminical influence of the Marâtha and Benâres schools is of quite recent introduction, is an exception that tends to prove the rule.

(*f*) Comp. Steele, L. C. 159.

(*g*) Above, pp. 919, 925; Norton, L. C. vol. I. p. 83.

more than a gift, where a capable giver existed, and a taking by the ceremonial parent. (*a*) On this the Brâhminical ritual was grafted to a varying extent. It could hardly be said with certainty what rites would by caste custom in any particular instance be deemed indispensable and which only desirable. Ignorance, haste, and other causes led to irregularities in adopting which it was highly desirable not to consider fatal to the affiliation. In some castes the spiritual purpose was disregarded, while the influence of example supported imitative ceremonies as a usual practice. (*b*) Except amongst the Brâhmaṇas perhaps nothing is precisely fixed and definite beyond a formal giving and receiving, and by a reflex action the religious ceremonies have become less essential even amongst the Brâhmaṇas than in the earlier time when they were a more peculiar people, more markedly distinct from the other castes. The wish for a temporal heir and for an object of parental affection has grown in importance as the keen appreciation of the spiritual need has declined, so that in Madras at least it has become an established doctrine that mere gift and acceptance will constitute adoption even amongst Brâhmaṇas. (*c*) In Bombay no Sâstri, so far as can be discovered, has ever lent himself to this laxity of practice. The religious ceremonies are rigorously insisted on, at any rate for Brâhmaṇas, though some indulgences in the actual performance of them have been countenanced. The definition of the essential ceremonies however is unsettled; the datta-homa is always prescribed in addition to the formal giving and taking, but beyond this it would be hard to say that any rite has been sufficiently pronounced indispensable. Even in the case of Brâhmaṇas the Courts have shown a disposition to exact as little as possible of mere ritual, (*d*) and the customary

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(*a*) As amongst the Talabda Kolis and others, *see* above, p. 927.

(*b*) *See* above, p. 922.

(*c*) *See* also above, p. 922.

(*d*) *See* above, pp. 922, 923.

ceremonies enumerated by Steele (*a*) embrace all probably that would in any case be held essential. In some of the cases (*b*) reference is made to a supposed efficacy of the ceremony for civil, though not for religious, purposes. (*c*) Even Sir T. Strange seems to have had a similar idea. (*d*) It must be pronounced altogether foreign to the Hindû law. (*e*) It is in virtue of his religious capacity that the adopted takes the place of a born son. (*f*)

A. 1.—THE ACT OF ADOPTION—ITS CHARACTER AND ESSENTIALS AS TO THE GIFT.

A gift, (*g*) which is attended with retention of ownership, even in part by the donor or subject to a condition precedent, is not by the Hindû law regarded as valid. (*h*) The considerations which apply to gifts in general are of more than usual force in the case of adoption. It is manifest that the intended purpose of adoption cannot be realized if the natural father's rights in the adopted son are retained. If the status of the son is subject to contingencies his position and that of the family he has joined are painfully uncertain. (*i*) The solemn ceremonies prescribed for a complete adoption are intended to effect an immediate and complete trans-

(*a*) *See* below, Sub-sec. D. 1.

(*b*) *See* also above, p. 947.

(*c*) See *V. Singamma* v. *Ramanuja Charlu*, 4 M. H. C. R. 165, and the cases there referred to.

(*d*) 1 Str. H. L. 96.

(*e*) See *Rajendro N Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548; L. R. 3 I. A. at p. 193.

(*f*) *See* above, p 873

(*g*) A gift in case of adoption, not a sale. *See* above, p. 894.

(*h*) *See* above, pp. 187, 440.

(*i*) *See* above, pp. 187, 929. Rights inherent in a status governed by the family law could not, under the Roman system, be affected by a contract. *See* Dig. Lib. II. Tit. XIV. Fr. 34 (Poth. Pand. § 41).

fer of the boy from the spiritual sphere of the natural to that of the adoptive family. (*a*) As far as this point there is always a *locus pœnitentiæ,* but when once the gift is consummated no revocation is allowed (*b*); the capacity to give, which belonged to the natural parents, is not so acquired by the adoptive parents (*c*) that they can restore the son they have once taken.

It follows that a mere promise or engagement in *fieri* cannot constitute an adoption. There must be a present unqualified gift and acceptance, just as in the case of marriages, otherwise there is no adoption. The Judicial Committee have insisted on the necessity (*d*) of the actual transfer in several instances. Colebrooke had previously said,—"A simple agreement to make an adoption, not carried into effect, will certainly not invalidate a subsequent adoption made with the requisite forms," (*e*) and again "Be the mode of adoption what it might, this seemed indispensable; that, at whatever time it was contended to have taken place, it should be shown by the claimant, that the operative expressions had been used, indicative of the disposition to give, or to become adopted on one side, and to adopt on the other. The Hindû law has not prescribed any particular expressions on the occasion; nor does it require that adoption should be by writing. But it has provided, that the intent shall be expressed at the time; and, if the transaction be by writing, its whole genius and course teaches us to look for it there." (*f*)

(*a*) *See* Datt. Mîm. V. 34; Vyav. May. Chap. IV. Sec. V. paras. 23, 29, 37, 38; and the formula 2 Str. H. L. 218.

(*b*) Steele, L. C. 184.

(*c*) Above, pp. 896, 916, 930. Under the Roman law the patria potestas of the adoptive father was subject to severe restrictions if he desired to use it by getting rid of the adopted son. *See* Inst. Lib. I. Tit. XI. § 3.

(*d*) Above, p. 923.

(*e*) Coleb. in 2 Str. H. L. p. 115.

(*f*) Coleb. in 2 Str. H. L. p. 143, 144.

In *The Collector of Surat* v. *Dhirsingji Vaghbaji* (*a*) Sir M. Westropp said :—" It is clear Hindû law that to constitute a valid adoption there must be a gift and acceptance," the gift after the father's death being competent only to the mother. It is only by reason of the gift indeed that the filial relation to the natural father is extinguished, or that the right of the son in the estate of the giver ceases. A mere deed or declaration by the alleged adoptive father that he has taken a boy as a foster son (pâlak putra) does not produce the effect of adoption. (*b*)

In a recent case (*c*) the Judicial Committee have recognized the nullity as an adoption of a gift and acceptance still in a measure in *fieri*, though the contract was made by a deed registered and expressed in the present tense. It was not necessary for their Lordships positively to decide whether there could be "an adoption simply by deed," because in the particular case there was an intention to complete the adoption by the ordinary ceremonies, but a strong opinion on the subject is intimated. " They desire, however, to say that they are far from wishing to give any countenance to the notion that there can be such a giving and taking as is necessary to satisfy the law, even in a case of Sûdras by mere deed without an actual delivery of the child by the father." The delivery accompanied by the requisite declaration of transfer of right makes a perfect gift forthwith. The adopted son must be given, not sold, (*d*) as the Krîta adoption is now disallowed. Hence an agreement by which the natural parents stipulated for an annuity to themselves as a consi-

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(*a*) 10 Bom. H. C. R. 235, referring to 1 Str. H. L. 95 ; Manu IX. 168 ; Mit. Chap. I. Sec. XI. para. 1.

(*b*) *Nilmadhab Das* v. *Biswambhar Das*, 12 C. W. R. P. C. 29 ; S. C. 3 B. L. R. P. C. 27 ; S. C. 13 M. I. A. 85.

(*c*) *Mahashoya Shosinath Ghose et al* v. *Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(*d*) See further below, Sub-sec. A. 6.

deration for giving their son in adoption was pronounced illegal. (*a*)

The gift must be expressly in adoption, as in the case of a wife the gift must be as in marriage. According to the Hindû law a mere gift in either case without the attendant volition would be the bestowal merely of a slave. (*b*) The religious ceremonies are important even where they are not regarded as essential, if only as marking clearly the specific nature of the gift and acceptance.

The assent of the mother, either natural or adoptive, is not absolutely necessary if her husband assents to the adoption. Without her assent "the mother's claim is not annulled by the donation," (*c*) but this claim is merely a moral one, making it expedient but not necessary to obtain a release from her as from the natural father of the son's filial duty. (*d*) For jural purposes a gift by the natural father suffices: and as an adoption is made for the sake of the sonless man his acceptance of a son in adoption suffices without the assent of his wife, as shown in the previous Section.

A. 2.—THE ACT OF ADOPTION.—CHARACTER AND ESSENTIALS AS TO THE ACCEPTANCE.

"Acceptance in a certain form is the efficient cause of filiation." (*e*) Hence there must be evidence of the taking as well as of the giving. (*f*)

(*a*) *Eshan Kishor Acharjee* v. *Harischandra Chowdhry*, 13 B. L. R 42 App.

(*b*) Coleb. Dig Bk. V. T. 273; above, p. 935.

(*c*) Coleb. Dig Bk. V. T. 273 Comm.; *see* 2 Str. H. L. 131.

(*d*) Coleb. Dig. Bk. V. T. 275 Comm.

(*e*) Coleb. Dig. Bk. V. T. 275 Comm. The salutation already noticed, p. 949, or the kissing of the boy's forehead, as it is described in Sutherland's translation of the Datt. Chand. Sec. II. 7, is a solemn indication of acceptance. *See* too Vyav. May. Chap. IV. Sec. V. para. 8.

(*f*) *Laxman bin Santaji* v. *Malu bin Ganu*, S. A. 550 of 1874.

The free consent of the giving and receiving parents is indispensable. (*a*) It is but rarely that a question on this point can arise when the giver and receiver were adult males, but in the case of women, and in that of minors, taking in adoption, should the practice be recognized (*b*) there is obviously room for abuses which ought to be guarded against. Fraud and cajolery practised on a widow, in inducing her to adopt, will be relieved against, (*c*) and a Hindû female, acting unguided by disinterested advisers, ought not to be prejudiced by her acquiescence in an adoption or a will. (*d*)

The gift and acceptance cannot be replaced by any other intimation of desire or consent. "Education and nurture do not constitute any relation entitling to inheritance." (*e*)

Although amongst Śûdras no religious ceremony is necessary except in case of marriage, (*f*) yet an adoption, even amongst Śûdras, must be completed by corporeal gift and acceptance. (*g*) A Śûdra took a boy of four years old, intending to adopt him, and thenceforth supported him, but never actually adopted him, and in course of time had three begotten sons. The Paṇḍit said this gave the boy no right as a son to share the estate, only a right to be settled in marriage. (*h*)

(*a*) Steele, L. C. 385.

(*b*) *See* above, p. 905, Note (*d*).

(*c*) *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. App. I. See *Somasekhara Râja* v. *Subhadramâji*, I. L. R. 6 Bom. 524.

(*d*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*e*) Coleb. in 2 Str. H. L. 111.

(*f*) *Sreemutty Joymoney Dossee* v. *Sreemutty Sibsoondaree Dossee*, Fult. R. 75, 76; 2 Str. H. L. 89.

(*g*) *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(*h*) 2 Macn. H. L. 198; below, Sec. VII.

A. 3.—THE ACT OF ADOPTION—ASSENT OF THE SON.

Manu (*a*) prescribes that the son given shall be not only of the same class but "affectionately disposed." This implies an assent by the boy capable of discrimination (*b*) as a token of the requisite disposition. Accordingly Jagannâtha prescribes that "no son must be given away against his will." (*c*)

A. 4.—THE ACT OF ADOPTION—CONTRACT OF ADOPTION.

An agreement to adopt a child is not rendered void by the death of one of the parties, husband and wife, who executed it. If the husband at his death refers to the agreement, the wife is authorized to adopt the child mentioned in the agreement. (*d*)

A mere agreement to adopt however is not itself an adoption, and will not invalidate a subsequent adoption made with the requisite forms. (*e*) Nor probably would such an agreement be specifically enforced any more than a contract of betrothal. (*f*)

(*a*) IX. 168.

(*b*) *See* Datt. Mîm. Sec. IV. 47.

(*c*) Coleb. Dig. Bk. V. T. 275 Comm. *See* above, pp. 930, 931. A child under eight years is considered as (dependent as) one unborn. Thence to sixteen he is called a bâla or paganda (adolescent); after that he is of full age. Nârada quoted in Viv. Chint. Transl. p. 35. Hence the Śâstris rule in favour of the widow's guardianship of a child under eight, at which age it is superseded by that of the paternal relatives. After eight years of age sufficient intelligence for religious acts is usually attributed to children, and the assent of a child so advanced is requisite to his adoption. It ought in strictness to be proved in contentious cases.

(*d*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. Sel. Dec 101; *see* also *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67, quoted below under Sub-sec. A. 7.

(*e*) Coleb. in 2 Str. H. L. 115, 135.

(*f*) See *Umed Kiká* v. *Nagindás Narotamdás*, 7 Bom. H. C. R. 122 O. C. J.; *In re Gunput Narain Singh*, I. L. R. 1 Calc. 74; Spec. Relief Act I. of 1877, Secs. 12, 21, 22.

Challa Papi Reddi v. *Challa Koti Reddi* (a) was a case in which a man *A*, adopted by his father-in-law according to the Illatam custom noticed elsewhere, (b) associated another son-in-law *B*, with himself. This was not a case of adoption, but the son of *A* was held bound by the engagement to *B* that he should share the estate with *A*.

A. 5.—THE ACT OF ADOPTION—PROOF OF THE TRANSACTION.

The fact of an adoption having been made or attempted, may be involved in varying degrees of doubt. The principles which govern the reception and appreciation of the evidence adduced in contested cases do not differ from those which operate in other departments of the law; but the special nature of the facts involved has given rise to many decisions which bear on the question of the sufficiency of particular acts and statements to constitute adoption. The same cases might properly be placed in Section VIII. on the Litigation connected with Adoption; but it may be convenient to consider them here in close connexion with the legal essentials of gift, acceptance, and assent in the act of adoption. (c)

The Courts have varied considerably in their views of the completeness of the proof of an adoption, which may properly be exacted before it is recognized in a contested case. No precise rules can be gathered from the decisions, except these, that the evidence must point to a real adoption, not to some connexion substituted for it, and that the religious ceremonies, even when not absolutely necessary, are in most castes so usual that the non-performance of them detracts much from the proof of a disputed adoption.

(a) 7 M. H. C R. 25.

(b) Above, p. 421. For a similar institution, *see* Index "Ghar-jawáhi," or Steele, L. C. 358.

(c) It will be seen below that the conduct of those interested has, in several instances, virtually been allowed to replace an act of adoption in constituting the legal relation. Occasionally even where an adoption was *prima facie* impossible. *See* p. 1096 (d).

A. 5. 1. MEANS OF PROOF.

In no case, it was laid down, should the rights of wives and daughters be transferred to strangers or remote relations, unless the fact of the adoption be proved by evidence free from suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth. (*a*)

The Court may exact but slight evidence of the performance of ceremonies on proof of the husband's permission to a widow to adopt. But from the mere observance of ritual forms no inference can be made of the permission. (*b*)

For the validity of an adoption it is not sufficient to prove that the adoption was attempted *bonâ fide*, but satisfaction of the requirements of the Hindû law must be proved. (*c*) "Even a brother's son does not become adopted by the mere performance of other sacraments for him without the ceremonies of adoption." (*d*) A person, immediately on the death of his wife from cholera, asked his brother to give him his son in adoption. The brother assented, but urged the necessity of ceremonies, which were reserved for next day. The adopter also died from cholera the same day as the wife, and the ceremonies remained unperformed. The boy went through the funeral ceremonies of the deceased person. These facts were held not to constitute a valid adoption by gift and acceptance. (*e*) Performance of funeral rites by an alleged adopted son and acquiescence of the adopter's widow will not sustain the validity of an adoption, unless it clearly appears that the act

(*a*) *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

(*b*) 1 Hay, 311

(*c*) *Teelok Chundur Raee* v. *Gyan Chundur Raee*, Beng. S. D. A. R. 1847, p. 554.

(*d*) MS. 585.

(*e*) *Kenchava* v. *Ningapa*, S. A. No. 645 of 1866, 10 Bom. H. C. R. 265.

itself was performed under circumstances rendering adoption legal. (*a*)

Long possession under an adoption will avail nothing if the adoption fails. (*b*) "A man not regularly adopted, but who has lived as a member of an undivided family for 25 years, may be ejected from the joint property by the other members." (*c*)

Still less will mere residence and general recognition avail according to some of the cases. Thus it was held that in the absence of any formal adoption a sister's son residing in his uncle's house from childhood, and recognized and treated as his son, does not acquire the legal status of adopted son. (*d*) And similarly that in the absence of any agreement mere residence with the family into which his aunt had married gives no right to any one to a share of the family property. (*e*)

A man having bought or otherwise taken a boy and brought him up as a foster-child, bequeathed part of his property to him. The Śâstri pronounced him disentitled to any more as against the blood relations in the absence of a formal adoption. (*f*)

As to the nature of the evidence required no merely technical rules have been prescribed. Thus an adoption which took place 60 years ago may be proved by oral evidence. (*g*)

(*a*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*b*) *R. Haimun Chull Singh* v. *Koomer Gunsheam Singh*, 2 Knapp. 203; S. C. 5 C. W. R. P. C. 69. *See* above, pp. 927 ss.

(*c*) MS. 123.

(*d*) *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641.

(*e*) *Y. Venkata Reddi* v. *G. Soobba Reddi*, M. S. D. A. Dec. 1858, p. 204.

(*f*) MS. 122. *See* above, p. 927; and p. 374, Q. 19.

(*g*) *Basappa* v. *Malan Gavda*, S. A. 229 of 1867. It will be seen that no writing is necessary to an adoption, though amongst some classes it is usual. Steele, L. C. 184.

Ocular testimony may indeed be dispensed with. The adoption of a son was held proved on strong circumstantial evidence, in the absence of direct proof of the performance of the necessary ceremonies. (*a*)

A. 5. 2.—PRESUMPTION IN FAVOUR OF ADOPTION.

Though a true adoption is impossible without the essential ceremonies, (*b*) the Courts have in many instances given effect to adoptions of which the direct proof was insufficient. In some of the cases the proof entirely failed. The conduct of the members of the adoptive family it was thought had in such cases created an estoppel against their denying the adoption, or else there had been so long an acquiescence in the adoptive status that the son could not, without extreme hardship, be deprived of his sonship. (*c*) To make them consistent with the general principle such cases ought to be referred, as generally they may be, consistently with the known facts, to a presumption of adoption arising from the circumstances. The position of an adopted son under such circumstances resembles that of an heir in whose favour, after long possession every reasonable presumption will be made. (*d*)

It depends upon the probabilities of each case under what circumstances an adoption may be recognized in the absence of the original deed. (*e*) There needs not, however, be a deed: the Śâstri says—"If one maintain another for a length of time, professing to have adopted him, and in fact committing

(*a*) *Perkash Chunder Roy* v. *Dhunmonee Dassia*, Beng. S. D. A. R. for 1853, p. 96.

(*b*) *i. e.* at least the transfer, and in the case of a Brâhmana, the homa, according to nearly all opinions.

(*c*) See *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*d*) See *Rajendronath Holdar's* case below, p. 1096 (*a*). Where the question is of the due performance of ceremonies, the presumption arises that all was rightly done.

(*e*) *Roopmonjooree* v. *Ramlall Sircar*, 1 C. W. R. 145.

all his affairs to his charge, having, upon his beginning to do so, invited and entertained his relations, acquainted the magistrate, and drunk manjanee, he cannot afterwards abandon the young man so adopted in favour of another; nor is the adopted compellable to renounce the connexion so formed. The relation of an adopted needs no writing for its support." (a)

A presumption arises that an adoption was duly made from the undisputed performance by the adopted in question of the kṛîya and paksha ceremonies for the members of the family of adoption. (b) The decisions agree with this, as in the following instances:—In the case of a brother's son recognized for many years and allowed by the family to perform the funeral rites of the deceased a presumption was admitted in favour of the adoption. (c) So proof of the performance of ceremonies was dispensed with where the adoption was recognized for a series of years and the adoptee had possession of property, (d) notwithstanding the continued residence of the adoptee with his natural parents. (e)

A gift by a duly authorized person in adoption is to be presumed from an adoption which has been acquiesced in for 33 years. (f) But a shorter time will suffice. An adopted son, whose adoption by a widow under a power from her

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(a) 2 Str. H. L. p. 113.

(b) Steele, L. C. 184. Kṛîya = performance, obsequies; Paksha = fortnightly, periodical *See* Steele, L. C. 27.

(c) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. 91; *Behari Lal Mullick* v. *Indramani*, 13 B. L. R. F. B 401; S. C. 21 C. W. R. 285; *Nittyanand Ghose* v. *Kishen Dyal Ghose*, 7 B. L. R. 1; S. C. 15 C. W. R. 300.

(d) *Sabo Bewa* v. *Nahagun Maiti*, 2 B. L. R. App. 51; S. C. 11 C. W. R. 380; *Rajendro Nath Holdar* v. *Jogendro Nath*, 14 M. I. A. 67; S. C. 15 C. W. R. 41 P. C.

(e) *Venkangavda* v *Jakangavda*, Bom. H. C. R. P. J. 1875, p. 49.

(f) *Anandrav* v. *Ganesh Yeshwantrav*, S. A. 373 of 1863.

husband with publicity and formality, was acted on and recognized for 27 years by the family, died possessed of property. His adoption was held good until it should be rebutted by evidence of the strongest kind, after making due allowance for all imperfections of evidence on the side of the defendant arising from lapse of time; for otherwise the adoptee would be deprived of his estate in both families, natural and adoptive. (*a*)

A plaintiff, suing for a declaration that an adoption is invalid, is even bound, it was said, to prove its invalidity, (*b*) where an adoption took place long ago and has been acted on, and the defendants are in possession by virtue of the adoption. (*c*)

The presumption has even been carried within the sphere of the law, where this was opposed to the adoption. Thus the adoption of a sister's son was upheld solely upon its having been recognized for a long time, and the impossibility of cancelling it without seriously affecting the rights of the adoptee. (*d*)

(*a*) *Rajendro Nath Holdar* v *Jogendro Nath*, 14 M. I. A. 67; S. C. 15 C. W. R. 41 P. C; *Sayamalal Dutt* v. *Saudamini Dasi*, 5 B. L. R. 362; *C. Herasutoollah* v. *Brojo Soondur Roy*, 18 C. W. R. 77.

(*b*) *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 C W. R. 463; S. C. 8 C. W. R. 241; *Hur Dyal Nag* v. *Roy Krishto Bhoomick*, 24 C. W. R. 107. *See* the cases in Note (*a*).

(*c*) *Gooroo Prosunno Singh* v. *Nil Madhub Singh*, 21 C. W. R 84.

(*d*) *Gopalayyan* v. *Raghupatiayyan*, 7 M. H. C. R. 250. The High Court however rejected the custom specially found by the District Court, and found "that communion had been created by the course of conduct of the plaintiff and his family." This illustrates Note (*c*) to Sub-section A. 5. above, p. 1091. The subsequent behaviour of the parties could not make that an adoption which really was not one. *See* the case cited below A. 5. 4. As far as the plaintiff was concerned the decision might have been placed on estoppel, but the one actually arrived at could be supported only on an absolute presumption against the rule of law as conceived by the Court.

A man having engaged that his daughter-in-law should adopt a person, and the latter having performed the promisor's funeral rites, the Śâstri said that though no regular ceremony of adoption had been celebrated, yet the adoption, if the adopted was a sapiṇḍa of the deceased, might be considered valid. (*a*) This opinion is not easy to reconcile with others or with the recognized authorities. What the Śâstri meant probably was that a formal gift and acceptance might be presumed, and that this in the case of a sapiṇḍa would constitute an adoption.

A. 5. 3—ESTOPPEL.

The doctrine of presumption in favour of adoption (*b*) has been carried further, or else considerations not strictly applicable perhaps to questions of status have been held to prevent the questioning even of an apparently invalid adoption by one who had countenanced it. In the case of an adoptive father, long recognition by one of another as his adopted son was said by the Śâstri to make an attempted supersession by another adoption illegal. Colebrooke placed his assent to this on the ground that "the circumstances authorized the presumption" that an adoption had "been actually made," (*c*) but the Śâstri considered the father bound as by estoppel.

An admission of the title of an adopted son was held strong evidence to uphold an adoption of a sister's son by a Vaiśya. (*d*) The admission has been made three times by the undivided brother of the deceased adopter. It was apparently held that the depositions were "decisive of the

(*a*) MS. 1682.

(*b*) *See* the cases under A. 5. 4.

(*c*) 2 Str. H. L. 113.

(*d*) *Ramalinga Pillai* v. *Sadasiva Pillai*, 9 M. I. A. 506, 515; S. C. 1 C. W. R. 25 P. C. The effect of this must not be carried too far. It is limited by *Gopee Lall's* case, below.

case" as "an admission of the whole title of the respondent both in fact and in law."

Active participation in the plaintiff's adoption by defendant's brother; acquiescence therein by many subsequent acts on the part of the defendant; letting the adoptive father die in the belief that the adoption was valid; concurrence in the performance of the funeral ceremonies by the plaintiff, were held to estop the defendant from disputing an adoption. (*a*) Nor need the case be quite so strong. Presence at, and acquiescence in, an adoption and association with the adopted son as such in legal proceedings estop a person, it was held, from disputing the adoption. (*b*) The Sadar Court of Madras went even so far as to say that the legality of an adoption cannot be challenged by one who has consented to it. (*c*) The Court must have thought that a duty was incumbent on the adopter's brother, the person in question, to protest or interfere.

Where with full knowledge of the invalidity of the plaintiff's father's adoption, as declared by the Court, the defendants had admitted plaintiff to a share in the family estate and executed a document to that effect, this was held binding on the defendants. (*d*)

Admissions however or acquiescence caused by mistake will not create an estoppel, as when the Judicial Committee say: "It has been argued on the part of the appellant that the defendant in this case is estopped from setting up the true facts of the case, or even asserting the law in her favour, inasmuch as she has represented in former suits and in various ways, by letters and by her actions, that Luchmunjee was the adopted son of Damoodurjee, adopted

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(*a*) *Sadashiv Moreshwar* v. *Hari Moreshwar*, 11 Bom. H. C. R. 190.

(*b*) *Chintu* v. *Dhondu*, 11 Bom. H. C. R. 192A.

(*c*) *Pillari Setti Samudrala Nayudu* v. *Rama Lakshmana*, M. S. D. A. R. 1860, p. 91.

(*d*) *Govind Balkrishna* v. *Mahadev Anant*, Bom. H. C. P. J. 1872, No. 31; P. J. 1873, No. 66.

by Damoodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee, or the defendant, on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordship's judgment is erroneous; but that creates no estoppel whatever between the parties." (a)

Thus too as to an alleged adoption by a dying man, it was said that acquiescence in the adoption by a widow who afterwards contested it, would not give it validity unless validity arose from the act itself and the circumstances under which it was performed. (b)

In another case, however, of less authority, widows who after their husbands' death, had completed the ceremony of adopting a brother begun by him, were not allowed afterwards to question the validity of the adoption. (c)

A. 5. 4 —RATIFICATION.

A similar principle to that set forth in Sub-Section 5. 3, must, it seems, be applied to the case of a ratification of adoption by widows or male sapiṇḍas. (d) The adoption must originally have been either valid or invalid, and in the latter

(a) *Gopee Lall* v. *Musst Sree Chundraolee Buhoojee*, 11 B. L. R. P. C 391, 395; S. C 19 C W. R. 12 C. R.

(b) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(c) Above, pp. 968, 1028. The adoption must have been palpably void, unless warranted by a particular custom.

(d) See *The Collector of Madura* v. *Ramalinga* (*Ramnad* case), 2 M. H. C. R. at p 233.

case it could not really be ratified as being essentially null. (a) The assent of the sapiṇḍas, when it is necessary at all, is necessary as a condition precedent to the efficacy of the widow's act. If the new status is not acquired the old one continues, with respect not only to the non-assenting sapiṇḍa but with respect to others. (b) In such a case the doctrine of ratification is not properly applicable. (c)

A 5. 5.—LIMITATION.

The Limitation Act XV. of 1877, Sch. II. Art. 118, prescribes six years after an adoption becomes known to a plaintiff as the time within which he must sue for a declaration that it was invalid or never took place. The mere omission however by a particular person to sue cannot have the effect of validating a void adoption. The particular suit by the individual is barred, but otherwise the law, it is apprehended, operates as before. (d) Similar considerations apply to Art. 119, which prescribes for a suit for a declaration of the validity of an adoption "six years from the time when the rights of the adopted son as such are interfered with." The status is not lost by forbearing to sue in a single instance.

(a) Comp *Rangamma* v. *Atchamma*, 4 M I A at p 103

(b) *Bamini Śaṅkara Pandit* v. *Ambabáy Ammál*, 1 Mad. H. C R. 363.

(c) See *Rangubái* v. *Bhágirthibái*, I. L. R. 2 Bom. 377; *Bateman* v. *Davis*, 3 Madd. 98; 2 W. & T. L. C. 806 (3rd Edn); *Wiles* v *Gresham*, 2 Drewry 258; S. C. 23 L. J. Ch. 667; Com Dig Confirmation (D 1); Shep. Touchst. 117, 311, 313, 314; *Armory* v. *Delamirie*, Notes 1 Sm. L. C. 306 (5th Edn.) "Ratification" is not a strictly correct term in relation to an act not done on behalf of those whose concurrent assent is needed to give validity to an act by another on her own behalf. Nor can ratification really change a state of facts, or touch the rights of third parties *See* Maynz, Dr, Rom. Lib. I. § 34, 85.

(d) *See* below, Sec. VIII.

A. 6.—TERMS ANNEXED TO ADOPTION.

It seems for the reasons already set forth that an adoption subject to a condition, whether precedent or a condition subsequent of defeasance, is impossible: (*a*) a contract cannot be made that the validity of an adoption, any more than of a marriage, shall be contingent on a certain volition or event. Nor can it be postponed in operation; its effect is immediate or not at all. (*b*) These rules spring from the nature of the institution, (*c*) which equally prevents other terms being appended, such as liberty to give back the boy

(*a*) Above, p. 187. *See* too Di. Lib. 50, Tit. 17, Lex. 77.

(*b*) *Ib* The formula of gift imports this.

(*c*) By the Roman law, until a late period, mancipation was an essential part of adoption, and mancipation was a solemn public act. Like some other important jural acts it could not be done subject to a condition or to a term postponing its effect to a future day. Such qualifications were abhorrent to the simplicity of primitive ideas, and too great a burden for the memory of the witnesses by whose recollection, in case of future dispute, the transaction would have to be proved. *See* Goudsm, Pand. p 155; Maynz, Dr., Rom. III. 86. 87 (3rd Edn.); Maine, Anc. Law, p 206 (3rd Edn). As society advanced the magistrate became of more, and the witnesses of less importance, but in exercising a kind of voluntary jurisdiction he long preserved the old forms, and he had to guard the interests of the community as these became more clearly conceived The considerations stated at p. 187 above then rose into manifest importance. Disastrous results must sometimes arise from its being a conditional matter, whether a certain man is, or is not, the husband of a certain woman, or the legal father of a certain other man. So too as to the celebration of the sacra by a person of doubtful competence. The family law consists for the most part of defined duties and rights annexed to mutual relations understood as absolute, and fixed once for all by birth, marriage, and other events of an invariable character, whoever may be the subject of them.

Some authentication of adoptions would prevent many law-suits in India. As to the use of public authentications of transactions under the Roman and the Teutonic systems, *see* Meyer, Inst. Jud. Tom. I. p. 305 ss. The records of the Courts in England were originally the recollections of official witnesses. *See* Bigelow, Hist. Proc. pp. 318 ss.

adopted or to adopt other sons which would involve the parties most concerned in perilous uncertainties. (*a*) The disposal of the adoptive father's estate should, according to the older Hindû law, be governed by rules as little subject to individual caprice as any within the system, but as separate property, and freedom of disposal have grown up, endeavours have been made to retain the spiritual advantages of adoption while avoiding the risks of handing over properties to the adopted sons. Certain terms as to property on which a boy is adopted are frequently committed to writing; and how far, if at all, they bind the adopted son, is becoming a question of great practical importance. (*b*)

By adoption a widow of a Hindu severed from his brethren deprives herself of her interest in the estate. (*c*) The adopted son immediately displaces her as heir with a retroactive effect. (*d*) In order to prevent this a widow sometimes endeavours to annex terms to the adoption by which she is secured a life interest in the estate and the management of it. Effect has been given to bargains of this kind in some instances, but the Sâstris have not approved them, and they must be regarded probably as opposed to the strict Hindû law of the Sâstras. It has been said that as a father may even sell his son (*e*) much more may he part with him in adoption on such terms as he thinks reasonable. But the sale of a son (*f*) is allowed only as a last resource in a time of distress. (*g*) The Krîta adoption by purchase is distinctly

(*a*) Comp. p. 90.

(*b*) *See* above, p 187.

(*c*) Steele, L. C. 47, 48, 185, 186, 188

(*d*) 2 Str H L 127; below, Sec VII

(*e*) Coleb. Dig. Bk III. Chap I T 33 Com

(*f*) 2 Str H L. 224. *See* above, pp 891, 896

(*g*) Yâjñavalkya prohibits it wholly. *See* Coleb Dig Bk. II. Chap. IV TT. 7, 16. *See* below.

forbidden, (a) so that the *à fortiori* argument is met by a prohibition in a nearer case. The adopted son ranks as if born at his adoptive father's death: his mother could not appropriate to herself the estate of her child; nor could she as his guardian legally make a gain for herself at his cost out of a transaction in which she was bound to do the best for her ward. The adoption invests the adopted with the estate as a support for the sacra; the widow took it but provisionally in her lower capacity for securing beatitude to her deceased husband, (b) and this connexion being established by the law of the family is superior to a convention in which the adopted son himself takes no part. Where indeed he is of full age and assents to injurious terms it may be that he is bound to fulfil them, but it is as under a contract which cannot prevent the estate from passing to him the moment he becomes son to the deceased adoptive father. From the Hindû point of view indeed it is questionable whether in consenting to be adopted a man can lawfully accept terms which sever the estate, even temporarily, from the obligatory sacra; but as on acquiring the property he cannot be prohibited from dealing with it, the previous bargaining can hardly in practice be prevented in the case of an adult adopted son. (c)

Even in the case of adoptions by males terms are sometimes made which alter the rights and obligations properly incident to the position of the adopted son as such. It is not possible perhaps to draw a precise dividing line between the bargains and settlements of this kind allowed and

(a) 2 Str H. L. 175 (Colebrooke).

(b) *See* above, pp. 93, 872, 985.

(c) Such a case as that of *Tara Munee* v. *Deb Narayan Rai*, 3 B. S. D. A. R. 387, could hardly now be upheld. The declaration of the adopted son that in certain events his adoption should be null could not make it null. As to agnatic rights the case is expressly provided against by the Roman law, Dig. Lib. 2, Tit. 14, Lex. 34.

disallowed by the Hindû law. (*a*) The principles already stated apply to them, and all are subject to the control of the Court as representing the Sovereign according to Hindû principles in protecting the weak and helpless. (*b*)

In the following case a contract was made which only expressed a right subsisting without it. A watandar's nephew adopted by him agreed to pay his daughter money in lieu of ornaments. On her death a balance remained due. Her daughter was pronounced entitled to claim it as "Saudayak strîdhaṇa" of her mother. (*c*) The Sâstri admits alternatively to the claim arising from family connexion that the son may have passed the agreement in consideration of the benefit he received by the adoption, but the case is but a weak one. The Sâstris seem generally to have thought that limitations annexed to adoption by which the adopted son would be deprived of the usual advantages of his position could not be enforced. The decisions referred to above, p. 187, are on the whole to the same effect. In a case wherein a Lingâyat of full age, about to be adopted by a widow, had agreed that she should retain the management of the estate, the Śástri said that nevertheless the adopted son was entitled to the management, as the widow by adopting had necessarily become dependent (*d*) except as to her strîdhaṇa and her right to maintenance. (*e*) If the dependence of a widow having a son is regarded as a part of the public law (*f*)

(*a*) Under the Roman law the terms had to be examined and approved by a judicial officer of rank. If prejudiced the adopted son could get himself set free. *See* Inst. Lib. I. Tit. XI. § 3 ; Dî. Lib. I. Tit. VII. ff. 32, 33.

(*b*) Manu VIII. 27 ; Viv. Chint. Transl. p. 300 ; Coleb. Dig. Bk. V. T. 450 ss ; 2 Str. H. L. 80

(*c*) MS. 1566.

(*d*) *See* Mit. Chap. II. Sec. I. p. 25 ; Manu V. 147, 148.

(*e*) MS. 1743.

(*f*) *See* Coleb. Dig. Bk. IV. Chap. I. T. 4, 5 ; Bk. II. Chap. IV. T. 55 Comm. *ad fin* ; Bk. III. Chap. I. T. 52 Com. ; 2 Str. H. L 96.

creating a relation not variable by the will of the individuals immediately concerned, (*a*) this answer is correct, and such no doubt was the view of the Śâstri. As a part of the family law resting on sacred texts it may well be supported, and the legal relations of the parties in other respects would, for the most part, be defined by the law, (*b*) not left to the exercise of free volition, but it does not appear that the principle has so far been distinctly embodied in any adjudication of the superior Courts.

In another case a similar agreement had been made with the adopting father and mother. On the death of the father the Sâstri said the adopted son succeeded to his estate, but that it would be (morally) wrong for him to break his agreement and disobey his mother, unless she was wasting the property through ill-will towards the son. (*c*) The Śâstri, as in the case noted above, p. 187, must have thought the condition so repugnant to the status taken by adoption, that effect could not be given to it. In the case of a kṛitrima adoption however (*d*) the Judicial Committee appear to have thought that such a condition might be annexed to the adoption, and in *Ramasarmi's* case (*e*) it was held that an agreement by the real father in derogation of the rights as adopted son of his son whom he was giving in adoption "was not void, but was at the least capable of ratification when the son came of age." But what requires ratification admits of repudiation, so that if ratification was necessary (which is not said) the son could not be prejudiced by such a transaction as the one in question. The Sâstris' opinions therefore can hardly be said to have been authorita-

(*a*) See *In re Kahândás Nárandás*, I. L. R. 5 Bom. at p. 164.

(*b*) *See* above, p. 367 Note (*c*).

(*c*) MS. 1728.

(*d*) *Musst. Imrit Koonwar* v. *Roop Narain*, Pr. Co. 15th March 1879; 6 Cal. R. 76.

(*e*) Above, p. 187.

tively set aside, and though an adopted son may resign his rights (*a*) it does not seem consistent with the older principles of the Hindû law, as set forth in the Śâstras, that a man, still less that a woman, adopting a son should be at liberty at the same time to disinherit him, and so sever the estate from the obligation to perform the sacra and maintain the helpless members of the family. Nor can the real father properly give his son on such terms. A father has not ownership in his son as in a chattel. (*b*) This is obviously important with reference to the possibility of accepting conditions injurious to the son, such as might arise through arrangements of the kind recognized in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*, (*c*) *Chitko Raghunath* v. *Janaki*, (*d*) and in *Radhabai* v. *Ganesh Tatya Gholap*, (*e*) however defensible in particular cases these may be on other grounds.

It would seem from the considerations that have been stated that the Sastris' view of this subject can hardly be contested on the ground which they have chosen. But it is certain that it is not allowed to govern the actual practice of the people; amongst whom fair arrangements for the protection of the widow's interest, during her life, are commonly made, and are always supported by the authority of the caste. (*f*) This is especially the case when the property was newly-acquired by the father: it is generally felt as to such property that his wishes expressed or understood ought to prevail, and that his widow has an interest which ought to be protected. (*g*) Sometimes the husband settles terms in an adoption made by himself. Sometimes he annexes to his will or to his permission to adopt specific terms as to the

(*a*) *See* above, pp. 340, 358.

(*b*) Vyav May. Chap. IV. Sec. I. paras. 11, 12, and Sec IX. para. 2.

(*c*) 6 Bom. H. C. R. 224.

(*d*) 11 Bom. H. C. R. 199.

(*e*) I. L. R. 3 Bom. 7.

(*f*) The answers to Questions 3, p. 366, and 10 p 370, above, were no doubt influenced by a sense of this.

(*g*) Comp. above, p 653 Note (*c*)

enjoyment of his sole or separate property. In some cases he leaves the whole or part of his property to relatives or to a charity, subject perhaps to a life interest of his widow or some other person. In other cases he gives no direction and dies intestate. Somewhat different questions arise under these different circumstances, and different views have been taken by the authorities.

In the case of an alleged adoption by a male of a nephew on condition or with a reserve to the wife of the adopter of a life enjoyment of the immoveable property, and after her death of the self-acquired property to the adopter's daughters, the Judicial Committee said only that it would take very strong evidence to prove such an adoption, and held it had not been proved. (a)

In *Vinayak* v. *Govindrao* (b) a direction was given to adopt a nephew by a will which greatly limited the estate to be taken by him as son. This was upheld on the ground that a sufficient provision was made for the adopted son and that he, after his adoption, had assented to the will and taken the benefit which it secured to him.

In a case however in which a will was thought effectual by the Pandits, they added :—"If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the will according to the Hindû law, it being incompetent for the testator, who authorized the adoption of a son, to alienate the whole of his estate, (c) and thereby injure the means of the maintenance of his would-be-heir." (d)

(a) *Imrit Konwar* v. *Roop Narain Singh*, 6 Cal. R. 76.

(b) 6 Bom. H. C. R. 221 A. C. J.

(c) *See* above, pp. 216, 618, 758; Vyav. May. Chap. IX para. 2.

(d) *Nagalutchmee Ummal* v. *Gopoo Nadaraja*, 6 M. I. A. 320. *See* above, pp. 213, 214, 219, 220.

In the case of an authority to adopt, unaccompanied by limitations of the property, the Judicial Committee said that—"A son adopted under a permission by a widow takes as such by inheritance from his adoptive father, not by devise." (*a*) If he takes without qualification as a son by inheritance it does not seem consistent with that, that he should be subjected to other terms by either adoptive parent than such as could be imposed on a son by birth. This was the view taken by the Śâstri in the case referred to at p. 187. He pronounced the adopted son's right unaffected by stipulations imposed on him by the widow in her own interest.

The terms stated in the deed, where there is one, usually embody the notions of the parties as to the legal effect of the adoption, (*b*) but this is by no means always the case. In *Chitko* v. *Janaki* (*c*) a widow adopted without, as appears, any direction from her husband. She contracted with the boy's father for his entire exclusion from any proprietary right, and for his heirship to her "subject" to these "conditions" or rather limitations. They could hardly be pronounced reasonable, but on account of the poverty of the boy's family they were upheld by the High Court. If the boy however immediately on the change in his status by adoption became heir to his adoptive father taking by inheritance an unqualified estate, the agreement must, it would seem, have been void. The widow's contract with the boy's father to the boy's detriment would no more stand than such bargains of her's with other persons.

When this ruling came under the observation of the Judicial Committee, their Lordships pronounced it a matter not unattended with difficulty. (*d*) In the particular case they

(*a*) *Bhoobun Moyee's* case, 10 M. I. A. at p. 311.

(*b*) As in the case at Steele, L. C. p. 183.

(*c*) 11 Bom. H. C. R. 199

(*d*) *Ramasawmi* v. *Venkataramaiyan*, L. R. 6 I. A. at p. 208.

had at the time to deal with, their Lordships found that the bargain was one that could be and had been ratified by the adoptive son after he became of age.

It has been more emphatically dissented from by the High Court at Madras. (*a*) Sir C. Turner, C. J., there said—"We are of opinion that a child taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption, and that, like other agreements made on behalf of minors for other than necessary purposes, it would lie with the minor, when he came of age, to consent to or repudiate them. (*b*) This we understand to be the effect of the ruling of the Judicial Committee in *Rámasámi Aiyar* v. *Vencataramaiyan*." (*c*)

In Special Appeal No. 32 of 1871 (*d*) of the High Court of Bombay it was thought, however, following *Vinayak* v. *Govindrao*, (*e*) to be at least possible that a widow adopting might reserve to herself a material part of the estate.

A distinction may no doubt be taken between the widow adopting on a general authority or without authority, and one adopting under terms defined by the deceased husband. At Calcutta the husband's authority to limit at will the estate to be taken by his widow and by the son she was to

(*a*) In the judgment of the latter a compromise by the widow of claims set up by the members of her husband's family was upheld, though made with a view to adoption, and directly diminishing the estate. It was thought a fair arrangement in itself, and one therefore which was not affected by the subsequent adoption (See above, p. 367.)

(*b*) See *Bamundoss Mookerjea* v. *Musst Tarinee*, 7 M. I. A. 169; *Nathaji* v. *Hari*, 8 Bom H. C. R. 67 A. C. J.

(*c*) L. R. 6. I. A. 196; *Lakshmana Rau* v. *Lakshmi Ammál*, I. L. R. 4 Mad. 160, 163.

(*d*) Decided 12th June 1871

(*e*) Above, p. 1106 Note (*b*)

adopt has been fully recognized. (*a*) A power of adoption having been given by will to a wife, coupled with a direction that the widow should, during her life, retain all testator's property, ancestral as well as self-acquired, it was held that the widow after adopting had a life interest with remainder to the adopted son. (*b*)

It does not seem possible to reconcile with this last decision the opinion of the Sâstris given in the earlier case. (*c*) In Bombay and the other provinces subject to the law of the Mitâksharâ a father's power of devise as against living sons is strictly limited, (*d*) and the Sâstris' opinion would substantially express the law. If the son adopted by a widow under a general power given by will takes even in Bengal otherwise than by inheritance, there is a difficulty on the decisions in conceiving how he can take at all. He may not have been born in the life of the testator, (*e*) he could certainly not be ascertained at the moment of his death. No gift could be made to such a person nor consequently could a bequest. (*f*) If however the adopted son takes by inheritance even the father's power of devise to his injury is very restricted. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender*

(*a*) The terms must, it seems, have been accepted by the boy's real father; otherwise a contention would have been raised on the ground of concealment of the limitations by the widow.

(*b*) *Bepin Behari Bundopadhya* v *Brojo Nath Mookhopadhya*, I. L. R. 8 Cal. 357, following *Mus. t. Bhagbutti Daee* v. *Chowdhry Bholanath*, I. L. R. 2 I. A. 256. The latter was not a case of adoption but of a settlement by a man on his wife with the concurrence of his Kritrima son to whom was given a remainder on the wife's death.

(*c*) In a case where the widow was given "absolute control" and possession during her life, Sir R. Couch, C. J., refrained from saying whether she took more than a power of management for the proposed son in adoption. *Râmguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

(*d*) *See* above, pp. 209, 216, 219.

(*e*) Above, p. 1055.

(*f*) *See* the *Tagore* case, L. R. S. I. A. 47, 67, 70; *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

Pertab Sahee (a) the Judicial Committee say:—"A man (with male descendants) may dispose by will of his separate and self-acquired property . . . . *if moveable*, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants."

The husband who authorizes a widow to adopt has not sons as coparceners to interfere with his disposal of his property, and an adoption by him after such a disposal could not affect it. (b) But the case just referred to shows that a gift or devise, made after an adoption "could not prevail to any extent against the son," (c) so that if the adoption by the widow is absolutely retroactive a will in her favour being overcome by the son's survivorship cannot secure her against the ordinary risks of adoption. A mṛitya patra in a form not uncommon may be more effectual by giving her an immediate interest in the property subject to the life-use of the donor. (d)

It is obviously somewhat inconsistent with the theory of a complete continuity of ideal existence between the son adopted by a widow and the predeceased adoptive father that the widow should be able to stipulate for terms other than those of the son's taking the whole estate with all its responsibilities. (e) This theory has in many cases been applied

(a) 12 M. I. A. at p. 38; see also *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 5 Bom. 48

(b) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 631

(c) Jud. Cit. at p. 637, and cases there referred to.

(d) *See* above, pp. 218 Note (c), 221. This form of will avoids the distinction drawn by the High Court of Madras between the gift and the will of an unseparated Hindû, unless the gift itself be deemed incomplete until separate possession of the property is given. *See* Coleb. Dig. Bk. II. Chap. IV. T. 56 Comm.; above, pp. 685, 695, 707 Note (c); *Villa Butten* v. *Yamenamma*, 8 M. H. C. R. 6.

(e) *See* above, p. 165. It is shown there that a Hindû inheritance is by native lawyers conceived as a *universitas*. The son takes it with all its burdens even though he should resign a part to the adoptive mother.

so as to annul the intermediate transactions of the widow, (*a*) but withal it is not a thorough-going theory as is seen in the case of collateral succession between the decease and the adoption. (*b*) The recognition of separate property however implies a right to dispose of it by the husband, and wills being allowed, he can give or bequeath to his widow as against an existing son, (*c*) much more it may be said as against a son to be adopted. (*d*) If dying sonless he makes no will, his widow takes his separate estate by inheritance, (*e*) and even with respect to the immoveable property, as she cannot be forced to adopt at all, it seems a necessary concession that she should be allowed to impose reasonable terms on an adoption for her own security. (*f*) By avoiding any disposition her deceased husband has, under the law of Bombay, made her discretion virtually his own. If he has given particular directions these must probably be regarded as conditions, without compliance with which an adoption cannot be made in so far as they are conditions precedent, (*h*) and which otherwise attend the adoption and govern the rights of property arising under it, so far as is consistent with the status induced by the adoption. The terms must, to satisfy in any degree the Hindû law be not grossly unfair to an infant adopted, and must be subject to control and revision by the Civil Court.

(*a*) Above, pp. 101, 367; *Rajkristo Roy* v *Kishore Mohun*, 3 C. W R. 14; MS. 1716; 2 Str. H. L 127.

(*b*) *See* too above, pp 94, 96.

(*c*) Above, pp. 207, 208, 219.

(*d*) *See* above, p 641.

(*e*) Above, pp. 88, 94; Mit. Chap. II. Sec. I, p. 39

(*f*) Analogy would suggest a possible reserve of one half as on a partition with her son she would take so much. *See* above, pp. 778, 782; Steele, L. C. 59. The Śâstris' view of the proper extent of the mother's right was the same. *See* pp. 366, 370.

(*k*) Comp. *Rangubâi* v. *Bhagirthibâi*, I. L. R. 2 Bom. 377.

Though the Hindû law, in its earlier form, strictly guarding the family estate, imposed rigorous limitations on gifts to females (*a*) it is inconsistent with its later development that they should not be capable of taking as large an estate as a donor is capable of bestowing. (*b*) The Mitâksharâ's doctrine of the widow's inheritance (*c*) implies that she may take the whole interest of her husband. (*d*) The restrictions on her dealing with the immoveable property (*e*) show that when they were set forth the law had not yet become fully unfolded. In the present age when individual right has taken a much higher place than formerly, and a man may dispose freely even of self-acquired lands, (*f*) it seems to follow that he may bestow them by gift or devise on a wife or widow as well as on any one else. As regards moveables no doubt can exist. The cases referred to above, pp. 208, 293, 315, show that an interest much larger than the technical widow's estate (*g*) may be given to a woman, (*h*) and it has recently been expressly ruled (*i*) that a man owning separate property may devise it without limitation to his widows. The widows thus dowered might adopt a son, and the question would then arise of whether by doing so they must necessarily defeat their own estate by a retrospective operation of the adoption so as to nullify the will. The husband's gift to them of his separate property could not be defeated by his son, whether born or adopted, unless the

(*a*) Above. p. 271.
(*b*) *See* above, pp. 208, 219, 293.
(*c*) Mit. Chap. II. Sec. I. para. 39.
(*d*) Above, pp. 149, 295 ss.
(*e*) Above, pp. 299 ss.
(*f*) Above, pp. 772, 812.
(*g*) Above, pp. 94 as
(*h*) *See* above, p. 777.
(*i*) *Mulchand* v. *Bai Mancha*, Bom H C. P. J. 1883, p. 199; S. C. I. L. R 7 Bom. 491, following *Jeewun Panda* v. *Musst Sona*, N. W. P. H. C. R. 1869, p. 6. The father could not disinherit his son by will under the Mitâksharâ law, as in *Prosunno Coomar Ghose* v. *Tarracknath Sirkar*, 10 B. L. R. 267. *See* above, pp. 207, 208, 219, 365, 587; 2 Str. H. L. 19, 21.

son were thus reduced to indigence, (a) and as in the particular case the wishes of the husband in favour of the widows have been strongly signified, there seems to be no valid reason why they should not be at liberty to make a reasonable reserve for themselves in settling the terms of an adoption. The assumed will of the deceased in favour of adoption may be supposed to have been thus conditioned, and the act of adoption to connect itself by relation with the purpose or permission that gives it effect. (b)

Where a deed of permission or a will has explicitly set forth the terms on which the deceased wished an adoption to be made, there should, it seems, be still less difficulty in giving effect to such terms wherever they are not wholly unreasonable. In the case of simple inheritance by a widow a transaction by which she defeats the rights of a quasi-posthumous son is certainly opposed to jural theory. (c) Nor could a widow even claim a partition with her son so as to obtain an equal share. (d) Her power to make stipulations in adopting must apparently be placed on the general subordination of merely pecuniary arrangements to the will of those concerned, on her faculty to adopt or not at pleasure, and on the benefit to be secured both to her husband and to the child of her choice (e) by not making the hazards of adoption too great. As it rests thus on considerations outside a strict construction of the law, it is peculiarly a subject for the equitable jurisdiction of the Courts, the exercise of which is most strongly called for where an infant is transferred from his family of birth and deprived of the rights annexed to his position there.

(a) Above, pp. 208, 216, 772

(b) *See* Vin. Abrt. Tit. Relation.

(c) Unless it can be maintained that in making no disposition the husband has intended her to be unlimited owner even of the immoveable property. This is not admitted by the Courts. *See* the Section on Strîdhaṇa.

(d) *See* above, pp. 653, 824.

(e) An analogy may be found in the marriage settlements arranged for minors by their parents under the English law.

The older authorities, both text books and decisions, agree in a great measure with the strictness of the Śâstris' view. It is only within a short time that a relaxation is to be noticed conformable to what has long been the usage in Bombay, and now perhaps going beyond it. As usual under such circumstances the decisions have not been quite consistent. In one case no such condition, it was said, as that an adoption of a boy remaining good so long only as he was obedient to the mother was proved to have been imposed upon an adoptee at adoption, and even if it were, such a condition would be invalid. (*a*) In some other cases, however, such a stipulation has been held not invalid, as in the one noted below, notwithstanding the widow's acknowledgment of the adoption and Government's having acted upon it without question. (*b*) The Śastri however would not allow even the adoptive son by contract to divest himself of his estate. An adoptive mother (Kolî) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Śâstri illegal, and the adopted son, if capable, still entitled to inherit, subject to the duty of maintaining the mother. (*c*)

The early cases are equally restrictive of the widow's right. The adoption, it was ruled, works retrospectively, notwithstanding that the adopting widow had declared in the adoption deed that the estate was to remain with her during her life. (*d*) So also an attempt by a widow in adopting to reserve the estate to herself for life by a formal declaration in writing was pronounced of no avail. (*e*)

(*a*) *Ram Surun Doss* v *Musst. Pran Koer*, N W. P. R. for 1865, Pt. 1, 293.

(*b*) *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 4 N. W. P. R. 103A.

(*c*) MS. 15.

(*d*) *Musst. Solukhna* v. *Ramdoolal Pandé et al*, 1 C. S. D. A. R. p. 324. In *Radhabai* v. *Damodar Krishnarao*, Bom. H. C. P. J. for 1878, p. 9, a document of somewhat doubtful import was construed as not intended to deprive an adopted son of his ordinary rights, and thus a discussion of *Chitko* v. *Janaki*, 11 Bom. H. C. R. 199, was avoided.

(*e*) *Musst. Sabitra Dace* v. *Suturjhun Sutputtee*, 2 C. S. D. A. R. 21.

The relative position of the adoptive mother and son are thus defined by Colebrooke :—" Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper strîdhaṇa it ceased to be her's at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian." (*a*) Treating the interval before adoption like a time of gestation the husband's bequests to his widow might take effect according to principles generally recognized. In the case of an intestacy recourse must be had it seems to popular usage, as a ground for an indulgence to the widow which is foreign to the system of the Śâstras.

It was conformable to this, that in the case above where a widow had reserved to herself a portion of property at the adoption, it was held she could sue in her own name in respect thereof. (*b*)

A. 7.—ASSENT AS A VALUABLE CONSIDERATION.

However restricted the capacity may be for varying the rights and duties annexed to the status of an adopted son, yet the boy whom it is proposed to give in adoption, and who has reached years of discretion, may exact terms from his family of birth. His assent to be given in adoption was held to be a good consideration for an agreement on the part of his brother, whose interest was necessarily augment-

(*a*) 2 Str. H. L. p. 127.

(*b*) *Oomabai* v. *Sakatmal*, S. A. No. 32 of 1871.

ed by the transaction, to give him a building site with a supply of water. (*a*)

An engagement to adopt and to settle property on the adopted, in consequence of which parents actually give their son to the keeping of the promisor, is a contract that can be specifically enforced. It stands on a footing similar to that of a promise serving as an inducement to marriage, and the representative of the promisor may be compelled to make good the promised settlement. The estate which had passed to the promisor's widow was held bound by the contract to which she gave full effect by transferring the property thirty years after her husband's death. (*b*)

Parents are not, however, allowed to annex to the gift of their son conditions in their own favour, exposing him to the risk of the adoption's being declared void. (*c*) The Court refused to give effect to such a contract. Nor are the sapiṇḍas, whose assent may be needed, at liberty to sell their assent as if it were a right of property. As to such a (supposed) case the Judicial Committee said—"The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption." (*d*)

(*a*) S. A 133 of 1874; *Ramkrishna Moreshwar* v. *Shivram Dinkar*, Bom. H. C. P. J. 1875, p. 169. The elder brother executed a conveyance to the younger.

(*b*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*c*) *E. K Acharjee Chowdhry* v. *Hurischandra Chowdry*, 13 B. L. R. 42, App. Reference is made to Sec. 23 of the Indian Contract Act (IX. of 1872); S. C. 21 C. W. R. 381, 382; *see* above, p. 894 note (*g*).

(*d*) The *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397, 413. *See* above, pp. 986 ss, 1005.

B.—THE ACT OF ADOPTION—THE PERSONS WHOSE PARTICIPATION IS REQUIRED.

B. 1.—IN REGULAR ADOPTIONS.

The persons who must attend at an adoption are—(1) Parents or survivors thereof on either side of the boy, or their representatives. (*a*) (2) The boy to be adopted. (3) The officiating priest or priests in the castes in which sacrifices are thought indispensable.

Persons who may be invited to attend at adoption, but whose non-attendance does not affect validity of adoption, are—(1) Near kinsmen. (*b*) (2) Neighbouring gentry. (*c*) (3) Visitors, standers by, who may become witnesses of adoption. (*d*)

B. 1. 1.—THE PARENTS GIVING.

"The giver and receiver should both be present at the ceremony of adoption. It should take place at the adopter's house or other place free from impurity. The adopter must personally (not by deputy) take the child." (*e*)

(*a*) Sir F. Macn. Cons. H. L. p. 218; 2 Str. H. L. p. 87. Under the Roman Law " Is qui adoptat vindicat apud prætorem filium suum esse," Gaius I. § 134: after an " in jure cessio" by the natural father. The ancient form is given in the Digest (Lib. I. Tit VII.) the giver saying " Mancipo tibi hunc filium qui meus est," and the receiver " Hunc ego hominem jure quiritium meum esse aio, isque mihi emptus est hoc ære æneaque libra." Poth Pand I. § VIII.

As usual in solemn ceremonies the personal presence of the parties was necessary. They had to make the prescribed declaration before a magistrate of high rank, whose authority then attached to the relation contracted in his presence; mere documents were ineffectual. *Ib.* An irregular adoption could be confirmed after a judicial inquiry and hearing those who opposed it. *Ib.* § XV.

(*b*) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*c*) *Sootrugun Sutputty* v. *Sabitra Dye*; 2 Knapp, 387; S. C. 5 C. W. R. P. C. 109.

(*d*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. 91.

(*e*) MS. 1675. *See* above, p. 930.

The presence of the natural or the adoptive mother, it was held, is not necessary if the fathers be present. (*a*) In the particular case the parties were Śûdras, but the ceremonies imply the presence only of the fathers (when living) as indispensable even amongst the higher castes. In a case where proof of gift was wanting, either by the father or the mother of the boy, it was said that a deed executed only by the adoptive father was insufficient to establish an adoption. (*b*)

Similarly in a case before the Judicial Committee it was laid down that the requisite declaration of gift can be made only by the parent (*c*) giving the boy. An instrument signed by the adopter and declaring the boy his representative is ineffectual for this purpose, (*d*) and is needless. A Śâstri says "When either of the parents has given a son by pouring water on his hands the gift is complete." (The gift was in the question stated as made by the father.)(*e*) "The parents need not consult their relatives." (*f*)

The corporeal gift of the boy to be adopted may be made by deputy as by a wife, or a brother of the real father, or as a deputy of a widow by her uncle when the request and assent have passed between the real and the adoptive parents. (*g*)

(*a*) *Alvar Ammaul* v. *Ramasawmy Naiken*, 2 M. S. D. A. R. 67.

(*b*) *Lakshman* v. *Malu bin Ganu*, Bom. H. C. P. J 1875, p. 186. See above, p. 910.

(*c*) *See* above, p 896.

(*d*) *Nilmadhab Das* v. *Bishumbhar Das*, 3 B. L. R. 27 P. C ; S. C. 13 M. I. A. 85

(*e*) MS. 1677.

(*g*) *Vijiarangam* v. *Lakshuman*, 8 Bom. H. C. R. at p. 256-7 ; ***Rangubai*** v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Jamnabai* v. ***Raychand***, I. L. R. 7 Bom 229.

B. 1. 2.—THE PARENTS TAKING.

"It is ordained that the husband and wife, among the Śûdras, should be present, and that they should cause a Brâhmin to make oblation to fire." (a)

The wife, as we have seen above, Section III., may act under a delegation from her husband in giving or receiving a son in adoption. In such a case the husband's presence is of course dispensed with.

(1) Adoption by a wife of a son in her husband's lifetime; (2) carrying on a suit on his behalf and in his name; (3) non-denial of adoption, were held to be strong circumstantial evidence in favour of adoption with the husband's consent and with due ceremonies performed. (b)

When one of the adoptive parents has died the other may accept in adoption subject to the conditions already considered. When both are dead, as the acceptance by either parent is impossible, the adoption itself becomes impossible also. The exceptions admitted in a few cases have been considered under Sec. III. (c) The law was thus laid down by the High Court of Bombay:—" There must be not only a giving but an acceptance manifested by some overt act to constitute an adoption according to Hindû law. (d) Here there is said to have been a giving, but to whom? to two dead persons, the only two who could have adopted a son to the man." (e)

B. 1. 3.—PRESENCE OF THE CHILD GIVEN.

The indispensable manual delivery and acceptance of the boy adopted (f) implies of necessity his presence at the

(a) 2 Str. H L p. 130.

(b) *Tincowrie Chatterjee* v. *Denonath Banerjee*, W. R. 1864, p. 155.

(c) Above, p. 1012.

(d) 1 Str. H. L. 95; Manu IX. 168.

(e) Per Westropp, C. J., *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 265.

(f) Steele, L. C. 184.

ceremony. This gives him the opportunity, should he object to the transaction, of expressing his dissent. (*a*)

B. 1. 4.—PRESENCE OF RELATIVES.

"The adopter's kinsmen ought to be convened, but their assent is not necessary." (*b*)

B. 2.—IN CASES OF ANOMALOUS ADOPTIONS.

In the quasi-adoptions in vogue amongst some castes of the Bombay Presidency (*c*) no forms appear to be used beyond those intimating assent on both sides, nor is the presence of relatives thought requisite.

In a kṛitrima adoption the consent of the party adopted is essential to the validity of it, (*d*) and should be expressed simultaneously with the acceptance of the adopter.

In Macnaghten, H. L. vol. II. pp. 196 ss, will be found several cases of kṛitrima adoptions. Nothing seems essential but the assent of the parties and of the boy's parents if they are alive. (*e*)

C.—EXTERNAL CONDITIONS TO BE SATISFIED.

C. 1.—AS TO PUBLICITY.

To render adoption complete, there must be a public act of giving and receiving, accompanied by a performance of some religious ceremony. (*f*)

(*a*) *See* above, A. 3.

(*b*) MSS 1631, 1677 If the doctrine of the *Saṃskârakaustubha*, as to the widow's independence in adopting be taken as law for the Bombay Presidency, the presence of relatives cannot be necessary, as an intimation of a superfluous assent, *see* above, pp 864, 880, 901; *Vasishṭha*, XV. 6

(*c*) Above, p 927

(*d*) *Lachman Lall* v. *Mohun Lall*, 16 C. W. R. 179.

(*e*) Suth. Syn. Notes xv. xvi.

(*f*) *S. Siddesory Dossee* v. *Doorgachurn Sett*, 1 Bourke, pp. 360, 361.

"It is enjoined that notice of an adoption should be given to the relations within the (the circle of the) Sagotr Sapiṇḍas and to the Râja, though no provision appears in case of their disapprobation, even in adoptions by widows." (a)

This injunction bears less on the choice amongst different boys in the family than on the necessity or at least the desirableness of the countenance of all members of the family to the celebration of a religious ceremony. To show their assent and presence they ought to sign the deed when there is one. (b)

"Intimation of an intended adoption should be given to a Mamlutdar or other Government officer of the vicinity, but the want of it does not vitiate an adoption otherwise made with due ceremony." (c)

Publicity is not absolutely essential to validity of adoption, yet it is always sought for on such occasions. (d)

C 2—AS TO TIME.

"A fortunate day ought to be selected for an adoption." (e)

"The Sankalpa or declaration of desire to adopt must be made by day. The remaining ceremonies may then take place by night. A formal acceptance is indispensable." (f)

(a) Steele, L C 15 The object of the intimation to Government where its interests are concerned may be seen from the cases above, pp. 1010–11. and the references at p. 937.

(b) *Ib*. 183.

(c) MSS 1677, 1711; *Vasishṭa*, XV 6.

(d) *R. Vassereddi Ramanandha Baulu* v *R V Jugganadha Baulu*, 1 M. S. D. A. Dec. 1832, p. 520; *Ranee Munmoheenee* v *Jairnarain Bose*, C. S. D. A. R. 1857, p 244; *Ranee Kishtomonee Debea* v. *Raja Anundnath Roy*, C. S. D A. R. 1857, p. 1127.

(e) MS. 1677.

(f) MS. 1679.

C. 3.—AS TO PLACE.

It is not a ground for setting aside an adoption that it was celebrated not at the usual place of residence of the parties, (a) though this is the proper course. (b)

Sacrifice need not take place in the house of the adopter,(c) but this is usual. (d)

D I —CEREMONIES AND FORMS—CONSTITUTIVE.

D I 1 —AMONGST BRÂHMANS

(a).—In adopting Strangers; and generally.

(b).—In adopting Sagotras

(c) —In adopting Adults and Boys already tonsured or initiated.

(d).—In adopting as a Dvyâmushyâyana.

D. I 1 (a)—IN ADOPTING STRANGERS, AND GENERALLY

The ceremonies used in adoption are either regarded as essential to constitute the relation; as sacrificial; as auspicious; as authenticative; or as simply indicating joy and generosity. Amongst the Brâhmaṇas, if the Śâstris can be taken as faithful expositors of their law, the first two classes blend into one. But the second class is of very variable extent. At pp. 218 ss of Strange's H. L. vol. II., there is a description of a very elaborate ceremonial, but at p. 87 this is cut down to a few simple particulars, the demand after invitations and notice to the authorities, the gift, the *datta homa*, followed after adoption by the upanâyana to be celebrated by the adoptive father. (e)

(a) *Bhaskar Buchajee* v *Naroo Ragonath*, Bom. Sel. Rep 25.

(b) Datt Chand Sec. II 9.

(c) *Th. Oomrao Singh* v. *Th Mahtab Koonwar*, 4 N. W. P. R. p. 103.

(d) Datt. Chand. Sec II 16; Datt. Mîm. V. 15, 21 ss.

(e) *See* above, p 938.

Jagannâtha (*a*) insists on the datta homa; and on the Saṃskâras (*b*) from tonsure onwards being performed in the adoptive family. The putreshti, he thinks, may be dispensed with, and this is so in Bombay. (*c*)

The Vyavahâra Mayûkha (*d*) prescribes an elaborate ceremonial borrowed from Śaunaka, the chief elements of which are those already indicated. That it was not deemed imperative in every particular may be gathered from Steele's Law of Caste, which describes the requisite ceremonies as follows:—

"Of the numerous ceremonies enjoined in the Śâstras, the following are the most essential:—1. Prutigruhu, the formal giving away of the boy by his parents, and acceptance by the other party, with the form of Julasunkulp, or pouring water on the hands. Presents may or may not be given. 2. Mustukawugrun, (*e*) the placing the boy in the adopter's lap, the latter breathing on his head. 3. Hom, fire sacrifice performed by the Poorohit or others. This is said to be unnecessary in adoptions of a brother's or daughter's son, which are performed by Wakyudan, or verbal gift. Soodrus cannot perform any ceremonies requiring muntrus from the Veds (Vedokt-kurum). 4. Deepwarna, the revolution of a lamp, a ceremony at Pooja, or worship of the idol. 5. Brâhmun Bhojun, alms of food, &c., to Brâhmuns. Such of these ceremonies as require the repetition of muntrus, as the Mustukwugrun, &c., cannot be performed by a female adopter, personally; she must go through the essential form of taking the adoptee in her lap, and supply funds for Brâhmun agency in other respects. After these

(*a*) Coleb. Dig. Bk V. T. 275

(*b*) A list of the Saṃskâras will be found in Coleb. Dig. Bk. V. TT. 133, 134, Notes, and in Steele, L. C. 23. As the latter says, they are now much neglected, Steele, L. C. 159.

(*c*) Steele, L. C. 43.

(*d*) Chap. IV. Sec. V. para. 8.

(*e*) *See* above, p. 949. The system of spelling followed by Steele differs from the one now usually followed.

ceremonies (Widhan) have been fully performed, an adoption cannot be annulled. Pending their performance, another may be chosen . . . . they are not essential where the adoptee is of the same gotr. But in case of discovery that the boy, being of another gotr, was not adopted with those ceremonies, or that he was of another caste, the adoption is null, and the boy is to receive maintenance as a Dâs or slave." (*a*)

As the Śâstris insist frequently on the necessity of the rites prescribed by the Śâstra it may be pointed out that these are very simple as compared with the elaborate ritual which has been built up on them in later days. Thus Vasiṣtha says:—"The adopter shall assemble his kinsmen, announce his intention to the ruler, make burnt offerings in the midst of his house, and recite the Vyâhritis." (*b*)

As caste or local custom may regulate the forms of marriage (*c*) so it would seem may it regulate the forms of adoption. This being so, the Courts have naturally never insisted on proof of more than the minimum prescribed by the caste law. (*d*) What this is has been differently estimated, but that all difficulties are to be got rid of by making mere gift and acceptance sufficient for adoption in all cases is a proposition that cannot be stated with confidence against the numerous opinions of the Śâstris of the Bombay Courts. (*e*)

Amongst Brâhmaṇas there may be a retraction until the datta homa has been celebrated, but not afterwards, and the

(*a*) Steele, L. C. 45, 46.

(*b*) Vasishṭha XV. 6. The Vyâhritis are mystic syllables pronounced in offering the fire oblations *See* Bühler *ad loc.* The ritual described by Baudhâyana is more elaborate *See* Baudh. Parisishta, Pr. VII. Ad 5; Datt. Mîm. Sec. V 42; Datt Chand. Sec. II. 16.

(*c*) *Gatha Ram Mistree* v. *Moohita Kochin et al*, 14 B. L. R. 298; *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya Bahadoor*, 25 C. W. R. 404, 414 *See* above, p. 941.

(*d*) *See* above, pp. 921, 922

(*e*) *See* above, pp. 922, 923.

last rule holds for all cases in which the fire sacrifice takes place. (a) The homa is thus thought essential to a complete adoption. (b) The celebration has no constitutive effect at all, until, in its essential parts, it is completed, and a person is at liberty to change his mind and put aside a boy before full performance of the ceremony. (c)

Jala Sunkalp, or the pouring of water on the hands, is deemed an essential part of the ceremony of giving a son. (d)

In all the castes in which the Sâstra ceremonies are observed at all the placing of the boy in the lap of the adopting parent is considered indispensable. (e)

Steele says (f):—"The Putreshta ceremony and the distinction of nitya and anitya adoptions are not recognized in Poona." (g)

The rule formerly announced by the Sadar Court of Bengal was that affiliation, established by sacrifice, is absolutely essential, (h) and with this the opinions of the Bombay Śâstris agree, at least as to the Brâhmaṇa caste. The following are instances :—

"The only adoption to be recognized in the Kali Yug, is the 'Datt Vidhan,' with assent of parents and due ceremonies." (i)

"No adoption is valid unless made with the prescribed ceremonies. Mere declarations by the adoptive father will

(a) Steele, L. C. 184.

(b) Above, p. 934.

(c) *Daee* v *Motee*, 1 Borr R. 75

(d) Steele, L. C. 42

(e) Steele, L. C. 184

(f) Steele, L. C 48.

(g) *See* below, E 1

(h) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D A. R. 356.

(i) MS. 1755.

"No adoption," a Śâstri again declares, "is valid without the prescribed ceremonies. The dispensation from ceremonies in the Saṃskâr Gaṇpatti, supposing the passage genuine, extends only to daughters' and brothers' sons," (a) and another insists that, "Whatever is done contrary to the rules of the Śâstras must be considered as null and void." (b) But the objections in the case went to the eligibility of the adopted and the adopting widow's capacity.

The age of the parties has not been thought to make any difference. An adoption of a married man was said to require for its validity the performance of the due ceremonies. (c)

A man *in extremis* adopted a son without ceremonies. The adopted performed his funeral ceremonies. The Sâstri said, this, according to the Mayûkha, constituted the son only a priti-putra, not an heir. (d)

In the case of a son adopted without any rites by a man since deceased, the Sâstri, not allowing that he was already sufficiently adopted, insisted on the elder widow's competence to adopt him as the person indicated by her husband, notwithstanding the opposition of the junior widow. (e)

In one case the answer was, "The required ceremonies must be performed by the person adopting. They cannot be completed after his death so as to constitute a valid adoption." (No mention of widow.) (f) But another Sâs-

adoption by will is not allowed, only a permission to adopt, *see* above, Sub-sec. III. B. 3.

(a) MS. 1686.

(b) MS. 1672.

(c) MS. 1643. This is the strongest mark of abandonment of right, and is properly used in such a solemn transaction as a gift or sale of land. *See* Mit. Chap. I. Sec. I. para. 32; 2 Str. H. L. 426.

(d) MS. 1680.

(e) MS. 1649.

(f) MS. 1685.

tri answered that "a ceremony begun by a dying person, who does not live to complete it, may be completed by his widow." (*a*) She may at any rate begin *de novo*, and this seems to be generally thought necessary. Thus "a merely verbal adoption is insufficient, nor can the deficient ceremonies be supplied after the adopting father's death. But his widow may adopt anew from the beginning." (*b*)

Jagannâtha discusses at some length (*c*) the question of whether besides a gift the prescribed religious ceremonies and saṃskâras performed in the adoptive family are essential to adoption. His conclusion is that "should the oblation to fire be partly omitted through inability to complete it, the adoption is sometimes good." As to the saṃskâras he accepts the passage of the Kâlikâ Purana which Nilkaṇṭha questions, (*d*) and derives from it the rule that tonsure and the subsequent saṃskâras are at least requisite to the completion of sonship. (*e*) Hence there can be no adoption of a boy whose tonsure has been performed. (*f*) As there is no ceremonial tonsure as a saṃskâra in the lower castes (*g*) the obstacle it would create does not exist amongst them, (*h*) nor has any rite to be performed in order to complete an adoption beyond a gift and acceptance distinctly for that purpose.

Colebrooke too says—" Adopted sons being duly initiated by the adopter under his own family name become the sons of the adoptive parent. The upanâyana (thread cere-

(*a*) MS. 1661.

(*b*) MS. 1684.

(*c*) Coleb. Dig Bk. V. T. 273 ss.

(*d*) Vyav. May. Chap. IV. Sec. V. para. 20.

(*e*) Coleb. Dig. Bk. V. T. 183 Comm.

(*f*) Coleb. Dig. Bk. V. T. 273 Comm. *See* 2 Str. H. L. 109.

(*g*) Coleb. Dig. Bk. V. T. 134, Note. There is in most a tonsure, but without the sacramental significance.

(*h*) Coleb. Dig. Bk. V. T. 275 Comm. *sub. fin.*

mony) . . . . must be performed in the name of the adopter's gotra." (a)

The performance of the sacred ceremonies is not competent to a woman or a man of low caste, since the utterance of the Vedic formulas is forbidden to them. (b) The difficulty is removed by a vicarious performance of these rites. "Like the consecration and dismissal of a bull, the adoption of a son may be completed by an oblation to fire performed through the intervention of a Brâhmaṇa." (c) The Brâhmaṇa incurs guilt, but the spiritual purpose is none the less achieved. (d)

In Madras the mere gift and acceptance as in adoption constitute adoption even amongst Brâhmaṇas. (e) Proof of the datta homam is not necessary there. The Madras High Court quoted with approval Sir T. Strange's statement:—

"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the

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(a) Coleb. in 2 Str. H. L. 111. *See* above, p. 938.

(b) Vyav. May. Chap. IV. Sec. V. paras. 12—15.

(c) Coleb. Dig. Bk. V. T. 275 Comm.

(d) Vyav. May. Chap. IV. Sec. V. para. 14; 2 Str. H. L. 89.

(e) *V. Singamma* v. *Ramanuja Charlu*, 4 M. H. C. R. 165. On this doctrine the Judicial Committee has observed:—"Then it has been more recently decided in the Madras High Court that even in the case of an adoption by a Brâhmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brâhmini woman. They may, however, observe that the reasoning of the Madras Court applies even *à fortiori* to Śûdras. The other Indian decisions which have been cited, and particularly those of the late Suddur Dewanny Adawlut, clearly show that the present question has long been treated as an open and vexed one by Paṇḍits as well as Judges. It was so treated in a case before their Lordships in 1872, *Sree Narain Mitter* v. *Sreemutty Kishen Soondory Dassee*, L. R. I. A. Supp. 149, but was not then decided, the suit being dismissed upon another ground." *Indromoni Chowdhrain* v. *Behari Lal Mullick*, L. R. 7 I. A. 36.

Rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brâhmin only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i. e.* between Brâhmins and the other classes, it being by the former only that the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. . ." (*a*)

Even in Bombay and amongst the classes who imitate the Brâhmaṇas in their ceremonies proof of the homa has not in all cases been thought essential (*b*) by the Courts.

In one case it seems to have been held that the religious ceremonies might be dispensed with even in the case of Brâhmaṇas, (*c*) but no other instance seems to have occurred in Bombay as a decision of a superior Court.

In a single instance a Sâstri pronounced an adoption without sacrifice valid for a Brâhmaṇa. An adoption publicly made by a Brâhmaṇa without the homa was, he said, valid on the authority of the Logakshi Bhâskar. (*d*)

D. I. 1—CEREMONIES AND FORMS.
(*b*). IN ADOPTING SAGOTRAS

The homa sacrifice or burnt offering deemed religiously indispensable in other cases is by custom pronounced unnecessary in the adoption of a brother's or daughter's son

(*a*) *V. Singamma et al* v. *Ramanuja Charlu*, 4 Mad H. C. R. p. 167.

(*b*) *Crastnarao* v. *Raghunath*, Perry, O. C. 150.

(*c*) *Jagannatha* v. *Radhabai*, S. A. 165 of 1865.

(*d*) MS. 1688. See above, p. 922. The authority is not generally admitted.

(or a younger brother.) (*a*) In these cases the mere verbal gift and acceptance are said to suffice. (*b*) As a daughter's son can be adopted only by a Śûdra, and no Śûdra can pronounce a mantra from the Veda, (*c*) the homa must in strictness be dispensed with in his case, though a vicarious offering and recitation by a Brâhmaṇa may according to the Vyav. May. Chap. IV. Sec. V. para. 13, and by custom answer the purpose. (*d*) In the case of a brother's son there is no need for a discharge from the gotra of birth and an admission to that of adoption, as both are the same, so that the main purpose of the fire sacrifice not existing, the sacrifice itself becomes needless. (*e*)

The adoption of a nephew by word of mouth without burnt sacrifice is valid. (*f*) The Sâstri, however, said in another case: "The prescribed forms cannot be dispensed with even in the case of the adoption of a member of the adopter's family." (*g*) But again, as in the following case, the ceremonies may be excused:—" An uncle must perform the ceremony even to adopt his nephew. But if he has accepted a gift of the nephew and performed his munj the boy is thus affiliated without the (regular) ceremonies."(*h*)

(*a*) Steele, L. C. 46; Comp. Colcb. Dig. Bk. V. T. 275 Comm.

(*b*) *See* above, p. 930.

(*c*) Datt. Mîm. Sec. I. 26.

(*d*) Comp. Datt. Mîm. Sec. I. 27.

(*e*) 2 Str. H. L 89, 101, 107, 123, 220.

(*f*) *Huebatrao Mankur* v *Govindrao Mankur*, 2 Borr. 83, 95. Yama says:—" It is not expressly required that burnt sacrifice and other ceremonies should be performed on adopting the son of a daughter or of a brother, for it is accomplished in those cases by word of mouth alone." (Wak Danu, a verbal gift.)

(*g*) MS. 1673. The Śâstri is supported by this that the Smṛitis which contemplate adoption from within the gotra still prescribe the homa sacrifice. See *ex. gr.* Vasishṭha XV.

(*h*) MS. 1690.

In Bengal the adoption of a kinsman may be made by verbal declaration, in presence of witnesses, but without any religious ceremony. (*a*)

D. 1. 1.—CEREMONIES AND FORMS—CONSTITUTIVE. (*c*)—IN ADOPTING AFTER TONSURE.

It has been seen (*b*) that in the case of an adult the gift by his parents is as indispensable as in the case of a child. (*c*) The formal acceptance is equally indispensable, though the placing of an adult son in the lap of the acceptor (*d*) may not be regarded as essential. Where burnt offerings are requisite they are not less, but if possible more, necessary (*e*) in the case of one who, by the successive saṃskârs has become more firmly knitted to his family of birth and its sacra. (*f*) If adoption is at all regarded by a caste as involving a change of religious dedication it is not easy to conceive how it can take place when the saṃskâras have been completed even in the case of a man of one of the lower castes; (*g*) but where the adoption is within the same gotra or quasi-gotra, no change of invocation is required, and the formal transfer should suffice.

In the case of untonsured children (*h*) mere irregularities in forms used in adopting are said to be cured (*i*) by means of the performance of the sacrifices and saṃskâras by the adoptive father. (*j*) The following is an instance :—

(*a*) *Kullean Singh* v. *Kripa Singh*, 1 C. S. D. A. R. 9.

(*b*) *See* p. 930.

(*c*) *See* pp. 910, 930.

(*d*) Steele, L. C. 184.

(*e*) P. 909.

(*f*) *See* above, p. 898.

(*g*) *i. e.* not twice-born. *See* above, p. 921 note (*h*).

(*h*) *See* Datt. Mîm. Sec. IV. 33.

(*i*) Comp. p. 909.

(*j*) *See* Datt. Mîm. Sec. IV. 69.

"When a man has received a son in adoption, whether regularly or not, and has performed sacrifices for him as included in the adoptive father's gotra, he must be recognized as an adopted son. The adoption is not affected by the natural father's subsequently performing the boy's munj." (a)

Sacrifice to fire will undo the effects of tonsure in the natural family. (b)

D. 1. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.
(d)—IN THE CASE OF A DVYÂMUSHYÂYANA.

The ceremonial in the adoption of a son as a dvyâmushyâyana does not differ from that of the ordinary adoption except by the variance in the formula of gift. "He shall belong to us both."(c)

D. 1—CEREMONIES AND FORMS—CONSTITUTIVE
D. 1. 2—AMONGST THE LOWER CASTES

The sacrifice of fire is important with regard to Brâhmaṇas only. (d)

(a) MS. 1677. *See* Coleb. Dig. Bk. V. T. 183 Comm ; Datt. Mîm. Sec. IV. 33 ss.

(b) *Sy Joymony Dossee* v. *Sy Syboosoondry Dossee*, 1 Fult. 75. *See* Datt. Mîm. Sec. IV. 51, 52. The author insists on a restriction to five years of age—not observed in Bombay—in order that the boy's investiture may take place in the adoptive family. The Datt. Chand. extends the age to eight years, Sec. II. 23, 27, 30. This authority also insists on investiture's not having taken place as a condition of fitness not apparently to be replaced by any ceremonies. In the case of a Śûdra marriage there is the same obstacle as investiture in the case of a twice-born. (*Ib.* para. 32.)

(c) Vyav. May. Chap. IV. Sec. V. para. 21.

(d) *Nobkissen Raja's Case*, 1 Str. H. L. 96; *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 4 N. W. P. R. p. 103 The needlessness of the datta-homam ceremony amongst Śûdras is placed by Ellis on the ground of their having no gotra (in the stricter sense). *See* above, pp. 929, 935. The transfer from the care of one to another set of tutela-

" It is held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will." (*a*)

" It has been held that, in the case of Sûdras, no ceremonies, except the giving and taking of the child, are necessary to an adoption." " The giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption." (*b*)

" As the Sâstras do not recognize Kshatriyas as existing in the Kali age, those who call themselves so should follow the ceremonies prescribed for Sûdras. (*c*)

ry deities being impossible, the rite by which it is consummated is superfluous. *See* above, pp. 920—927. It is plain that the central idea of adoption according to the Brâhmanical conception must be entirely wanting in the case of Śûdras. The indigenous natural adoption of the latter has been wrought into a kind of harmony with the former only by the accommodations shown in the preceding pages. Śrâddhas are now looked on as appropriate to nearly all castes, *See* above, p. 922.

(*a*) 2 Str. H. L. p. 126. The following case rules only that no other ceremonies are necessary in Bengal: " It is admitted that whatever may be the force of the words 'so forth' in the case of Brâhmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Śûdra is the *datta homam*, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brâhmin priest." *Indromoni Chowdhrain* v. *Behari Lall Mullick*, L. R. 7 I. A. 35.

(*b*) *Shoshinath Ghose et al* v. *Krishna Sunderi Dasi*, I. L. R. 6 Calc. P. C. 381.

(*c*) MS. 1675. . . . . " The word Dvijâte (twice-born) which in former ages included Brâhmins, Kshatriyas, and Vaiśyas, in the present is generally understood to be confined to Brâhmins, these only performing the upanâyanum, or ceremony of tying on the sacrificial cord; whence the second birth, with the texts of the Veda." 2 Str. H. L. p. 149; *ib.* 263. Pure Kshatriyas and Vaiśyas are not now recognized, Steele L. C. 89, 90. In 2 Str. H. L. 263, Ellis gives an instance of a considerable conversion of Lingâyats who thereon

"An oral adoption is effected by the ceremony of giving and accepting." (*a*)

An overt act of adoption is sufficient to prove an adoption, unaccompanied by religious ceremonies. But evidence of the giving and receiving is indispensable, and is easily procured where there has really been an adoption in a family of any local consequence. (*b*)

"The Śâstras give no rules of adoption applicable to Lingâyats. If the caste rules prescribe any particular ceremonies, these should be observed." (*c*)

But even of a Simpi it was said: "No one (not even a brother's grandson) can be adopted without the ceremony of homa or burnt offering." (*d*) The Śâstri must, in this case, be considered to have stated the law too stringently.

A dying widow put sugar in the mouth of a child of one of her relatives and called him her son. The Śâstri said there was nothing in the Śâstras to give validity to this as an adoption. (*e*)

"The Śûdras cannot recite the Vedic texts, but they can adopt, confining themselves to the ceremonies proper to their caste." (*f*)

assumed the sacred thread as Vaiśyas. Such cases are not very uncommon, and they justify the distrust with which the Brâhmaṇas look on pretensions to the twice-born caste rank.

(*a*) MS. 1655. (Śûdras.)

(*b*) *Premji Dayal* v. *Collector of Surat*, R. A. 54 of 1870; Bom. H. C. P. J. for 1873, No. 12.

(*c*) MS. 1677.

(*d*) MS. 1689. The Śimpi ranks as an Atiśûdra, *i. e.* below the recognized Śûdra. *See* Steele, L. C. 107.

(*e*) MS. 1687.

(*f*) MS. 1675. *See* above, p. 1130 (*d*).

In a Sûdra adoption the ceremony of "pootreshto jog" is not essential, yet it is conformable to law and religion; and if performed, is the best proof of real intention of adoption. (a) It has been pronounced essential when the adoption is in the dattaka form. (b) But it is not necessary in Bombay. (c)

Among the Sikhs proof of datta homam does not seem to be essential. (d)

Whether in Bengal religious ceremonies are generally necessary to make valid adoptions among Śûdras might seem uncertain. (e) The performance of the datta homam was once held essential there to the adoption even of a Śûdra, (f) but this was afterwards overruled (g) by a Full Bench, no further ceremony, it was said, being necessary than gift and acceptance. (h)

D. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.
D. 1. 3.— SUBSIDIARY FORMS.

Amongst these are the expressions of assent by the relatives and the representative of the Government. Additional prayers and sacrifices fall into the same class. But the chief subsidiary form is that of reducing the declaration of trans-

(a) *Hurrosoondree Dassee* v. *Chundermohinee Dassee*, Sev. 938.

(b) *Luchmun Lall* v. *Mohun Lall*, 16 C. W. R. 179.

(c) *See* above, pp. 1135-36.

(d) *Deo dem Kissen Chundershaw* v. *Baidam Bebee*, East's Notes, Case 14.

(e) *Sri Narayen Mitter* v. *Sy Krishna Soonduri Dossee*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J; *Nittianand Ghose* v. *Kishen Dyal Ghose*, 7 B. L. R. 1.; S. C. 15 C. W. R. 300.

(f) *Bhairabnath Sye* v. *Maheschandra Bhaduri*, 4 B. L. R. 162 A. C.; S. C. 13 C. W. R. 169.

(g) *Behari Lal Mullick* v. *Indramani Chowdhrain*, 13 B. L. R. 401; S. C. 21 C. W. R. 285.

(h) *Nittianand Ghose* v. *Krishna Dyal Ghose*, 7 B. L. R. 1.

fer to a formal instrument signed by the parents and attested by the relatives and other principal persons present. Where any particular settlement is made, varying in any way the rights and obligations of the parties within the limits allowed by their law, a written instrument should be deemed indispensable. For the adoption itself no writing is necessary; but in every case it may probably be useful to authenticate the transaction. Macnaghten says—

"There is no law requiring the execution of a written instrument on the occasion of receiving a boy in adoption, though the practice of resorting to writing is prevalent." (a) And the Judicial Committee ruled that neither registration of adoption, nor any written evidence, is essential to validity of adoption. (b)

No stereotyped form of adoption is requisite; absence of registration or of a stamp may raise suspicion but cannot invalidate the deed. (c) The language of the Privy Council in the case lately quoted is important. "According to the Hindû law, neither registration of the act of adoption, nor any written evidence of that act, having been completed, is essential to its validity. It is to be lamented, that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would certainly contribute much to the security of property and the happiness of Hindu families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate and recorded in some Court."

(a) 2 Macn. H L. 176.

(b) *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; *Pritima Soonduree* v *Anund Coomar*, 6 C. W. R. 133; 2 Wyman, 135.

(c) *Pritima Soonduree* v. *Anund Coomar*, 6 C. W. R 133.

"But although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brâhmans, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth." (*a*)

The execution of deeds, without actual gift and acceptance, is not sufficient (*b*) to constitute an adoption. A mere constructive giving and receiving cannot be relied on. A suit to set aside deeds giving and receiving in adoption, where no son was given according to the deeds, is not maintainable. (*c*) [For without gift and acceptance there can be no valid adoption, and cancellation does not avail anything.] Where a deed was executed, signifying an intention, if a certain approval was obtained, to take a boy in adoption, and the boy was not given or accepted, the adoption was held incomplete, the deed being provisional and intended to be acted upon during the life of the executing party, who had not capacity to make a testamentary disposition. (*d*)

(*a*) Lord Wynford in *Sootrugun Sutputty* v *Sabitra Dye*, Knapp's P. C. p 290, 291.

(*b*) *Siddessory Dossee* v. *Doorga Churn Sett*, 2 I. J. N. S. 22; *Sri Narayan Mitter* v. *Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(*c*) *Sri Narayan Mitter* v. *Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(*d*) *B. Banee Pershad* v. *M. Syad Abdool Hye*, 25 C. W. R. 192.

An adoption of a daughter's son was held invalid for want of a writing or deed of adoption, and for want of proof that religious ceremonies were performed. (*a*) This decision cannot be considered very satisfactory. If the parties were Brâhmaṇas the adoption of a daughter's son was invalid. If they were Śûdras religious formalities were unnecessary.

D. 1.—CEREMONIES AND FORMS—CONSTITUTIVE.
D. 1. 4.—INFORMALITIES.

According to the Poona castes—" Any irregularity or defective performance in the adoption of customary rule, ... is a cause of its annulment." (*b*)

It is not easy to gather from the cases what informalities are to be regarded as vitiating an adoption and what do not affect its validity. The chief authorities tend, it will be seen, to the sufficiency of a gift and acceptance authenticated by *some* religious rites, especially the homa. (*c*) The others cannot be regarded as so important that the omission of some of them is a cause even for grave suspicion. Colebrooke says—" An inadvertent omission of an unessential part as sacrifice does not vitiate adoption. (*d*) . . . . . " The essence of the adoption of a son given . . . is the gift on the one side, and the formal acceptance of the child as a son on the other . . . the rest of the ceremonies prescribed . . . may be completed in pursuance of the adopter's intention, by others for him, if he should die prematurely. The unintentioned omission of some part of them by the adopter would hardly invalidate the adoption; though the wilful omission of the whole by him

(*a*) *Baee Gunga* v. *Baee Sheokoovur*, Bom. Sel. Rep. 80.

(*b*) Steele, L. C. App. p. 388.

(*c*) *See* above, pp. 935 ss. The Śâstris, as we have seen, are more exacting.

(*d*) 2 Str. H. L. 126.

might have that effect, since the performance of the ceremony of tonsure, and other rites, in the family of the adopter, is indispensable to the completion of the adoption." (*a*)

"However defective the ceremony," Ellis said, "and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever; *à fortiori*, not on account of any informality." (*b*) And Colebrooke on the same case, "The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son (Mitaksharâ on Inheritance, Chap. II. Sec. X.), but he cannot forfeit the relation of son." (*c*) "The meaning of that passage is, that a lawful adoption, actually made, is not to be set aside for some informality which may have attended it; not that an unlawful adoption shall be maintained." (*d*)

In one case Sir E. Perry expressed himself thus: —

"Wassadeo Wittaji expressed a strong desire in his will that a son should be adopted to him; and as we find it indisputably proved that the widow did in fact solemnly adopt the infant plaintiff in the presence of a great many Brâhmins, Purvoes, and relatives; that all the more important ceremonies were observed, the Ganputty Pûjâ, or worship of the god Ganput, the Pûjâ Wachan, or reverence to the Ganges, the Hom or sacrifice of fire,—we were inclined to think that even if other observances had been disregarded, still, the essence of the ceremony having been adhered to, the adoption was good for every legal purpose." (*e*)

(*a*) Colebrooke in 2 Str. H. L. p. 155.

(*b*) Ellis in 2 Str. H. L. p. 126.

(*c*) Colebrooke in 2 Str. H. L. p. 126.

(*d*) 2 Str. H. L. pp. 178, 179.

(*e*) *Crastnarao Wassadevji* v. *Raghunath Harichandarji et al*, Perry's Or. Cases, pp. 150, 151.

The non-observance, however, of the ceremonies, other than those held to be indispensable, though it does not render an adoption invalid, yet will afford presumptive evidence against the adoption where the situation in life of parties renders such forms usual.(a)

In Madras "if the performance of the datta homam be established, the adoption is established; but, if otherwise, the converse does not hold good. Further evidence may be adduced. In no case can the omission of the ceremony affect an adoption in other respects valid. If not performed, when the adoption is from another gotram, it would seem, from analogy, that the son so adopted must be anitya datta." (b)

D. 2—CEREMONIES AND FORMS—COLLATERAL.

2 1.—INDUCING GOOD FORTUNE.

"Donations are to be given to Brâhman mendicants."(c)

D. 2. 2.—INDICATING JOY AND GENEROSITY

"Some clothes and ornaments are to be presented to the adopted child." (d)

D. 2 3.—AUTHENTICATIVE.

The instruments described above under Sub-Section D. 1. 3 might properly be placed under this head also. But in some few castes they are thought essential, and in all they serve to make the declaration explicit. A reference here seems enough. The assembly of relations and neighbours is another and the usual means of record of the transaction.

"At an adoption a festival is held, to which are invited relations, friends, and leading men of the caste. Presents

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(a) *Sutrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, 287; 1 C. S. D. A. R. 15.

(b) 2 Str. H. L. p. 220.

(c) MS. 1675.

(d) MS. 1675.

are distributed among the head men of the caste, village officers, relations and guests. The fact of distribution of sugar, cocoanut, and pân is evidence of an adoption." (*a*)

E. VARIATIONS.—IN THE CASE OF QUASI-ADOPTIONS.

E. 1—DISAPPROVED ADOPTIONS.

A distinction was taken by a Paṇḍit in Madras between a permanent (nitya) adoption accomplished by a ceremony including the homam and a temporary (anitya) one, where the homam had been dispensed with. In the latter case it was said the son of the man thus adopted might be initiated in either gotra. Ellis recognizes this, (*b*) but the anitya adoption is not allowed in Bombay. The boy is wholly adopted or not at all.

The krîta son, it is said, must be received from the hand of the father or of the mother as his agent. (*c*) This mode of adoption is no longer allowed, (*d*) except in the modified form used by ascetics, (*e*) who buy children to maintain a spiritual succession. (*f*) A Sâstri thought the ordinary forms should be used. "Sûdras in adopting (and Gosâvîs are Sûdras) are to omit the recitations from the Vedas." (*g*)

"In the kindred case of the kṛitrima, or son made, the mode of adoption as practised in those of our provinces in which it prevails is very simple, being completed by the declaration and consent of the parties without any religious ceremonies." The Datt. Mîm. however makes the religious rites indispensable alike to the Dattaka and Kṛitrima, and

(*a*) Steele, L. C. p. 184, "Pân" is the betel-leaf.

(*b*) 2 Str. H. L. 121, 123.

(*c*) Colcb. Dig Bk. V. T. 281 ss ; *see* 2 Str. H. L. 138, 143.

(*d*) Above, p 894, Note (*g*).

(*e*) 2 Str. H. L. 133.

(*f*) *See* above, pp 550 ss.

(*g*) MS. 1678. *See* above, pp. 933, 934.

hence Colebrooke says they must, when the krîta form is allowed, be essential to that also. (*a*)

As to Bombay, adoption after payment of a price is not, it is said, recognized there in the Kali yuga, (*b*) but one or two of the Gujarâth castes adhere to the practice, and "with some castes in Madras the mode of adoption is uniformly by purchase." (*c*) Amongst them it may be allowed on the ground of class usage, which must also govern the ceremonies in any particular instance. (*d*) The krîta adoption [*i. e.* by purchase] is really obsolete, unless on the ground of local usage (*e*) even in Madras.

VARIATIONS IN THE CASE OF QUASI-ADOPTIONS.

E. 2.—CONNEXIONS RESEMBLING ADOPTION.

In the case of a pâlak putra a mere assent of the parties openly expressed is all that custom requires.

In one case, noted above, (*f*) the Śâstri was of opinion that by mere nurture and recognition an Agarvâlî (*g*) had given to a boy the status of an heir. But this, as shown in the remark is opposed to the general Hindû law; it could be sustained only on the ground of caste custom.

Recognition of dancing girls as daughters suffices, it was said, to constitute adoption without any formal act. (*h*)

(*a*) Coleb. 2 Str. H L. 155. The consent of the person adopted by the kritrima form is indispensable. *See* above, p. 1016.

(*b*) [illegible]*han Kishor Acharjee* v *Harischandra*, 13 B L. R. App. 42; S. [illegible] C. W. R 381; *see* 2 Str H. L. 156.

(*c*) 2 Str. H. L. 148.

(*d*) Above, p. 2.

(*e*) *Gooroovummal* v. *Mooncasamy*, 1 Str. H L 102, 103; 1, Str. Notes of Cases, p. 61.

The Roman adoption *per æs et libram* approached most nearly amongst the Hindû forms, probably, to the krîta. There was a real or fictitious sale by the pater-familias of the person adopted.

(*f*) P. 373, Q. 18.

(*g*) *See* Steele, L. C. 97.

(*h*) *Vencatachellum* v. *Venkatasamy*, M. S. D. A. Dec. 1856, p. 65.

SECTION VII.

CONSEQUENCES OF ADOPTION.

I.—GOVERNED BY THE ORDINARY LAW.

I 1.—PERFECT ADOPTION

A.—GENERAL CONSEQUENCES.

A. 1.—CHANGE OF STATUS.

"Adoption causes an immediate change of status." (*a*)

"The relationship of the son to his family of birth ceases." (*b*)

"The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it." (*c*) An adopted son ceases to be the son of his natural parents, and becomes the son of the adoptive father to all purposes. (*d*)

(*a*) MS. 1671. "Adoption alone constitutes affiliation; but the ceremony of tonsure performed by the family, to which he originally belonged, renders it essentially invalid . , . . . But this affiliation once effected, is not cancelled by his naming his former family in performing a sacrifice, or in consecrating a pool. Birth caused by male seed and uterine blood is one ground of filiation, the second birth, by investiture and other ceremonies, is equally a ground of filiation, by whomsoever performed. When he who has procreated a son gives him to another, and that child is born again by the rites of initiation, then his relation to the giver ceases, and a relation to the adopter commences: this birth cannot afterwards become null by his erroneously reverting to his original family." (Coleb. Dig. Bk V. T. 183 Comm.)

(*b*) MS. 1760.

(*c*) *Uma Sankar Moitro* v *Kali Komul Mozumdar et al*, I. L. R. 6 Calc. 259.

(*d*) *Gopeymohun Thakoor* v. *Sebun Koer et al*, East's Notes, Case 64; 2 Morl. Dig p. 105; *Appaniengar* v. *Alemaloo Ammal*, M. S.

The adopted takes generally the rights and the duties of a begotten son. (*a*)

"If it is once conceded that the adoption is valid, all the legal consequences attached to it must follow as a matter of course." (*b*)

It follows that "only one adopted son can subsist at one time." (*c*)

When a Hindû gives his son in adoption, his power, it was said, more resembles that of a proprietor than that of guardian. (*d*) This is true in so far as a guardian could not possibly give away his ward. The father has power to annihilate his own paternal right, and does so by giving in adoption.

The chief purpose, and originally it seems the only purpose, of adoption having been the maintenance of the adoptive father's sacra, (*e*) it is said "A son given is therefore the

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D. A. R. for 1858, p. 5; *Narasammál* v. *Balarámácharlu*, 1 M. H. C. R. p. 420. The statement must be slightly qualified. *See* below.

(*a*) Above, p. 367. "Adoption is as if the adoptive father had begotten the son." Per Willes, J, in the *Tagore* Case, I. L. R. I. A. Supp. pp. 47, 67.

(*b*) Per D. Mitter, J., in *N. Rajendro N Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548.

(*c*) Steele, L. C. p. 45.

(*d*) *Chitko* v. *Janaki*, 11 Bom. H. C. R. 199. He is bound, however, to guard the interests of his son (*see* above, Sec. VI. A 6). Under the Roman law down to a late time a child could be disposed of like goods, and therefore let on hire or pawned. This was forbidden except in cases of extreme necessity, such as justify a sale under the Hindû law, and at last wholly prohibited by Justinian. *See* Maynz, Dr. Rom. Sec. 410; Vyav. May. Chap. IV. Sec. I. paras. 11, 12, Sec. IV. para. 41, Sec. V. para. 2, Chap. IX. paras. 2, 3, compared with Manu IX. 174, Vasishṭha XV. 2; XVII. 31, 32. Âpastamba forbids the sale, Pr. II. Pat. 6, Kh. 13, para. 11. So too does Yâjñavalkya. Kâtyâyana allows it in extreme necessity, Coleb. Dig. Bk. II. Chap. IV. TT. 6, 7, 16. Above, p. 894.

(*e*) Above, pp. 872 ss.

child, not of his adoptive mother, but of his adoptive father only." (a) The interest of the adoptive mother and her ancestors in the adopted son and the religious duties to be performed by him is an idea of later growth and less definitely settled. It may now be accepted however that "if a son be adopted by the husband, the wife has a secondary claim to that child, because property is common to the married pair, (b) and the line of the maternal grandfather is the ancestry of the adopter's father-in-law." (c)

I. 1. A. 2.—CHANGE OF SACRA.

The change of sacra, that is of connexion with the manes of ancestors, of obligations to them, and of the peculiar family rites and formulas is the most important element of adoption to the orthodox Hindû. The supreme importance of initiation as completing this connexion is much dwelt on in the Śâstras, (d) and the due celebration of śrâddhas occupies the chief place in the religious books. (e) For their effectual performance the son adopted must be qualified by a complete reception into the family. (f)

(a) Coleb. Dig. Bk. V. T. 273 Comm. *See* H. H. Wilson, Works, vol. V. p. 57.

(b) *See* above, p. 92; Coleb. Dig. Bk. II. Chap. IV. T. 18.

(c) Coleb. Dig. Bk. V Chap IV T 275 Comm. The expression is in English very awkward. The son being commanded to honour his maternal grandfather, this is an intrepretation of the command for the case of an adopted son. In the event of an adoption during a son's exclusion from caste, followed by the son's re-admission, the position of the adopted son on a reconciliation between the one he has replaced and his father seems not to have been settled. (*See* above, pp. 905, 906) The adopted son would probably be reduced to a share of one-fourth.

(d) *See* above, pp. 872, 900 ss.

(e) Comp. Vyav. May. Chap IV. Sec. VII. 29 ss.

(f) *See* Vasishṭha II. 4, 5; XI 49; H. H. Wilson, Works, vol. V. p. 45, compared with the statement above, p. 984.

" Śrâddha ceremonies are performed on the anniversary of a father's death. The Paksha ceremonies are performed subsequent to the first

When a son has been adopted, and has gone through the saṃskâras, it must be inferred that, as in the case of a son by birth, a deliverance from *put* of the ancestors by adoption has by this fulfilment of duty been effected. (*a*) In the event therefore of his death, no further adoption is necessary for the fulfilment of religious duty.

The ceremonial impurity arising from births and deaths in the family of his birth no longer affects the person who has been transferred to another by adoption. He presents no oblations to his natural father and his ancestors, but "distinct oblations" to the adopted father and his ancestors. (*b*)

I 1. A. 3—ADOPTION TRANSFERS THE OFFSPRING.

"A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family." (*c*)

"This is so though another son is born (to the adopted) after the adoption." (*d*)

"The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father." (*e*)

By Act XXI. of 1870, § 6, the word "son" in the Indian Succession Act (X. of 1865) is in many places made to

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year after a father's death, at some time during the month Bahâdrapad. There are also daily and monthly offerings for the benefit of a father and ancestors deceased.'' Steele, L C p 26 n; Coleb. Dig Bk. V. T. 399 note, enumerates sixteen Śrâddhas that must be performed for a Brâhmaṇa recently deceased *See* Coleb Dig. Bk. V. T. 276 Comm.; above, pp 444, 447, 880, 896; and Comp Ortolan, Instituts, Tom. II. §§ 129, 132, on the corresponding institution at Rome.

(*a*) Coleb. Dig. Bk. IV T. 155 Comm ; above, p. 872.

(*b*) Datt. Chand. IV. 2.

(*c*) MSS. 1730, 1742.

(*d*) MS. 1738.

(*e*) MS. 1737. *See* above, p. 80.

extend to an adopted son, and "grandson" to a grandson by adoption. The following sections of the Succession Act must be so constrned, § 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, 182.

I. 1. A. 4.—ADOPTION IN THE ADOPTIVE FATHER'S LIFE IS PROSPECTIVE.

The general effect of adoption is as if a son had been born, though the rights thus acquired are subject to total (*a*) or partial defeasance by the birth of a real son. Thus, it has been said, it is competent to an adopted son to claim a partition of ancestral property (*b*) where a begotten son could do so. The adoption is in this sense tantamount to the birth of a son to the adopter; (*c*) consequently there cannot be two adopted sons. (*d*) But neither does the adoption any more than the birth of a son affect bygone transactions of the father which were valid when entered into. (*e*) An adoption during the pendency of a suit affecting the ancestral property, does not affect a previously completed gift by the adoptive father though accompanied by a trust in his own favour. (*f*)

I. 1. A. 5.—ADOPTION AFTER THE ADOPTIVE FATHER'S DEATH IS RETROSPECTIVE.

"As soon as a son is adopted by a widow he succeeds to her husband's estate. Her independent rights and those of

(*a*) As in the case of a Râj impartible. The right to maintenance must be excepted.

(*b*) MS. 1731.

(*c*) *Heera Singh* v. *Burzar Singh*, 1 Agra H C. R. p. 256.

(*d*) Steele, L. C. App. p. 393; above, p. 916.

(*e*) Even in the case of a partition the right of an after-born son to share in divided property depends on whether he was begotten at the time of the partition (*Yekeyamian* v. *Agniswarian et al*, 4 Mad. H. C. R. 307, 310). If begotten before it, he would take a share; if after it, he would share only with his father in the latter's share.

(*f*) *Rambhat* v. *Lakshman Chintaman Mayalay*, I. L. R. 5 Bom. at p. 635.

her mother-in-law forthwith cease." (*a*) The widow succeeds to her separated husband, but her estate is subject to immediate defeasance on her adopting a son. Her right is reduced to a legal claim to maintenance.

Adoption works retrospectively and relates back to the death of the husband of the adoptive mother, invalidating a gift or sale, unless it was made for preservation of the estate from foreclosure under a prior conditional sale by the husband, (*b*) or other necessary purpose. In the following cases the retroactive effect is expressed most strongly:—

"In *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* (*c*) it was held that according to the Hindû law, a boy adopted by a widow, with the permission of her late husband, has all the rights of a posthumous son, so that a sale by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity." (*d*)

"In *Bamundoss Mookerjea* v. *Musst. Tarinee* (*e*) (in which the decision of the Bengal Sadr Diváni Adálat was adopted without qualification by the Privy Council) the Judges, referring to that case, said:—'In that case the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity.'" (*f*)

(*a*) MS 1716.

(*b*) *Prannath Rai* v. *R. Govind Chandra Rai*, 5 C. S. D.A. R. 37. "An adopted son is in most respects precisely similar to a posthumous son." Coleb. in 2 Str. H. L. 127.

(*c*) 3 Beng. S. D. A. R. 228.

(*d*) *Nathaji Krishnaji* v. *Hari Jagoji*, 8 Bom. H. C. R. 73 A. C. J.

(*e*) 7 M. I. A. 169.

(*f*) *Nathaji* v. *Hari*, supra.

Yet in the case last quoted it was laid down that an adopted son has an absolute vested interest and a right of action only from date of actual adoption (*a*), and that the power of adoption in a widow does not, *per se*, divest her of her life interest. Her position in the meantime is such as has already been described, (*b*) and as she is certainly a manager in possession, and represents the estate, her transactions with respect to it must, for the benefit of the estate itself, be upheld (*c*) where they have not been palpably detrimental or in excess of her limited powers of dealing with immoveable property inherited from her husband. (*d*)

In the case of a dispute between a widow and her husband's sapiṇḍas it was lately said by the High Court of Madras . . . "Where *boná fide* claims are made which call for adjustment, where the existence of the husband's consent to the adoption is in question, we consider that the powers of the widow and reversioners may not impoperly be exercised to effect a settlement of the claims before an adoption is made, and that their exercise is not affected by the circumstance that the dispute as to the direction or consent conveyed to the widow was at the same time set to rest, and that the arrangements affecting the estate were made in contemplation of the adoption. The widow, although she may have received an express direction to adopt, could not have been compelled to act upon it, and she might have persisted in her denial that she had received authority to adopt, had the reversioners declined to allow her to retain possession of the jewels." (*e*)

(*a*) *Musst. Tarinee* v. *Bamundoss Mookerjea*, 7 C. S. D. A. R. 533.

(*b*) Above, pp. 94, 367.

(*c*) H. H. Wilson contends for the widow's full power of disposal. Works, vol. V. p. 66 Above, pp. 306 ss.

(*d*) *See* above, pp. 367, 368.

(*e*) *Lakshmana Ráu* v. *Lakshmi Ammál*, I. L. R. 4. Mad. 160, 165.

The right of inheritance then vests in an adopted son from the time of his adoption only, in this sense, that until the adoption by a widow, she fully represents the estate, though with limited powers, and may maintain suits concerning it. Such a suit continued in her own name after an adoption was held to have been maintained by the widow as guardian of the adopted son. (*a*) For other purposes the adoption reacts as from the moment of the adoptive father's death.

The continuity of existence with the deceased does not affect rights and interests which were not his in his life or which are not a mere development of these. (*b*) Thus where a new grant had been made, it was ruled that the absolute ownership of Government in the interval from the death of the Rajah until the act of State by which a transfer of territory was made to his widows and daughters was fatal to the claim of a defendant, in preference to the widow, as lineal heir to the Râjah, by right of adoption, though the adoption was valid (in all other respects). (*c*)

I. 1. A. 6.—ADOPTION IS IRREVOCABLE AND IRRENOUNCEABLE.

Adoption once really made is indefeasible. (*d*) Accordingly the Śâstris say:—"An adoption made with due ceremonies and followed by the chaul cannot be set aside." (*e*) "It is

(*a*) *Dhurm Das Pandey* v. *Musst Shama Soondri Dibiah*, 3 M I A. 229; S. C. 6 C. W. R P. C 43; 2 Str. H. L 127.

(*b*) *See* below, Sub-sec. B 2. 6 (*b*).

(*c*) *Jijoyiamba Bayi* v *Kamakshi Bai*, 3 M H C R. 424.

(*d*) 2 Str. H L. 142. *See* above, pp. 365, 938. "An adoption concluded agreeably to the Śâstras is not annullable It is not retractable among Brâhmans after the Hom ceremony has been performed, nor among the lower castes." Steele, L. C. p. 184.

(*e*) MS. 1752. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption." Coleb. Dig. Bk. V. T. 273 Comm.

"The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son

held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will." (*a*)

When a widow sought to violate this rule the Court said— "Nor can we admit that the facts and the validity of the joint adoption (by two widows) being unquestionable, she is singly competent to set aside or annul in any degree an act which must be assumed to have been performed in obedience to the injunctions of her deceased husband." (*b*)

An adopted son cannot renounce his family of adoption and the consequent obligations to which he is subject. He can but resign his rights in that family. (*c*) A Sâstri declared that "an adoption cannot be annulled except on sufficient grounds (*i. e.* not by mere agreement)," (*d*) and the decisions rule that the status created by adoption cannot be given up by the adopted son (*e*) or dissolved by the parties immediately concerned.

Where a woman sought to disclaim an adoption made by her by a deed purporting to convey her property to her illegitimate son, this was pronounced illegal, though the upanâyana of the adopted had been performed (after adoption) in his real father's house. "The adoption," Colebrooke said, "being once completely and validly made it cannot be recalled." (*f*)

(Mitâksh. on Inheritance, Chap. II. Sec. X,), but he cannot forfeit the relation of son." Coleb. in 2 Str. H. L. 126.

(*a*) 2 Str. H L 126.

(*b*) *Ry. Roop Koour* v. *Ry. Bishen Koour*, N. W. P. S. D. R. N. S. Pt. II. 1864, p. 655.

(*c*) Above, p. 938. Comp. pp. 340, 792.

(*d*) MS 1741. See *Mohapattur* v. *Bonomallee*, Marsh, R. 317.

(*e*) *Ruvee Bhudr* v. *Roopshunkar*, 2 Borr. 713.

(*f*) 2 Str. H. L. 111.

In one case of an adoption of doubtful validity it was indeed ruled that—If after becoming of age an adopted son execute an agreement acknowledging the validity of his right to depend on his performance of certain conditions, his infraction of these will nullify his right. (*a*) But the soundness of this judgment seems open to doubt. (*b*) A man must belong to the one family or the other, it cannot rest on the mere option of another person. (*c*)

A. 7.—NO RETURN TO THE FAMILY OF BIRTH.

This follows from the principles already laid down. According to the Śâstri—"The son given in adoption cannot be reclaimed." (*d*)

To a question put to the Śâstris by the Court in another case they replied :—

"If any one about to adopt should receive from one not related to himself in the male line that person's son, and should perform his adoption according to the ceremonies of the Vêda, and after that cause his regeneration by performance of the choora and oopanayana saṃskâr, &c., (tonsure at three years of age; investiture with the string at five or eight years; and the remaining regenerating ceremonies) in the name of his own gotra, or paternal line, that son so invested with the lineage and estate of the adopter has no right to keep up connexion with the other lineage, that is, he cannot return to his own................." (*e*)

(*a*) *Musst. Tara Munee Dibia* v. *Dev Narayan et al*, 3 C. S. D. A. R. 387.

(*b*) See *Bálkrishna Trimbak Tendulkar* v. *Savitribai*, I. L. R. 3 Bom. 54.

(*c*) See *In re Kahandás Nárandás*, I. L. R. 5 Bom. at p. 164. Above, p. 187, and Sec. VI. A. 6 of this Book.

(*d*) MS. 1748.

(*e*) *Ruvee Bhudr* v. *Roopshunker*, 2 Borr. 656.

In Bengal as in Bombay the adopted son cannot return to his family of birth. (*a*)

A. 8.—THE CONNEXION BY BLOOD WITH THE FAMILY OF BIRTH IS NOT EXTINGUISHED.

Although there is a complete severance in religious and secular interests from the family of birth, the artificial status is not allowed to make marriage possible between an adopted son and his real mother or sister. It is only the religious and ceremonial connexion with the family of birth that is extinguished, and as the Datt. Mîm. VI. 10 says, adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees. (*b*)

A. 9.—TERMS AND CONDITIONS.

The incongruity of an adoption, the operation or abiding validity of which is to be subject to a term or condition has already been noticed. (*c*) In a case of this kind the Court said—

"We * * cannot find that the Hindû law recognizes a conditional adoption, which appears to leave unsecured, and in jeopardy, the objects contemplated by the adopting, and to involve an element of injustice to the adopted party * * Insubordination to the widow of the deceased adopting father being an insufficient [reason] * * we hold that he could not

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(*a*) *Sreemutty Rajcomaree Dossee* v. *Nobcoomar Mullick*, 2 Sevestre, 641 note.

(*b*) *Moottia Moodelli* v. *Uppon Venkatacharry*, M. S. D. A. R. for 1858, p. 117; *Narasammâl* v. *Balarâmâchârloo*, 1 M. H. C. R. 420. See above, p. 1022.

(*c*) Above, p. 187 Note (*d*). Under the Roman law there could be no "adoptio ad diem" or "sub conditione." as mancipation by which it was originally effected was a solemn public act not susceptible of qualification. *See* Maynz, Cours. de Dr. Rom. Sec. 412; Goudsm. Pand. p. 155; Maine, Anc. Law, p. 206 (3rd Edn.).

legally do so (*a*) and that the entry of such condition in the *wajib-ool-urz* (*b*) is worthless and ineffective. Nor do we admit that any value or efficacy would accrue to the entry, or that any validity would be given to the condition, even if the defendant, * * when still very young, whether he were legally of age or not, authenticated the *wajib-ool-urz, pro forma* with the view of curing the ostensible defect of its having been authenticated by his father after his decease. It would be extremely inequitable to hold that he thereby deliberately intended to express his assent to the conditions * of which it is quite possible, and not at all unlikely, that he was ignorant. Even if he were aware of it, and ignorantly supposed himself to be bound by it, we are not prepared to admit that he is for that reason bound by it." (*c*)

In discussing under the preceding Section (*d*) the legal possibility of making an adoption subject to terms differing from those annexed to it by the law, the effects of agreements and of adoptions thus made have been to some extent considered. It would seem, that of the several cases which occur in practice that of the adoptive father's stipulations for preserving the estate, and securing his widow against destitution could not be refused effect by the Courts, so far at any rate as they bear on his separate or sole property. But if a man adopting for himself may do so on terms varying the usual rights of the son, it is but a slight extension of the principle when wills are once admitted to say that he may by a power or will allow his widow to impose such terms. And when a widow takes the whole estate without any will or direction to adopt, but with an assumed license from

(*a*) *i. e.* prescribe such a condition.

(*b*) A petition, memorial.

(*c*) *Per Curiam* in *Ram Surun Das* v *Musst Pran Kooer*, N. W. P. S. D. R. Pt. I., 1865, p. 293. Comp. the remarks of the Judicial Committee above, Sec. VI. A. 6.

(*d*) Sec. VI. A. 6.

her husband, it may be conceived that he knowing an adoption was probable, but entirely at the option of the widow, has given her a tacit authority to make her own terms. This logical development of the principles involved in the allowance of a will seems to be contained in the following two cases.

Where a power of adoption had been given by will to a wife coupled with a direction that the widow should during her life retain the whole of the testator's property, ancestral as well as self-acquired, it was held that the widow, after adopting, had a life interest with remainder to the adopted son. (*a*)

In *Ramasami Aiyan* v. *Venkataramaiyan* (*b*) where the natural father of a boy, whom the widow of a deceased Hindû proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father, the Privy Council held that the agreement was not void, but was at least capable of ratification when the adopted son became of age. *Chitko* v. *Janaki* (*c*) was referred to doubtingly. The stipulation that the boy adopted as a son should obtain that status without the corresponding rights was one, no doubt, unwarranted by the Hindû law of the Sâstras, and was subject to challenge by the son until he had ratified it on becoming *sui juris*. The Pandits consulted in Bengal on this point had said that an instrument by which a widow adopting a son reserved the property to herself for life was not lawful. The adopted son, they said, in spite of such

(*a*) *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya*, I. L. R. 8 Calc. 357, following *Musst Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al*, L R 2 I. A 256 The latter is not a case of adoption, but of a settlement by a man on his wife with the concurrence of his kṛitrima son, to whom was given a remainder on the wife's death.

(*b*) I L R 2 Mad. 91.

(*c*) 11 Bom. H. C. R. 199.

an instrument, was entitled to the estate. (*a*) In a somewhat similar case in Bombay, an adoptive mother (Koli) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Śâstri illegal, and the adopted son, if capable, was, he declared, still entitled to inherit, subject to the duty of maintaining the mother. (*b*) But wills also are not allowed by the Śâstras, and yet in one form or another they have grown up to meet social needs, even within the sphere of the Hindû law. So too the customary law has approved reasonable arrangements for the adopting mother's security. It seems impossible now to say that this advance will not be maintained. (*c*)

Cases such as that of *Ramguttee Acharjee* v. *Kristo Soonduree Debia,* referred to above at p. 1110 note (*c*), must raise questions as to whether by the disposition the adopted son takes a vested estate forthwith on his adoption, although his enjoyment or actual possession be deferred, or whether

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(*a*) *Musst Soolukhna* v. *Ram Doolal Pandeh,* 1 C. S. D. A. R. 324 (1st Edn) Above, p. 177 (*c*).

(*b*) MS. 15.

(*c*) Any interest that a widow allows an adopted son to take in possession during her own life must so far be a detriment to her own estate, seeing that she is owner of the whole, and cannot, according to the Śâstris, be deprived of this which they regard as a jointure by any testamentary disposition made by her husband. In the case of *Musst. Goolab* v. *Musst. Phool* (1 Borr. 173) the Zilla Judge proposed to the Śâstris a question—Can a man separated in interest from his brother, and whose wife is alive, bequeath his property to his brother's son? The answer resting on the Mitâksharâ was—" The wife . . . . . has a right to inherit her husband's estate, and a will made by the husband . . . . in favour of his brother's son is not valid." (pp. 175, 176.) This was confirmed by the Paṇḍit of the Sadr Court (p. 180). The theory of a power of bequest equal to the power of gift was not accepted by the law officers in these cases, and the widow was regarded as taking by a kind of survivorship, though no doubt with a restricted interest or faculty of disposal.

adopted him. (*a*) "The natural father need not incur the expense of getting the boy married; it devolves properly on the adoptive mother. She cannot recover from his father the expenses of his adoption and investiture. She cannot restore the boy, nor can the father reclaim him on the ground of having got him married." (*b*)

"Tonsure performed in the family of the natural father, after gift, has no vitiating effect." (*c*)

(*b*).—SON THE ACTIVE SUBJECT.

"A boy severed by adoption from his own family and incorporated in the adoptive family is not affected in status by performing the funeral ceremonies of his natural father and mother." (*d*)

"An adoptee performs the ceremonies of Kreea and Puksh for his [natural] father and relations, only in case his natural father should die without any other son or near relation, when he would perform them as a Dharmapûtra. An adopted performs Sutak (*e*) for his natural family according to their adoptive relationship." (*f*)

(*a*) In the *Mánkars'* case the Śâstris in the opinion quoted above, p. 1010, recognize a widow's direct interest in adoption for securing her own future happiness. *See* too p. 938.

(*b*) MS. 1754.

(*c*) *Musst. Doolubh Dai* v. *Manee Beebee*, 5 C. S. D. A. R. 50. "The adoption of a child . . . . . for whom tonsure and other ceremonies were afterwards performed under the family-name of his natural father, would be nevertheless valid: for the ceremony of tonsure performed under the family name of his natural father is void, because he did not then belong to that family; and because the ceremony is performed by one who had no right to do so, since he truly became son of the adopter, and certainly belonged to his family, not having been already initiated under the family-name of his natural father when the adoption took place." Coleb. Dig. Bk. V. T. 273 Comm.

(*d*) MS. 1673.

(*e*) Sûtaka—Impurity; here ceremonies for its removal.

(*f*) Steele, L. C. p. 185.

"Since it is not a fit practice for a son given to perform the obsequies of his former mother, it is proper to take for adoption a boy whose mother is living, and who is given both by her and by her husband." (*a*)

"In case of being adopted by his father's brother, the adoptee is enjoined to perform the Śrâddha both for his natural and adoptive fathers, inheriting the property of the former, however, only in default of heirs in order of succession before brothers' sons." (*b*)

An adopted son is considered in the nature of a purchaser for valuable consideration, which is his loss of inheritance in his natural family. (*c*)

B 1. 2—RELATIONS AS TO PROPERTY

"An adopted son forfeits all right of inheritance in his natural family." (*d*) "He (the adopted son) cannot, after being adopted, claim the family and estate of his natural father, which follow the funeral oblations; nor is he liable to pay his natural father's debts." (*e*) "He (an adopted son) can only inherit from his natural father, in default of other heirs in previous order of succession . . . . in virtue of his adoptive, not his original, relationship." (*f*) Even where the sacrificial idea is absent, "a Jain adopted by his uncle

(*a*) Coleb. Dig Bk. V T 275 Comm. The conception is that without a positive resignation the mother's claim to the son's religious services may continue.

(*b*) Steele, L. C p 47. He ranks as a brother's son.

(*c*) *Gopeymohun Deb* v. *Rajah Ray Kissen*, cited in *Doe Dem Hencower Bye* v. *Hanscower Bye*, East's Notes, Case 75; 2 Morl. Dig p. 133. *See* above, Sec. VI. A. 7.

(*d*) *Appaniengar* v. *Alemalu Ammal*, M S. D A. Dec. 1858, p 5.

(*e*) Steele, L. C. p. 47; Mit. Chap. I. Sec. XI. para. 32; above, p. 365; Coleb. Dig. Bk. V T. 181; Manu IX. 142. The term "funeral oblation," intends that which is made for a father.

(*f*) Steele, L. C. p. 186.

ceases to be heir as son to his natural father." (*a*) The Śâstri added that "what he had acquired before adoption by using the capital of his natural father belonged to the latter." (*b*) The natural relation was in fact jurally annulled, and his father would no more inherit from him than he from his father. (*c*) But in an emergency the Śâstri says—"Should the natural parents have no other heir, the son they gave in adoption may perform their Śrâddhas and take their property also."(*d*)

After adoption, the person adopted cannot mortgage property belonging to his natural family, nor can his widow do so after his death. (*e*)

B 1 3—RELATIONS AS TO OBLIGATIONS

The natural father is not responsible for the debt of a son given in adoption. (*f*) Nor conversely is the son liable. (*g*) Thus the Śâstri says:—"A son given in adoption must pay his natural father's debts only if he has inherited property from the natural father," (*h*) and in the case of a suit it was ruled that an adopted son is not liable for debts of his natural father who died in jail in execution of a decree for debt against him. (*i*)

(*a*) MS. 1757.

(*b*) MS. 1756.

(*c*) Coleb in 2 Str. H L 129

(*d*) MS. 1761.

(*e*) *Yesubai kom Daji* v *Joti*, Bom H C. P J. 1875, p 16.

(*f*) 2 Str H. L 125; see *Udaram Sitaram* v. *Ranu*, 11 Bom. H. C. R. 76, 84, 86.

(*g*) *Pranvullubh* v *Deokristen*, Bom S. D A. Sel. Rep. 4.

(*h*) MS. 1758. *See* above, p 365.

(*i*) *Pranvullubh Gokul* v. *Deokristen Tooljaram*, Bom. Sel. Rep. p 4.

B. 1. 4.—RELATIONS BETWEEN THE ADOPTED AND THE OTHER MEMBERS OF HIS FAMILY BY BIRTH—IMMEDIATE PERSONAL RELATIONS.

An adopted son is to be considered as one actually begotten by the adoptive father in all respects except an incapacity to contract a marriage in his family of birth. (a)

"Adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees." (b)

"An adopted son is restricted from intermarrying with any girl of either his natural or adoptive families within the prohibited degrees, and his descendants are under a similar restriction with regard to the former family to the third generation, viz. so long as remembrance may continue of the adoption." (c) "He cannot intermarry with either his natural or adoptive gotr." (d)

A Sâstri said in one case, that "adoption severs the connexion with the natural relatives so completely that the adopted son's widow may adopt his younger brother." (e) We have seen that there is some authority for this kind of adoption, (f) but the better opinion appears to be that embodied in the ruling that an adopted son cannot adopt as his son his brother by birth. (g)

(a) *Narasammál* v. *Balarámácharlu,* 1 M H C. R 420. The same case pronounces strongly against the adoption of a sister's son in the Andhra or Telingana country.

(b) *Moottia Moodelli* v *Uppon Vencatacharry,* M. S. D. A. Dec. 1858, p. 117.

(c) Steele, L. C p. 47. Above, pp. 937, 938.

(d) Steele, L C. p. 186.

(e) MS. 1625.

(f) Above, p. 1021.

(g) *Moottia Moodelli,* v. *Uppon Vencatacharry,* M S. D. A. R. 1858, p. 117.

B 1. 5 — RELATIONS AS TO PROPERTY

"A son (an only son) who, having been given in adoption has passed out of his family of birth, has no longer any claim to the property of that family," (*a*) and reciprocally, a member of a Hindû family cannot as such inherit the property of one taken out of that family by adoption. His severance is so complete that no mutual rights as to succession to property can arise between him and his relations of the natural family. (*b*) Hence it was said, that on an adopted son dying without issue, his property reverts to his adoptive family, his introduction into the new family causing his severance from his natural kindred, and they forfeiting all claims to succeed to his estate. (*c*)

B 2 — CONSEQUENCES AS CREATING RELATIONS IN THE FAMILY OF ADOPTION.

B 2 1 — BETWEEN THE PARENTS AND ASCENDANTS, AND THE SON AND DESCENDANTS — IMMEDIATE PERSONAL RELATIONS.

(*a*) PARENTS THE ACTIVE SUBJECTS

"An adoptive father is entitled to the custody of the person of the adopted son." (*d*) It follows that the proper residence of an adopted son is with his adoptive parents. (*e*) The only exception is in case of cruelty or incapacity. Thus it was ruled that the adoptive parents, if willing, have a

(*a*) MS. 1756.

(*b*) *Narasammál* v. *Balarámácharlu*, 1 M H C. R. p. 420; *Ráyan Krishnamácháriyár* v *Kuppannayyangar*, 1 M. H C. R. p 180; *Srinivasa Ayyangár* v *Kuppan Ayyangar*, 1 M. H. C. R. p. 180.

(*c*) *T. M. M. Narraina Numboodripád* v. *P. M. Trivicrama Numboodripad*, M. S. D. A. R. for 1855, p. 125.

(*d*) MS 1677.

(*e*) *Lakshmibai* v. *Shridhar Vasudev Takle*, I. L. R. 3 Bom. 1.

present world by the practice of alms-giving, feeding Brâhmans, pilgrimages and other Hindû virtues." (*a*)

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)." (*b*)

"Though the adoption be not annulled, yet should the adoptee not perform his filial duties, he separates from his adoptive father, receiving some share of the property." (*c*)

An adopted son succeeds to the adoptive father's property, subject to the right of maintaining the widow. (*d*)

(*a*) Steele, L C p 42 In *Ram Soonder Singh* v *Surbanee Dási*, 22 C W. R 121, Mitter, J, says the prescribed repetition of the Śrâddhas implies a power of repeated adoption by the widow though a son should have attained maturity and passed through all the Saṃskâras. There does not seem to be any authority for this, but at any rate the duty would be that of the widow of the son should there be one. (*See* above, p 93, and Sub-Sec. I 1. A. 2 of the present Section, p. 1148)

(*b*) *Uma Sankar Moitro* v *Kali Komul Mozumdar et al*, I L R 6 Calc 261 According to Datt Mîm VI para 50, the manes of the adoptive mother's ancestors benefit by the Śrâddhas celebrated by the adopted son. "In the double set of oblations, it is indispensably necessary that the son should perform the Śrâddha for the paternal line, not for the line of his maternal grandfather: but it is simply reprehensible in one who performs the Śrâddha for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors Consequently, since the Śrâddha may be performed without noticing the maternal grandfather's line in a subordinate double set of oblations, and the like, the Śrâddha for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of Aswina." Coleb. Dig. Bk. V. T. 273 Comm.

(*c*) Steele, L. C. p. 185; above, p 939. As to a second adoption on the refusal or incapacity of the first adopted to fulfil his duties, *see* above, pp. 585, 587, 938, 946.

(*d*) *Rungama* v. *Atchama*, 4 M. I. A. p. 1; S. C. 7 C. W. R. 57 P. C. *See* above, p. 248. "The adoptee is bound to provide the widow in necessaries." Steele, L. C. p. 188.

"There being a born son and an adopted son, they are jointly and severally responsible, according to their means, for the support of their parents." (*a*)

"A daughter-in-law adopts a son, and as his guardian manages the estate. The mother-in-law can claim maintenance from her." (*b*)

A widow of an adoptive father being refused maintenance by the adopted son sold part of the estate in her possession. The Sâstri said the adopted son could recover it only on payment of the purchase money and interest. (*c*)

B. 2. 2—RELATIONS BETWEEN THE PARENTS AND THE SON WITH RESPECT TO PROPERTY.

(*a*) BETWEEN THE ADOPTIVE FATHER AND SON.

An adopted son has all the rights of a son born. (*d*)

An interest vests in the adopted immediately on his adoption, (*e*) though he be a minor, and he is entitled to the

(*a*) MS 1842.

(*b*) MS 1831

(*c*) MS 16 See above, pp. 252, 653, 762; below, Sub-sec. B. 2. 2. (5). Provision may be made for a widow's maintenance before ejecting her. (*See* above, p 653)

(*d*) Steele, L. C 47; *Maharajah Juggurnath Sahaie* v. *Musst Mukhun Koomvur*, 3 C W. R C. R 21, *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C W R. C. R. 49; *Ry. Kishenmunee* v. *Raj Oodwunt Singh*, 3 C. S D A R 228; *Srinivasa Ayyangár* v *Kuppan Ayyangár*, 1 M. H. C R. 180; *N. Chandrasekharudu* v. *N Bramhanna*, 4 M. H. C. R. 270; *R. Vyankatrav* v. *Jayarantrar*, 4 Bom. H. C R A C. J. 191; *Trimbuk Bapoe* v. *Narain Vinaik*, 3 Morris 19; *Ráyan Krishnamáchári-yár* v *Kuppannayyangár*, 1 M. H. C. R. p. 180; *Sree Narain Rai* v. *Bhya Jha*, 2 C. S. D. A S 27.

(*e*) *Sudanund Mohapattur* v *Soijo Monee Debee*, 8 C. W. R. 455; S. C. 11 C. W. R. 436; reversed, 20 C. W. R. 377, by the Judicial Committee on the ground that the validity of the will questioned by the adopted son had been adjudged in a previous suit by him.

profits after his adoption, (*a*) as also to immoveable property purchased with money derived from ancestral estate, which property continued to exist at his adoption. (*b*)

"A man who has adopted cannot alienate immoveable property without good reason. With reason he may, especially what he has himself acquired." (*c*) The older cases agree with this opinion, as when the Judicial Committee ruled that by adoption a person divests himself of his right to dispose of immoveable property without the consent of the son adopted. (*d*) Adoption, however, it has been ruled, is not a valuable consideration proceeding from the boy adopted in such a sense as to bind the adoptive father against an alienation of his self-acquired property. (*e*) The adopted stands in this respect on precisely the same footing as a son by birth. (*f*) The case might have been dealt with on the ground that where no more was engaged for, the adoption gave to the adopted only the ordinary advantages of a son.

(*a*) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W R. Misc. 6.

(*b*) *Sudanand* v. *Bonomalee*, 6 C. W. R 256, and cases in Note (*i*) above.

(*c*) MS. 1725.

(*d*) *Rungama* v. *Atchama*, 4 M. I A. 1; S. C 7 C W. R. P. C. 57. *See* above, pp. 614 ss, 208 ss

(*e*) *Purshotam Shenvi* v *Vasudev Shenvi*, 8 Bom. H. C. R. 196 O. C. J.

(*f*) The case of *Mohapattur* v. *Bonomallee* (*see* above, p. 723) was relied on, because as in it the first adopted son suing as heir did not dispute the father's disposal of his self-acquired property, it was thought apparently that it could not be disputed. But that was a Bengal case, and in Bengal the relations of father and son as to property are different from what they are in Bombay (*see* Dayabhaga, Chap. II. 8, 17, 18, 28–30; 2 Str. H. L. 437, 444; Mit. Chap. I. Sec. I. para. 27; above, p 667; 12 M. I. A at p. 38, there referred to; 2 Str. H. L. 449). Under the Mitâksharâ the son has a joint interest in the immoveable

Had a contract been made or property settled on the son, there seems to be no doubt that on the principle of the cases referred to in Sec. VI. A. 6 and 7, his becoming an adopted son would be a consideration (*a*) such as would make the transaction binding.

The right of interdiction has been recognized by the Śâstris as acquired by adoption as in the following instance— "An adopted son can claim from his father property that the father is making away with in order to deprive the son of it, (*b*) as an alienation made in order to deprive a son or brother may be rescinded by the State."

property acquired by the father. He must submit to his father's dealings with such property on account of his subordination and the father's freedom from control (self-government) as manager (*see* above, pp. 211, 648), but this subjection cannot last beyond the father's life. The father's right is one of joint ownership plus *svatantrata*, unshared control (*see* 2 Str H. L. 443). On his death the son's right by survivorship makes him complete owner, and the father's will cannot operate against him, although it would be effectual against others, not co-owners, only successors. (*See* above, p. 587). The right to sell is not identical with the right to give, nor is the right to give identical with the right to devise (*see* above p. 219). This is manifest from what the Judicial Committee say in *Lakshman Dada Naik's* case (I L. R. 5 Bom. at pp. 61, 62); and though the law of wills follows the analogy of the law of gifts it need not go so far. It is plain that it does not; and the power of a father to devise his acquired lands away from his son cannot apparently be rested on the recognized authorities (*see* Vyav. May. Chap. IV. Sec. I. paras. 4, 5; Colebrooke at 2 Str. H. L. 435, 436). In the case of *Musst. Goolab and Phool* (above Sub-Sec. A. 9), the Śâstris and the Courts refused effect to a will which went to deprive widows of their right of inheritance, though undoubtedly the wives could not have interfered with their husband's dealings during his life. Ellis at 2 Str. H. L 428 expresses a similar opinion. Colebrooke differed only because he thought the power followed from wills ranking as gifts. The right of a son is as co-owner, that of the wife altogether dependent (see *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99).

(*a*) See *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*b*) MS. 1735.

A Joshi having an adopted son, 15½ years old, executed a deed of gift of part of his vatan to his daughter's children. This was endorsed with an assent by the natural father of the adopted son. Such signature was pronounced useless. But the adopted son was pronounced answerable to make good a gift of part only of the vatan. (*a*)

" A gift of a house made by a Brâhman to his mistress does not enable her to dispose of it to the detriment of his subsequently adopted son, though she may retain it for life if she behaves becomingly to her master" (*i. e.* apparently the son). (*b*)

" An adopted son may claim a division of ancestral property from his father, but not of his father's own acquisitions." (*c*)

" An assignment of a village for maintenance to an adopted son cannot be revoked." (*d*)

An adopted son can sell his right, title, and interest in his share of undivided family property. (*e*)

" An adopted son's son can claim a share of the grandfather's (former) property though his father be alive, unless the property having been mortgaged or alienated the father has recovered it." (*f*)

(*a*) MS. 711. *See* above, p. 194.

(*b*) MS. 712. *See* above, pp. 762, 763. The donor could by an explicit grant give her a larger interest. *See* above, pp. 208, 293, and Sec. VI. A. 6 of this Book.

(*c*) MS. 1731. In answer to Q. 1704, it is said, he cannot claim a partition (nature of property not specified).

(*d*) MS. 790. This was probably understood as a case of partition. *See* above, pp. 702, 939.

(*e*) *Rutoo bin Bapooji* v. *Pandoorangacharya*, Bom. H. C P. J. 1873, p. 176. The son was tenant of the whole property, and his interest was sold in execution. The purchaser was pronounced liable to the adoptive father for a moiety of the rent, he having been put into possession of the whole. *See* above, p. 663.

(*f*) MS. 1736. *See* above, p. 722.

An adopted son becomes heir to the whole of the adoptive father's property, and is excluded from inheritance in his own family. (*a*)

A son, adopted by a widow under her husband's authority, supersedes all other heirs. (*b*)

A son, adopted by a widow of a predeceased son, succeeds to his grandfather's estate as well as to that of his own adoptive father, whether the adoption took place in the grandfather's lifetime or not. (*c*) If the adoption was made with the consent of the grandfather, his subsequent disposition or the birth of a son to his daughter in wedlock will not invalidate the adoption. (*d*)

An adopted son takes by inheritance and not by devise (*e*) in the case of his adoption by a widow under an instrument providing for the boy only as an adopted son and successor.

(*a*) *Bhasker Buchajee* v *Narro Ragoonath*, Bom. Sel. Rep. p. 25; *Duttnaraen Singh* v. *Ajeet Singh et al*, 1 C. S. D A. R. p. 20; *Gopeymohun Deb* v *Raja Ray Kissen*, *see* East's Notes, Case 75; *Ranee Bhuwanee Dibeh* v. *Ranee Sooruj Munee*, 1 C S D A R p 135; *Srinath Serma* v. *Radhakaunt*, 1 C S. D. A. R. p. 15; *Appanienyar* v. *Alemaloo Ammal*, M. S. D. A. R. for 1858, p. 5; *Raje Vyankatráv* v. *Jayavantráv*, 4 Bom H. C. R A. C J. p 191

(*b*) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str 91; *Nundkomar Rai* v *Rajindernaraen*, 1 C S D A. R. p 261. "Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator as if he had existed at the time of the testator's death, having been actually begotten by him" Willes, J., in the *Tagore* Case, L. R. Supp I A at p 67. *See* above, p 983

(*c*) *Gourbullab* v *Juggernotpersaud Mitter*, Macn Con H L 217.

(*d*) *Ramkishen Surkheyl* v *Musst Sri Mutee Dibea et el*, 3 C S D A. R. 367. The assent of the grandfather was necessary on the principles stated in Sec III B 3 33

(*e*) *Musst Bhoobum Moyee Debia* v *Ram Kishore Acharj Chowdhry et al*, 10 M I A p 279, 309; S C. 3 C W R P C 15; Beng S D. A. R for 1856, p 122 *See* above, Sec. VI. A. 6.

An adopted son, though separated from his adoptive father, succeeds to the residue of the latter's estate, undisposed of by him by gift or will, in preference to the widow, in case he dies leaving no unseparated son surviving him. (a)

On an adopted son's dying without issue his adoptive father's property goes, it was said, to his natural heirs. (b) This would depend on whether the son died before or after the father.

In a suit by an adopted son to set aside a will, the will was held of no effect as a valid devise of property. At the father's death the right of survivorship was in conflict with the right by devise. Then the former, being the prior title, took precedence. (c)

As an adopted son has no more rights than a natural son would have, so the adopter is at liberty, it was said, according to the law of Bombay, to dispose by will of immoveable property acquired by him, to any one he pleases. (d)

If an elder adopted son takes the whole of the ancestral property, which the father could not dispose of without his consent, he must give up for the benefit of the second adopted son the whole property included in the devise, to the disposition of which his consent was not necessary. (e)

(a) *Balkrishna Trimback* v *Savitribai*, I. L R 3 Bom. 54. *See* above, p 359.

(b) *Subrahmaniya Mudali* v. *Parvati Ammal*, M. S D A R, for 1859, p. 265.

(c) *Vitla Butten* v. *Yamenamma*, 8 M H C R 6.

(d) *Purushotam* v *Vasudev*, 8 Bom. H. C R. 196 O. C. J. *See* above, pp. 208 ss, 641, 772.

(e) *Rungama* v. *Atchama*, 4 M I A 1; S C 7 C. W R P C. 57. The right of the second adopted son rested wholly on the devise, his adoption being invalid.

A Hindû cannot disinherit a duly adopted son, even for bad character, nor can he adopt another. (*a*) It is only in an extreme case of violation of duty that a son's rights are lost, or that a father can disinherit an adopted son. Both stand on the same footing. (*b*)

Renunciation by an adopted son of his right in his adoptive father's property, though permissible, does not free him from adoption. If he resigns the right, the adoptive mother succeeds to the separate property of her husband.(*c*)

An adopted son may for money relinquish his share in the adoptive father's family. This puts him into the position of a separated son. It does not disinherit him. If he be disinherited for adequate cause his son takes his place as heir. (*d*)

On the death of an adopted son before that of the father his joint proprietary right, like that of the son by birth, is of

(*a*) *Daee* v *Motee*, 1 Borr 81. "It is declared that, if culpable, even a son of the body does not take the heritage, hence vicious sons, whether begotten in lawful wedlock or the like, or adopted as sons given and the rest, are excluded from participation; sons so adopted, being void of good qualities, shall have a maintenance: but such sons, being virtuous, shall take the inheritance of a father, or of his kinsman," Coleb Dig Bk V T 278 Comm *See* above, p 575, 585, 587 A person cannot disinherit his son by will, *Gopeymohun Deb* v *R Raykissen*, East's Notes, Case 75, *Pranvullubh Gokul* v *Deokristn Tooljaram*, Bom Sel Rep 4

(*b*) *Sadanund Mohaputtee* v. *Bonomallee*, C. S. D. A. R. 1863, p. 205. *See* above, p. 1146. In Khandesh, it was stated in answer to Steele's inquiries, that exclusion from caste does not cause a forfeiture of property or of the right of inheritance. Steele, L. C. 152. *See* above, p 907. But the holder of any religious office peculiar to Hindûs naturally forfeits it by change of religion. *Ib*. Answer from Sâtâra.

(*c*) *Ruvee Bhudr* v. *Roopshunker*, 2 Borr 656 On his resigning, the right descends to the next in succession. This might be his son, who would take in preference to the mother.

(*d*) *Balkrishna* v *Sabitribai*, I. L. R 3 Bom. 54 *See* above, p. 372.

course absorbed in that of the father, (a) and his widow, should he leave one, is entitled to maintenance in the family of adoption. (b)

B. 2. 2. (b).—BETWEEN THE ADOPTIVE MOTHER AND SON.

"As soon as a son is adopted by a widow, he succeeds to her husband's estate. Her independent rights and those of her mother-in-law forthwith cease." (c)

"The possession of authority to adopt a son by a widow in Bengal does not destroy or supersede her personal rights as widow, which continue until the adoption is actually made. . . . . The property is in the widow from the death of the husband until the power of adoption is exercised. . . It is only an alienation by the widow improper as against the subsequent heirs generally, that the adopted son can get rescinded. (d) The authorization in fact is as if non-existent until it is acted on by the widow. (e)

(a) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R 76, 86.

(b) 2 Str. H. L. 235. See above, pp. 246 ss, 758.

(c) MS. 1716. *See* Steele, L. C 48, 49 "Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper strî-dhana, it ceased to be her's at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow by the same means, cannot be used by her as her own, after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian." Coleb. in 2 Str. H. L. 127.

(d) *Bamundoss Mookerjea* v. *Mussl. Tarinee*, 7 M. I. A. 178, 180, 185, 206.

(e) *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R 7 Calc. 283. *See* above, p. 903.

An adopted son becomes son of both father and mother, and performs funeral rites to both.(a) He is heir to the adoptive father, and, in the absence of a daughter, to the mother's strîdhaṇa. (b) "In the lower castes a partition sometimes occurs, but the adoptee is heir to his adoptive mother, and generally manager during her life." (c)

Adoption by a widow in Bengal, under her husband's permission, deprives her of her widow's estate, (d) and entitles her to maintenance. (e) The same is the result, even when the adoption is valid without the husband's permission, as amongst the Agarvâli Jains. (f) It follows from this that a Hindû widow, after adopting a son, cannot mortgage the family property as her own, nor can such a transaction be validated by the son's ratification. (g)

An adoption works retrospectively and relates back to the death of the husband of the adoptive mother. It invalidates a gift or sale, unless it was effected under inevitable necessity, and entitles the adopted son to succeed to his estate as the same stood at the death of his adoptive

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(a) *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C. W. R. 49. "An adopted son," the judgment says, "has all the rights and privileges of a son born." Datt Mîm. Sec. I. para. 22. "Women have legally no right to adopt for the transmission even of their separate property but . . . . such a custom may obtain in the caste". Ellis in 2 Str. H. L. 128.

(b) Above, p. 513.

(c) Steele, L. C. p. 186.

(d) *Nundkomar Rai* v. *Rajindurnaraen*, 1 C. S. D. A. R. 261; *Musst. Solukhna* v. *Ramdolal Pande et al*, 1 C S. D. A. R. 324; *Durma Samoodhany Ummal* v. *Coomara Venkatachella Reddyar*, M. S. D. A. R. for 1852, p. 111; *Radhabai* v. *Damodar Krishnarav*, Bom. H. C. P. J. for 1878, p. 9.

(e) *Musst. Rutna Dobain* v. *Purladh Dobey*, 7 C. W. R. 450.

(f) *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87.

(g) *Siddheshvar* v. *Ramchandrarao*, I. L. R. 6 Bom. 463.

father. (a) In *Rajah Vyankatrao's* case the adoption was made by the widow about seventy years after her husband's death. (b) It follows from the widow's limited power that, as the Judicial Committee said, the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes, (and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption). (c) In the case, however, of an adopted son succeeding collaterally, his right, it is said, vests only from the adoption. At least he cannot retrospectively take away what passed to another collateral through his own non-existence, when the succession opened. (d)

An adopted son, moreover, though he is competent to question his mother's acts during his minority or before his adoption, cannot question a sale effected by her with consent of all the legal heirs then existing and ratified by the Civil Courts. (e)

A woman's religious gift of a house as her own which belonged to the family estate was pronounced invalid as against the adopted son. "There is no merit in aKṛishnârpana made without the consent of the son." (f)

(a) *Rajah Vyankatrav* v *Jayavantrav*, 4 Bom H C. R A C J. 191; *Nathaji* v *Hari*, 8 Bom H C R A C J 67; *Ranee Kishenmunee* v. *Rajah Oodwunt Singh*, 3 C. S. D. A. R. 228; *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A 169

(b) *See* above, Sec. III B. 3 23; 3 34.

(c) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 443.

(d) *Bamundoss Mookerjea* v. *Musst. Tarinee Dibia*, Beng. S D. A. R. for 1850, p. 533; S. C 7 M. I. A 169; *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharj*, 10 M. I. A. 279; S C. 3 C. W. R. 15 P. C; Beng. S. D. A. R. for 1856, p. 122. On this subject *see* above, Sec. III. B. 3. 23; 3. 25; 3. 34; 3. 35; and below, B 2. 5.

(e) *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar*, 3. C. W. R. 14. *See* above, p. 367.

(f) MS. 714. For Kṛishnârpana, *see* pp. 99, 479.

First there was permission given to adopt, then a sale by a Court of the property, then after twelve years there was actual adoption under the permission. It was held, that what was sold was not merely the widow's interest, as the proceeds of the sale were applied to debts for which the property was liable. The purchaser was held not subject to eviction by the adopted son, after the death of the widow, who had enjoyed a life estate under the deed of permission to adopt. (*a*)

"Under pressure of absolute necessity only an adoptive mother, living apart from her son, may sell the immoveable family estate." (*b*)

A Sûdra widow after adopting a son bought a field in her own name. It was held that she could give this to her daughter against the wish of her daughter-in-law, though she could not alienate the common property. (*c*) As regards the patrimony the case would be different; the adopted son transmits to his widow a succession which excludes his mother. (*d*)

In the event of successive adoptions the relations of the parties are determined by the following decisions. In the first it was said—

"The first adopted son became his father's heir. On the death of that son the widow became the heir, not of her late husband, but of the adopted son." (*e*)

(*a*) *Rajah Debendro Narain Roy* v *Coomar Chundernath Roy*, 20 C. W R 30 C R (P C) It may be questioned whether, on strict principle, the permission could thus cut down the adopted son's interest *See* above, Sec. VI A. 6. As to the widow's authority, *see* pp. 94, 367.

(*b*) MS 14 This implies that the son is inaccessible, or else when applied to refuses sustenance *See* above, pp 653, 762. But the right is questionable in any case She should sue the son. *See* pp 245 ss, 653

(*c*) MS. 1577 *See* above, pp. 314, 315, 507

(*d*) *Vencata Soobamal* v *Vencamal*, 1 Mad. S. D. A. R 210.

(*e*) Privy Council in *Ramasawmy Aiyan* v *Venkataramaiyan*, L. R 6 I A. p 208.

Through adoption a widow, it was said, divests her own estate only, and by succeeding to her son as heir, she does not lose the right to exercise the power of adoption. (*a*) The correctness of this depends on the principles considered in Sec. III. (*b*) She would, it seems, lose the right by the adopted son's leaving a widow or even having attained full religious maturity. (*c*) In other cases of adoption by a mother it has been said that a widow who has succeeded to her son, and who afterwards adopts a son, thereby divests herself of the estate. (*d*) Regarded as an unseparated brother of the deceased the adopted son would take precedence of the mother. As a separated brother he would not ; but in adopting a son the widow must perhaps be considered as replacing the one deceased with all his rights. The transaction is so anomalous (*e*) that any determination of these points must be in a great measure arbitrary. In similar circumstances the Judicial Committee hesitated to give a final decision, saying only "whether by the act of adopting another son, she in point of law divested herself of that estate in favour of the second son, may be a question of some nicety, on which their Lordships give no opinion." (*f*) H. H. Wilson (*g*) says -" It may be safely asserted that the Hindû law has not provided for the case" of a new adoption after the death of the boy first adopted. It must rest entirely on local usage where this is proved or known to exist.

A second adoption does not nullify an intermediate alienation by a widow after the death of the first adopted son. (*h*)

(*a*) *Bykant Monee Roy* v. *Kisto Soonderee Roy*, 7 C W R 392.

(*b*) Sub-Secs B 3 23; 3 25; 3. 35.

(*c*) See *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, 10 M. I. A at p. 310. Above, pp. 872, 1118.

(*d*) *Vellanki V Krishna* v *Venkata Rama Lakshmi*, I. L R 1 Mad. 174; *Jamnabai* v *Raychand*, I L R 7 Bom 225

(*e*) *See* above, p 1013.

(*f*) *Ramasawmy Aiyan* v *Vencataramaiyan*, L R. 6 I. A. at p. 208.

(*g*) Works, vol. V. p 63.

(*h*) *Gobindo Nath Roy* v *Ram Kanay*, 24 C W. R. 183.

The widow succeeded the first adopted son, who seems to have

A son adopted by the widow of a Hindû is legal representative of the deceased, and can maintain a suit under Act XIII. of 1855 for the benefit of persons entitled to compensation under the Act; but he is not entitled to any portion of the compensation awarded. Whether he would have been if adopted by the deceased himself is a question. (a)

A widow cannot sue as representative of her husband so long as her adopted son is alive, (b) nor can she prefer an appeal. A mere disclaimer by sons, and therefore by an adopted son, in the absence of proof of the widow's being herself the next reversioner after the sons (c) will not enable her to sue as owner. There must be a distinct assignment.

Where, pending a suit for partition by a widow in an undivided family, she adopts, though the suit is prosecuted in her own name, she is considered as guardian and trustee and accountable to her son for the profits of the property decreed. (d)

died in childhood Her power of alienation would then be governed by the estate she took *See* above, pp 110, 330, 367, 449, 451 She would not be allowed to make a second adoption a means of fraud. *See* above, pp 366 ss Supposing the deceased son had sold or incumbered without reason, the anomaly of a second adoption acting retrospectively would be very manifest

(a) *Vinayak Raghunath* v *G I P R Co.*, 7 Bom H C. R O C. J. 113.

(b) *Ram Kannye Gossamee* v *Meernomoyee Dossee*, 2 C W R. 49; *Jannobee* v. *Dwarkanath*, 7 C W R 455, *Narsara* alias *Gangava* v. *Ramangavda*, A D 1868

The widow must proceed in the adopted son's name after obtaining a certificate of administration under Act XX. of 1864 unless the property is of a trivial value, falling under Sec. 2 of the Act.

(c) *Ram Kannye Gossamee* v *Meernomoyee Dossee*, 2 C. W. R. 49; *Jannobee* v. *Dwarkanath*, 7 C W. R. 455

(d) *Dhurm Das* v. *Musst. Shama Soondri*, 3 M I. A. 229; S. C. 6 C. W. R. P. C. 43. In Bombay she could not claim a partition. *See* above, p. 677.

An adoptive son like a real son will not, where there are dissensions, and a probability of waste, be allowed to take the estate out of his adoptive mother's hands without providing for her maintenance. (a) Nor can he, by selling the family dwelling, deprive her of her right to residence. (b)

As to the property more especially regarded as strîdhana the relations are thus stated :—

The adoptive mother "retains, during life, the right over her own property, but the adoptee is heir to his adoptive mother." (c) "A son adopted by a widow," the Sâstri said, even "without her deceased husband's permission, inherits her property." (d)

The son adopted by a daughter-in law after an adoption by her father-in-law succeeds to her and her husband's property. (e) The property taken in inheritance by a daughter is strîdhana according to the Mitâksharâ. (f) Hence an adopted son succeeds to the property which his adoptive mother inherited from her father, (g) but not as first heir. An adopted son succeeds to his mother's strîdhana in the absence of daughters. (h)

As to the reciprocal succession to the son the decisions are:—A widow succeeds to her adopted son as to her son by

(a) *Jamnabai* v. *Raychand*, I L R 7 Bom 225 *See* above, pp 261, 653, and as to the circumstances justifying a demand on the mother's part for a separate assignment of property, *Venkatammal* v *Andyappa*, I L R 6 Mad 130

(b) *See* above, pp. 734, 826.

(c) Steele, L. C. p. 188

(d) MS. 1710. This is not true in the Bombay Presidency, if without permission means contrary to his wish ; *see* above, pp. 970 ss ; 2 Str. H. L. 91.

(e) MS. 1666. *See* above, pp. 371, 946

(f) Above, pp. 149, 151, 335.

(g) *Sham Kuar* v. *Gaya Din*, I L R. 1 All. 255. *See* too Coleb. Dig. Bk. V. TT. 273—275 Comm

(h) *Teencowree Chatterjee* v *Dinonath Banerjee*, 3 C. W. R. p. 49. *See* above, pp. 152, 324

birth (a) and takes a life-interest upon the death of the adopted son under age. (b)

B 2. 2 (c).—RELATIONS BETWEEN ADOPTIVE STEP-MOTHER AND SON

"The adopted son succeeds to all his step-mothers." (c)

Where a widow had adopted a son under authority of her husband, on the death of the widow and the boy, the other co-widow was allowed to succeed to a moiety of the estate in her own right, not in that of a son adopted by her with due authority from her husband. (d) This decision is questioned, and it is obvious the widow had no right except to maintenance. The boy adopted by her, if validly adopted, was entitled to the whole estate.

On the death of one, adopted as son of one of two co-widows, the property does not descend to the other widow, but, it was said, to the next legal heir who was nephew of the original proprietor or adoptive father. (e) The succession being to the son, his step-mother's position would be determined by the rules given above, pp. 110, 470 ss.

(a) 2 Str H L 129

(b) *Soondur Koomaree* v *G Pershad Tewarree*. 7 M I A 54; S C 4 C W. R. P C 116 *See* above, pp 110, 449

(c) MS 1658 *See* above, p 522 "If a son be adopted by a man married to two wives, he would have two maternal grandfathers, and would claim as maternal ancestry both their lines of forefathers. This seeming difficulty is thus reconciled: although there be two sets of maternal ancestors, they should be jointly considered as manes of ancestors, and they should be thus named in performing the Śráddha, "Such a one, maternal grandfather, sprung from such a primitive stock! to thee (to each of you) this funeral cake is offered,' and so forth, as is done by the son of the wife considered as a son of two fathers. Thus some reconcile the difficulty." Coleb. Dig. Bk. V. T 273 Comm.

(d) *Narainee Dibeh* v. *Hirkishor Rai*, 1 C. S. D A. R. 39

(e) *Kasheeshuree Debia* v. *Greesh Chunder*, C. W. R. Sp No. 71.

A son adopted by one wife may succeed to the strîdhaṇa of another co-wife (*a*) in Bengal. In another case in that province the reciprocal right was denied. According to the Mitâksharâ, it was said, a step-mother cannot succeed to the estate of her step-son, or a step-grand-mother to the estate of her step-grandson. (*b*) According to the principles admitted in *Lulloobhoy* v. *Cassibai*, (*c*) the step-mother ought to come next in succession to the father's mother, and the analogy of the law of partition is in her favour (above, pp. 653, 654, 677).

The importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without a child or widow. The step-mother is comparatively a remote successor. H. H. Wilson(*d*) discusses in rather caustic terms a Bengal case of a contest amongst three widows. (*e*) The youngest as mother of a posthumous son, who died, was entitled as his or as her husband's heir. The husband, however, had left directions for an adoption by his eldest or his youngest widow with the assent of the middle one. No concurrence proving possible, the master was ordered to report on a fit boy. He reported in favour of one named by the second widow, and son of her father's brother. This relation led the Court to order his adoption, not by the second widow but by the eldest. Thus the widow who had resisted his adoption became his mother and heir, while the one who had proposed him and the one in whom the estate had vested were reduced to the position of step-mothers. The property having been mostly ancestral, the learned author contends that the father could not by his will make a valid disposition which would

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(*a*) *Teencowree Chatterjee* v *Dinonath Banerjee*, 3 C. W. R. p. 49.

(*b*) *Lala Joti Lal* v. *Musst. Durani Kower*, B L. R. F. B. 67. *See* above, p. 472.

(*c*) L. R. 7 I. A. 212.

(*d*) Works, vol. V. p. 58 ss.

(*e*) Sir F. Macn. Cons. on H. L. 168.

affect the complete title of his posthumous son, and the estate taken by that son's mother as his heir. (*a*) This, while it goes further, agrees in principle with the more recent decisions of the Judicial Committee (*b*) against the capacity of a mother-in-law to adopt under a power so as to divest her daughter-in-law of the estate taken by the latter in succession to her husband.

B. 2 2. (*d*).—RELATIONS BETWEEN ADOPTED SON AND GRANDPARENTS.

In *Ramjee Hurree* v. *Thukoo Baee* (*c*) a son adopted after the death of the propositus by the widow of his predeceased adopted son succeeded against the widow of the propositus in possession; but the widow was allowed a life use of a moiety for her maintenance.

B 2 3.—RELATIONS WITH RESPECT TO OBLIGATIONS. (*a*) BETWEEN THE FATHER (AND GRANDFATHER) AND THE SON AS TO DEBTS AND CLAIMS.

"An adopted son like another is responsible independently of assets received for the debt of the grandfather by adoption though not incurred for the family." (*d*) Jagannâtha agrees with the Śâstri. The adopted son's liability for his father's debt, he says, like that of the son by birth, arises at the father's death and is independent of assets. (*e*) A previous partition even only throws the burden first upon those sons who remained in union with the father.

An adopted son is liable for his father's debts to the extent of the inheritance received by him, and if he waives or

(*a*) H. H. Wilson, Works, pp. 61, 62.

(*b*) *Bhoobun Moyee's* case, 10 M I. A. 278; *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 I. A. 229, 245.

(*c*) 2 Borr. R. 485 In this case the adoption devested an estate vested in the elder widow. *See* above, pp. 992 ss.

(*d*) MS 979. *See* above, pp 80, 160

(*e*) *See* Colcb Dig. Bk. I. TT. 167—170 Comm

does not obtain the inheritance, his self-acquisition is not liable for the debts. (a)

A son adopted in pursuance of an *unoomoti puttro*, some time after the death of his adoptive father, does not require, and is not entitled to obtain, a certificate under Act XXVII. of 1860, to enable him to collect debts in respect of the properties left by his adoptive father, which accrued due while they were under the management of his adoptive mother. The estate of the adoptive father, if the adoption is a good one, vests immediately on the adoption in the adopted son, and debts to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right, and not as representative of his adoptive father. (b)

B. 2 3. (b).—BETWEEN THE ADOPTIVE MOTHER AND SON.

A mortgage [before adoption] by a widow to pay off her husband's debts was upheld as against a boy subsequently adopted. (c) On a similar ground of benefit received by the son, a bond executed by a widow in possession was held binding on the adopted son of the last zamindar, the bond having been given for debts which the adopted son as zamindar had by his acts admitted his liability to pay. (d)

The widow's authority as manager makes the son liable for necessary debts. "A son adopted by a widow is responsible for a debt incurred by her for the family during his minority." (e)

(a) *Jummal Ali* v *Tirbhee Lall Doss*, 12 C W R 41. The adoption was that of a brother, but it was not a point in issue

(b) *Narain Mal* v *Kooer Narain Mytee*, I. L. R 5 Calc. 251.

(c) *Satra Khumaji* v *Tatia Hanmantrar*, Bom H.C P. J 1878, p 121.

(d) *Chetty Colum Coomara Vencatachella* v *Rajah Rungasawmy Jyengar*, 4 C W R P C 71 The Judicial Committee say—"Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they, of course, could constitute no charge on the zemindary."

(e) MS 1678.

But he has once or twice been thought answerable merely as son for his mother. Thus an adopted son was pronounced liable for the mother's debt incurred for purposes not ascertained, he having taken her property; and as generally answerable apart from that for parents' debts. (*a*)

In one case the High Court of Bengal seems to have thought, that a second adopted son was liable in his estate for all debts, without distinction, incurred by the mother between the death of the first and the adoption of the second son. (*b*) For this the case of *Bhoobun Moyee Debia* (*c*) is referred to, but it does not seem to deal with any such point. It views with some doubt the possibility of an adoption where a previous son had reached an age to fulfil the ceremonial duties, (*d*) but nothing as to the liabilities arising should a second adoption be admitted. (*e*)

It was said to be a nice question, What is the effect of admission of the adopter as binding on a subsequently adopted person? (*f*) It would seem that such admissions made by a widow would be subject to objection if prejudicial to the adopted son or the estate. (*g*)

During the minority of a boy, adopted by a widow, she squandered her husband's property, contracted debts, and refused to render accounts to her son. It was held that as

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(*a*) MS. 943. *See* above, pp. 164, 165.

(*b*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183.

(*c*) 10 M. I. A. 279.

(*d*) *See* above, Sec. III. B. 3. 25.

(*e*) It is an additional argument against an adoption by a mother after the death of an adult son, that the hazard to which creditors would be exposed would greatly impede her good management of the estate.

(*f*) *Brojendro Coomar Roy* v. *The Chairman of the Dacca Municipality*, 20 C. W. R. 223.

(*g*) The adopted son takes by a right paramount to that of the widow and will be bound by her acts and admissions only so far as these can be ascribed to her as manager or agent. *See* above, p. 367.

the son was liable to pay the *bonâ fide* debts of the mother, she was liable to account to him for her management, or to pay the damages claimed. (*a*)

An adopted son's estate is not liable for personal debts of the adoptive mother, (*b*) but a sale of part by the adoptive mother, a widow, to recoup co-sharers' payments of Government land revenue, was upheld as a lawful exercise of discretion by a guardian.

The adoptive mother is the legal representative of her son, and entitled to a certificate under Act XXVII. of 1860. (*c*)

B. 2. 4.—RELATIONS BETWEEN SON BY ADOPTION AND CHILDREN BY BIRTH

(*a*) IMMEDIATE PERSONAL RELATIONS.

The adopted son gives place to a son by birth, should there be one in the performance of the krîya and the śrâddhas. The adopted son takes a minor part in some celebrations which it is needless to give in detail. (*d*)

As the adopted son becomes a member of the adoptive family, the restrictions on marriage between him and female members of the family may be deemed the same as if he had been born into the place he occupies. This at least is so to three degrees from the stem, so that a woman may not be married to her first cousin by adoption. (*e*) Whether the prohibitions extend further is uncertain; questions on the subject are very infrequent owing to the general prejudice against the marriage of near relatives.

Should an adopted son or his widow desire to adopt, the same grounds of preference, and the same general principles would apply as if he had been born in the family of adoption. (*f*)

(*a*) *Nurhur Shamrao* v. *Yeshodabaee*, Bellasis, Rep. 65.

(*b*) *Roopmonjooree* v *Ramlall Sirkar*, I. C. W. R. p. 145.

(*c*) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. Misc. 6.

(*d*) *See* Datt. Chand. Sec. II.

(*e*) *See* above, pp. 937, 938.

(*f*) *See* Sec. III. and Sec. IV.

(b) RELATIONS WITH RESPECT TO PROPERTY.

The relative rights of children by birth and by adoption in the matter of inheritance to the family estate have been discussed in Book I. (a) In relation to the adoptive mother's property as well to that of the father, the adopted son takes a right (b) subject by analogy to a partial defeasance in competition with a son by birth.

"The share of an adopted son is one-fourth of the share of a son born to the adoptive father after the adoption." (c)

The heirs of a deceased Hindû in Shahabad being a real and an adopted son; the adopted son takes one-fourth, and the real son three-fourths of his property. (d)

"If after the adoption of a boy, a son be legally begotten and born in marriage, the latter will inherit three-fourths of the father's property, the former one-fourth. The Kaustubh gives the adoptee one-third or even one-half." (e)

(a) Above, pp. 369, 372 ss

(b) Above, p. 513.

(c) *Ayyavu Muppanar* v *Niladatchi Ammal et al*, 1 M. H. C. R. p 45. As to the proportion of the adopted son *see* Coleb Dig. Bk. V. T. 301 Comm; above, pp 365, 372, 373 The begotten son cuts down the adopted to one-fourth according to Vasishtha XV. 9. In Bengal the ratio is one-third, Tag Lec. 1880, p. 539. In the Punjab he takes equally, Cust. Law, II 158.

(d) *Preag Singh* v. *Ajoodya Singh*, 4 C. S. D. A. R. 96.

(e) Steele, L. C. p. 47 "In some places, the two boys (the begotten and adopted) share all property equally; in others, the former takes two-thirds; in others, three-fourths; in others, the father, on the birth of his begotten son, gives the adoptee a present according to his ability, and separates him from the family, and in consequence he takes no share; in others, the adoptee obtains nothing without a complaint to the Sirkar. The former is entitled to management of hereditary property, and if an Enamdar or Wuttundar to the Dastkhat (right of signature), Sikka (seal), Naonagar (mark, or signature of a Patel), and other privileges of eldership." Steele, L. C. pp. 186, 187. *See* above, pp. 69, 738.

"After the adoption of a son, one is born to the adopter. The latter succeeds to his father's watan." (a) The precedence of the legitimate son by birth over the son by adoption is secured by several texts. (b)

The Dattaka Chandrika, which says that the illegitimate son of a Śûdra in competition with any heir down to the daughter's son takes but half a share, (c) gives to the adopted son of a Śûdra an equal share in a partition made during the father's life, and half a share in a partition after his death. (d)

A woman's illegitimate son, it was said, takes nothing by inheritance from her in competition with her adopted son. Even her conveyance of her property to the former was pronounced invalid as against the heritable right of the latter. (e) This could hardly be maintained unless the property was that of the deceased husband; of her separate estate the widow could dispose. (f)

In one case an adoption had been contested. The adopted son took the estate and then died. It was sought to exclude from succession the son of him who had formerly denied the

(a) MS. 1739. The watan is regarded as going by preference to the head of the family, *see* above, pp. 69, 179, 736, 935; Steele, L. C 218, 229; and as an impartible estate, so far as it supports the office, *see* above, pp. 173, 736; *Purshotam* v. *Mudakangavda*, Bom. H. C. P. J. 1883, p. 228.

(b) *See* Datt. Mîm. IV. 26.

(c) *See* above, pp. 84, 780.

(d) Sec. V. 30. As a Śûdra father may give to his illegitimate son an equal share with his legitimate sons (*see* above, p. 775), it seems to follow that he should be able to do as much for his adopted son, though this is not provided for in the sacred writings, which do not indeed contemplate adoption by Śûdras. Strange says, that "among Śûdras . . . . the after-born son and the adopted share equally the parental estate." 1 Str. H. L. 99.

(e) 2 Str. H. L. 110.

(f) Above, pp. 317, 335, 370, 371, 711; 2 Str. H. L. 127.

adoption; but the Court said:—"*Deendial's* denial [formerly] of *Munnoo's* adoption *de jure*, cannot, therefore, estop his son from claiming the right of succession to Munnoo's property unquestionably acquired by him *de facto* by adoption and by no other title." (*a*)

A sister succeeds to the brother by adoption as to one by birth. (*b*)

RELATIONS BETWEEN THE ADOPTED SON AND REMOTER CONNEXIONS BY BLOOD.

B. 2. 5.—OF THE ADOPTIVE FATHER

The adopted son becomes impure through deaths and births in the family of adoption, but for a shorter time than a son by birth. (*c*) The son adopted into a united family becomes a participator in the family sacra celebrated by the head of the family. (*d*) In the event of a partition after his adoption the sacra becomes dispersed, and he thenceforth offers sacrifices separately. If his father, being separated, had sacra of his own, the adopted son will naturally continue them, as even in a united family there are some services to the father's manes which devolve necessarily on the son. But if a member of an undivided family having no separate sacred fire of his own has died sonless, and then a partition has taken place causing a dispersion of the general family sacra amongst the parceners, (*e*) the son afterwards adopted by the widow has no share in these. He honours his adoptive father's spirit, but cannot draw back

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(*a*) *Sheo Sohai Misser* v. *Musst. Billasee,* N. W. P. S. D. R. N. S. Pt. I. 1864, p. 504.

(*b*) *Mahantapa* v. *Nilgangowa,* Bom. H. C. P. J. for 1879, p. 390.

(*c*) Datt. Chand. IV. 1—5.

(*d*) Vyav. May. Chap. IV. Sec. VII. para. 28.

(*e*) It is a general maxim that what was prevented at its proper season may not be taken up afterwards. *See* Coleb. L. and Essays, vol. II. 138.

the common sacrifices. (*a*) The connexion of the estate with the sacra makes this consideration important for the law of property. There is no failure of the family sacrifices while the state of union continues. Every member joins in them directly or vicariously. On a partition it were sacrilege to let them sink into abeyance, and once separately appropriated they cannot, without sacrilege, be given up.

The adopted son, though he may be partially superseded by a begotten son, yet, in the absence of such a son, takes the whole share of his adoptive father in a partition of the joint estate. (*b*) Nor do the Hindû authorities draw any distinction in this respect between a son adopted before and one adopted after the death of the adoptive father. Each member of a united family is replaced in the family by his son down to a partition of the inheritance. (*c*) From the moment of partition the son fully replaces him only in the new family thus set on foot. (*d*) The son adopted by a widow, ranking as posthumous, blends with the united family and takes his ideal father's interest in the estate, (*e*) nor can this be prevented by the existence of other joint interests which the intruder impairs by sharing them. (*f*) The control of the widow by the surviving brethren is an attribute of their guardianship, not of their ownership, and is itself subject to control if unfairly used according to Hindû notions. But if a partition has been made after the death of a sonless coparcener, and a provision has been made

(*a*) The religious duties of separated brethren are necessarily divided. *See* Vyav. May. Chap. IV. Sec. VII. pp. 28, 29; Manu III. 69; Narada XIII. 37, 41, 383; Mit. Chap II. Sec. XII. para. 3.

(*b*) Above, p. 935. *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*, 9 C. W. R. 423.

(*c*) *i. e.* so far as the great-grandson of one in actual participation. *See* above, pp. 65, 66, 340, 778.

(*d*) Above, p. 355.

(*e*) Above, p. 366.

(*f*) *See* above, pp. 958, 961, 964.

for his widow and daughter, (*a*) it seems that a subsequent adoption will not enable the adopted to reclaim his ideal father's share from those amongst whom it has been dispersed. The texts say that a proposed partition must be postponed until the result of a widow's pregnancy is seen. (*b*) They also provide for a redistribution in favour of an actually posthumous son. (*c*) But they do not say that the parceners must await a widow's election to adopt or not, or that a share must be made up for the son subsequently adopted. (*d*) As, therefore, there is a general rule allowing partition at the will of the existing members and explicit exceptions for two particular cases, it would be opposed to the Hindû principles of construction to admit a claim in a third case on which there is no express authority for taking the property back from its separate owners. (*e*)

The fact, again, of property held by one descendant or group of descendants from the same stock unshared by other descendants implies partition or separate acquisition. By an extinction of the united proprietary group the continuity and unity of ownership are destroyed. The principles of partition rather than of inheritance, as conceived by the Hindû lawyers (*f*), come into play, and the law distributes the property once for all to those who are at that moment

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(*a*) *See* above, pp 758, 776, 780.

(*b*) Above, pp. 75, 657, 847 ; Mit Chap. I. Sec. VI. para. 12.

(*c*) Above, p. 792.

(*d*) The Śâstris in one case declared that—"Inspired legislators had made provision for the custody of the estate of minors, but neither they, nor any writer, had provided for the charge of the estate of the unborn during an indefinite time ; therefore the unborn could have no property." *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 188. *See* above, pp. 67, 590. The joint estate supporting common sacra remains accessible to an adopted son of an undivided member until it has been divided. After this there is no authority for recovering any portion.

(*e*) *See* above, pp. 588, 590.

(*f*) *See* above, p. 600.

entitled, by a distinct transfer and a creation of new interests incompatible with any continuance of the old. The revival of an interest once extinguished is no where contemplated. The law as laid down in cases of adoption subsequent to a partition following the adoptive father's death, or to the opening of a collateral succession, seems thus quite in accordance with Hindû principles. In the two cases immediately to be cited it does not appear that the distinction between the divided and the undivided family was kept quite clearly in view. In these there had not been a partition, and the family still admitted of increase by adoption. An adoption made by a widow will not, it was said, devest the surviving joint sharers with her late husband's father of any part of the property, nor when his father was separated will it devest the deceased husband's sisters of their succession to their father, unless made in either case with the assent of the persons entitled. (*a*) Property vested in one of two united brothers by the death of the other, it was said in *Govind Purshotam* v. *Lakshmibai*, (*b*) cannot be devested by the subsequent adoption of a son to the deceased. In the absence of a partition it would seem that the adopted son must take his father's place, as in *Sri Raghunada's* case.

An adopted son succeeds collaterally as well as lineally (*c*) to ancestral property. (*d*) But though an adopted son

(*a*) *Ramchandracharya* v. *Shridharacharya*, Bom. H. C. P. J. 1881, p. 145. *See* above, p. 995.

(*b*) Bom. H. C. P. J. 1882, p. 12.

(*c*) *Sham Chunder et al* v. *Nurainee Dibeh*, 1 C. S. D. A. R. p. 209; *Sumboochunder Chowdry* v. *Naraini Dibeh*, 3 Knapp, p. 55; S. C. 5 C. W. R. p. 100 P. C; *Gour Hurrie Kubraj* v. *Musst. Rutnasuree Debia et al*, 6 C. S. D. A. R. p. 203; *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*, 9 C. W. R. 423; *Lokenath Roy et al* v. *Shamsoonduree*, Beng. S. D. A. R. for 1858, p. 1863.

(*d*) *Gokul Chund* v. *Narain Dass*, N. W. P. R. 1862, Pt. I. p. 47.

succeeds collaterally as well as lineally, (a) his right, it is said, vests for this purpose only from the adoption, (b) *i. e.* the widow till then can sue in her own right. Nor can he retrospectively take away what passed to another through his non-existence or non-adoption when the succession opened. (c)

In a leading case the Judicial Committee said:—

"Their Lordships think, therefore, looking at these authorities, (d) and the weight that is due to them, that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations, and, if so, these appellants are not in a condition to succeed, because they have distinctly admitted in their own pleadings, and by the answer of their own pleaders given to the Court, that an adopted son of the brother by the whole-blood was in existence at the time of their suit being commenced. If an adopted son of the whole-blood is in the same situation as the natural son of the whole-blood, then the only remaining question is whether the son of the brother of the whole-blood succeeds in preference to the sons of the brother by the half-blood; and upon that point there is no dispute, for the authorities are uniform." (e)

(a) *Sumboochunder Chowdry* v *Naraini Dibeh*, 3 Knapp, 55

(b) *Bamundoss Mookerjea* v. *Musst Tarinee*, 7 M I A. 169 *See* above, A. 5.

(c) *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharj*, 10 M. I. A. 279.

(d) *See* Mit. Chap. I Sec. XI. pp. 30, 31; Suth. Syn. Head IV. Coleb. Dig. Bk. V. TT. 184, 217 Comm.

(e) *Sumboochunder Chowdry* v. *Naraini Dibeh*, 3 Knapp. Pr. Co. 61-62. *See* Mitâksharâ, Chap. II. Sec. IV. paras. 5 and 7; Daya-Bhaga, Chap. XI. Sec. VI. para. 2. " Can a son given be heir to a kinsman, or not ? . . . . A text of Manu shows, that a son given, being endowed with every virtue, shall take the heritage." Coleb. Dig. Bk. V. T. 277 Comm.

That an adopted son of a whole-brother is preferred to a natural son of half-brother, (a) follows from the principles stated in the earlier part of this work. It will be noticed too that in a case between separated brothers and their sons, the latter do not represent their predeceased father in succession to his post-deceased brother, or take so long as another brother survives. Much less, therefore, would an adopted son take back any part of the succession thus disposed of before he was adopted. In the case of a daughter's son, as he is not by his birth, nor therefore by his adoption, a co-owner with his maternal grandfather whose proprietary personality could thus be conceived as persisting in him, he cannot take back the estate from those to whom the law before his existence has given it. This is the application of the general principle made by the Śâstris at 7 M. I. A. p. 188. In Bombay the daughter herself would succeed in the case supposed, and then supposing her father had had an undivided brother predeceased, the question would arise of whether the daughter's existence was a bar to adoption by the widow of the first deceased brother, or to the succession of the son thus taken. There is not the slightest Hindû authority for saying that the adoption could not be made; and when made it would react so as to put the boy adopted in the place held by his adoptive father in the undivided family. A daughter, though she inherits, does not continue the estate and the sacra as a son or a widow does. (b) Her existence is no bar to adoption, and in the case supposed the right to adopt a fit person would subsist though she were a son.

(a) *See* above, pp. 111, 112, 372. The Mitâksharâ gives the succession to the half-brother in preference to the whole brother's son, but still the latter precedes the son of a half-brother. The Judicial Committee placed the right of the adopted son on his becoming "for all purposes the son of the [adoptive] father." *See* Rep. p. 60.

(b) *See* above, pp. 93, 129, 130, 872.

In the case of collaterals generally, the nearest or those who are equally the nearest of the nearest kin succeed. Amongst them too there is no waiting for the possible birth of a posthumous son, who, if already born would precede those in existence. (*a*) The widow of a gotraja sapiṇḍa under the Bombay law intercepts the estate for her unborn child, but amongst the Bandhus the principle of interpretation adopted by the Vyavahâra Mayûkha (*b*) would shut out a child from succession, though when born, the nearest to the propositus, if his birth followed instead of preceding the opening of the succession. Similarly in the case of a son adopted: he can retroactively continue an estate, but cannot recover one given to others prior to his adoptive existence. If his mother has succeeded as representative of her husband's line, he as son can supersede her: if she has not, he cannot supersede others whose personality is not identified with his adoptive father's. (*c*)

That the estate which has once passed away to a separated collateral cannot be affected even in part by a subsequent adoption is strongly shown by the case of *Nilcomul* v. *Jotendro Mohun Lahuree* (*d*) where even a postponement of adoption procured by fraud was allowed to prevent the adopted boy, as a collateral, from defeating the intermediate collateral succession of the guilty party.

In the case of collateral succession to the property of separated branches or members of a family, there is no rule reducing the share of an adopted son in competition with a

(*a*) Comp. p. 577, Q. 2, Rem. 2; p. 581, Q. 8, Rem. 1.

(*b*) Above, p. 491.

(*c*) In the event of a property falling in collaterally to a branch united in itself, this inheritance would be taken by the then existing members to the exclusion of a son afterwards adopted by a widow of a predeceased member of the group. Such at least is the view that seems most conformable to principle for the reasons set forth above, pp. 702, 715; but the matter as shown there is one of controversy amongst the Hindû lawyers.

(*d*) Above, pp 368, 996.

son by birth. The rule applies in terms only to the patrimony in which interests are acquired by birth and by adoption, not to an estate passing through default of cosharers to a collateral line. The adopted son is a sapiṇḍa, (*a*) equally with the son by birth, and the analogy of the equality of the half-blood with the full-blood in the case of sapiṇḍas not specifically provided for, (*b*) may fairly be extended to the adopted son. As the collaterals in the adoptive family inherit equally from him as from a son by birth, so should he inherit from them equally with a son by birth.

An adopted son of a coparcener excluded on account of blindness, &c., from a share in a partition is, according to the Dattaka Chandrika, entitled to maintenance. (*c*)

A niece's son adopted by her paternal uncle was pronounced entitled to the management of business as managing Patel, while the widow of the deceased nephew was pronounced heir to his property. (*d*) (Nothing is said of the caste or of division or non-division. Division and Śûdra caste seem to be assumed.)

" An adopted son is not precluded from inheriting the estate of one related lineally, though at a distance of more than three generations from the common ancestor." " The rights of an adopted son, except in a few instances precisely defined in the Dattaka Chandrika and the Dattaka Mîmâṃsa by express texts, are in every respect similar to those of a natural born son. The adopted son succeeds to the sapiṇḍa kinsmen of his father, and as regards the sapiṇḍa relationship, there is no difference between the adopted and natural born son." (*e*)

(*a*) Above, pp. 114, 116, 463

(*b*) Above, p. 125.

(*c*) Sec. VI; 1.

(*d*) MS. 5.

(*e*) *Puddo Kumaree* v. *Juggut Kishore*, I. L. R. 5 Calc. 615; in appeal S. C. L. R. 8 I. A. 229; *Mokundo Lall Roy* v. *Bykunt Nath Roy*, I. L. R. 6 Calc. 289, quoting *Tara Mohun Bhuttacharjee* v. *Kripa Moyee*, 9 C. W. R. 423. *See* above, p. 938. Sutherland, 2 Str. H. L. 116,

In Bengal, it has been held that an adopted son succeeds to the property of a son of his sister by adoption. (*a*)

One adopted succeeds another as nearest collateral relative. (*b*)

RELATIONS BETWEEN THE ADOPTED SON AND REMOTER CONNEXIONS BY BLOOD.

B. 2. 6.—OF THE ADOPTIVE MOTHER.

As to the succession of an adopted son to property in right of a connexion through his mother with her family of birth (*c*) the decisions have differed. (*d*) In *Chinnaramakristna Ayya*

says, he (the adopted son) inherits collaterally as well as lineally according to the Mitâksharâ, notwithstanding passages in Datt. Mîmâṃsa and Datt. Chandrika limiting his sapiṇḍaship to three degrees.

(*a*) *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*, I. L R. 5 Calc. 615.

(*b*) *Gour Hurrie Kubraj* v. *Musst. Rutnasuree*, 6 C. S. D A. R. 203; *Sham Chunder et al* v. *Naraiani Dibeh*, 1 C. S. D. A. R 209.

(*c*) *See* above, pp 487 ss. "In a case where the right is not dubious, the funeral cake shall be offered by a daughter's son to his maternal grandfather, although he do not claim the estate and family." Coleb. Dig. Bk. V. T. 276 Comm.

(*d*) Under the Roman Law as adoption did not make the adopted a cognate of his father's cognates; the mutual rights of inheritance were restricted to those connected as agnates. With the adoptive mother's family he had no connexion to form a basis for mutual rights. (*See* Willems, Dr Pub. Rom p 87; above, p 936) Justinian's rule under which the adopted son remained in the family of his birth corresponded to the preference long established by practice of the marriage without "Manus" to that accompanied by "Manus." The Roman wife in the later ages remained a member of her father's family. She did not become a member of her husband's family. It was, therefore, most natural that her husband's adopted son whose connexion even with the adoptive father's family was limited to the agnates should have none at all with hers. The mutual rights of succession between mother and child rested on special laws. *See* Ortolan, Inst. § 152. Willems, Dr. Pub. Rom. p. 77.

v. *Minnatchi Ammal* (*a*) he was refused the place of a daughter's son as heir to her father's property. The P. Sadr Amin had decided in his favour on the authority of the Dattaka Mîmâṃsa, but the High Court set him aside in favour of the grandson of a brother of the adoptive mother's father. The latter is by the Madras High Court ranked as a Bandhu. According to the Mitâksharâ he is a gotraja sapiṇḍa of the propositus, but would still rank after the daughter's son; but the Madras decision denies to the adopted son any right at all as a grandson to his mother's father.

In the North-West Provinces on the other hand it was held, in *Sham Kuar* v. *Gaya Din* (*b*) that the adopted son succeeds to the property inherited by his adoptive mother from her father, and as the doctrine of a mere life estate being taken by a female heir prevails there (*c*), the adopted son must have been thought a competent heir to his maternal adoptive grandfather.

In Bengal a decision precisely the reverse had been given in *Gunga Mya* v. *Kishen Kishore Chowdry*. (*d*) In *Teencowree Chatterjee* v. *Dinonath Banerjee* (*e*) it was ruled, that to his adoptive mother's strîdhan the adopted son succeeds in the absence of daughters. It had previously been held that *Gunga Mya's* case was not conclusive, and that where an adopted son was the propositus, the maternal relatives inherited from him as from a son by birth. (*f*) This would seem to establish a reciprocal connexion by which the adopted son ought in his turn to benefit, but such a doctrine

(*a*) 7 M H C R 215

(*b*) I L R 1 All 255

(*c*) *See* above, p 332

(*d*) 3 C S. D A R 128

(*e*) 3 C. W. R. 49.

(*f*) *Gangapersad Roy* v. *Brijessuree Chowdhrain*, 15 S. D. A. R. 1091. *See* above, pp. 489 ss.

was denied in *Moun Moyee Debeah* v. *Bejoy Kishto Gosave*, (*a*) and it was by this case that the Madras Court was governed in that of *Chinnarama* v. *Kristna Ayya.* The text of Manu is very explicit in giving the right only to a son begotten by the daughter's husband, (*b*) and the "daughter's son" in Vishnu (*c*) probably had no other in view. But as the adopted son now makes oblations to his adoptive mother's male ancestors (*d*) the connexion may logically be attended with mutual rights of inheritance, as in the case of a daughter's son by birth. (*e*)

The question came before the Judicial Committee in *Rani Anand Kunwar* v. *The Court of Wards*, (*f*) but their Lordships did not pronounce upon it. The High Court of Bengal, however, has recently held that, according to Hindû law, an adopted son takes by inheritance from the relatives (father and brother) of his adoptive mother in the same way as a legitimate son. (*g*) A similar opinion has still more recently been expressed by the Judicial Committee in *Kali Komul Mozoomdar* v. *Uma Sunkar Moitro*, P. C., 30th June 1883. Their Lordships say:—"As to the second question, their

(*a*) W R. F B 121 *See* 1 Hay. 260

(*b*) Above, p 447

(*c*) Above, p. 446.

(*d*) *See* Coleb Dig. Bk V T. 275 Comm.

(*e*) Above, pp. 444, 491.

(*f*) I. L. R 6 Calc. 764; S. C. L. R. 8 I A 14

(*g*) *Uma Sunker Moitro* v *Kali Komul*, I L R 6 Calc 256 "It is, therefore, clear, that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the Law of Inheritance in the Bengal School is based, to hold that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son" (Jud. Cit. p. 262.) This is approved and followed in *Surjokant Nundi* v. *Mohesh Chunder Dutt Mojoomdar*, I. L. R. 9 Calc. 70

Lordships have held in *Pudma Coomari Debi v. The Court of Wards*, (*a*) that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mîmâṃsa. That this is the Hindû law is shown by the careful examination of the authorities by the learned Native Judge who delivered the judgment of the Full Bench of the High Court, which is the subject of this appeal. The respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal grandfather at the death of his widow, which he would be if he were a natural born son, and as an adopted son he is in the same position. This is clear from the Dattaka Mîmâṃsa, Sect. 6, p. 50, where it is said, 'The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grandsires (of adopted sons).' Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the respondent is right."

I. 2.—IMPERFECT ADOPTION UNDER THE ORDINARY LAW. (*b*)

The law of the Śâstras, or what was supposed to be so, (*c*) has practically been superseded by the customary law and

(*a*) L. R. 8 I. A. 229.

(*b*) *See* Sec. VI. A. 5. Should no adoption be attempted the estate descends as if none were intended. *See* Sec. VIII. and 2 Str. H. L. 90.

(*c*) Above, pp. 935, 936.

the decisions of the Courts as to the status of a boy defectively adopted. These decisions are of course authoritative so far as they extend. Still it may be useful to consider what the Hindû lawyers have said as to the consequences of an imperfect adoption as affecting the relations between the adopted and the family of birth and the family of adoption, and the view taken of his relations as a grantee of public lands or endowments.

The customary law is thus stated :—

"Adoptions may be annulled if made contrary to caste custom. Several of the caste inquire into the irregularity complained of, and their decision is carried into effect (whether declaring the validity or annulment of the adoption)." (a)

"In such case the separating adopted son might take a small share ($\frac{1}{10}$th) without being chargeable with the payment of his adoptive father's debts." (b)

I 2 A.—RELATIONS TO THE FAMILY OF BIRTH

An adoption may have been imperfect in the sense of not constituting the proposed relation or, in having failed merely in some unessential particular not impairing its jural effect. The Hindû lawyers recognize an intermediate result, where the gift has been so far completed as to sever the child from his family of birth, but the acceptance in adoption has not been so made as to make him a member of the adoptive family. (c) This status of the adopted is of only theoretical interest; both the castes and the Courts, as we have seen, refuse to acknowledge a parting from the one family without a union to the new one.

(a) Steele, L C App p 388

(b) Steele, L C App pp 389, 390

(c) The gift alone severs connexion with the family of birth, even if the rites are insufficient to establish a connexion with the family of adoption. (Datt. Chand. II. 19, 20; *see* 2 Str. H. L. 122.)

The rights of a man in his family of birth remain unaffected, when his adoption has been invalid. (*a*)

I. 2. B.—RELATIONS TO FAMILY OF ADOPTION.

To disqualify for sharing in a partition leprosy or the like defect must have arisen previous to division; but if succession is once vested exclusively in the others, it is not devested by adoption (*b*) on the part of the disqualified man whose share has been appropriated. It seems that such persons cannot themselves adopt, but that sons already adopted are entitled to a provision for their maintenance. (*c*) Custom sometimes allows a vicarious adoption. (*d*)

When an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father. A cancellation of adoption might, it was ruled, be based upon the grounds—(1) The adoption was not in the manner and according to the ceremonies required by Hindû law; (2) The boy was not a fit and proper person to perform the plaintiff's obsequies or to make offerings for the benefit of the souls of the plaintff's ancestors, being devoid of education and religious knowledge and principles, and the associate of thieves,

(*a*) *Bhawâni Saṅkara Paṇḍit* v *Ambabay Ammal*, 1 M. H. C. R 363, 365; above, p. 936. "Examples of irregularities justifying annulment are: adoption of a father's brother or sister's son, or an elder than the adopter, or of a boy without the necessary consent, or of a boy who is a cripple, or disabled in senses or understanding." Steele, L. C. App. p. 388. As to a defective gift being null, 2 Str. H. L. 433; H. H. Wilson, Works, vol V. p 73

(*b*) *Sevachetumbara Pillay* v. *Parasucty*, M. S. D. A. R. for 1857, p. 210; 1 Str. H. L. 163. Above, p. 992.

(*c*) *See* above, Sub-sec. I 1 B. 2 5, and pp 579, 587, 751, 752, 880. The son adopted when the adopter was competent, as before he was afflicted with leprosy, ought on general principles to take his father's place as though the father had died. *See* above, pp. 154, 577.

(*d*) *See* above, p. 581.

gamblers, and women of immoral character; (3) He failed to perform his part of an agreement or compromise in writing entered into by him with the plaintiff. (*a*)

An absolute disqualification of the boy, the performance of the ceremonies of adoption on a boy of a different caste, or the omission of them in adopting a boy of a different gotra, (*b*) is variously said to make the adoption null, while severing the boy from his family of birth or to constitute an adoption of an inferior kind. According to either view the boy defectively adopted is entitled to maintenance on the footing of a dâs or slave. (*c*) The gift alone is supposed to sever him completely from his family of birth. (*d*) The authority last cited makes the performance of the ceremonies by the adoptive father effectual to release even a tonsured son from connexion with his family of birth, and to raise him from the servile rank to that of a son to the adoptive father. (*e*) It would now probably be held that there must be the proposed change of status or none at all, and that failing a complete adoption, the boy must remain a member of his family of birth. (*f*) The gift or sale, which formerly gave a good title to the purchaser as owner of a slave, can no longer operate since the passing of Act V. of 1843 (*g*) The doctrine of a complete gift and acceptance as son being sufficient, and the attendant ceremonies only incidental, not absolutely essential, gets rid of many difficulties arising from the precepts just

(*a*) *Sukhbasi Lal* v. *Guman Singh*, I. L. R. 2 All. 366 Above, pp. 944, 946.

(*b*) Datt. Mîm. V. 56.

(*c*) *See* Steele, L. C. 46. 181; Datt. Mîm Sec. III 2, 3; Sec IV 40 ss.; Coleb. Dig Bk. III. Chap. I T. 29. 33 Comm.; Bk. V. T. 182. 273, 275 Comm

(*d*) Datt. Chand Sec II 19.

(*e*) See *ib.* para 27.

(*f*) *See* Coleb in 2 Str H L 223; Steele, L. C. 383. Comp. Just. Inst. Bk I T. XI. 2; and Ortolan, § 138.

(*g*) *See* 2 Str. H L. 221, 224.

considered. (*a*) That there cannot be a complete gift without complete acceptance, *see* the Viram. Transl. pp. 33, 35, and comp. Datt. Mîm. Sec. IV. 3. The work last cited specifies a gift, acceptance, and burnt offering as indispensable, (*b*) and with this, as to Brâhmaṇas, custom seems to agree. (*c*) Colebrooke explains the slavery incurred by the quasi-adopted as servitude only of that highest kind from which a man frees himself by resigning his right to subsistence. (*d*) The servitude indeed could not be more than nominal, seeing that though the son irregularly adopted was not entitled to succeed or to share the patrimony, his adoptive father was bound to get him married, and so set him up as a householder. (*e*)

If one of a different caste has been adopted, the authorities exclude him from any share in the patrimony, but declare him entitled to maintenance, (*f*) a right which arises in every case of severance from the family of birth without complete acceptance into that of adoption. Thus "in case of discovery that the boy being of another gotr, was not adopted with [the regular] ceremonies, or that he was of another

(*a*) *See* Coleb. Dig Bk. V. T. 273 Comm

(*b*) *See* Sec V. 56

(*c*) Steele, L C 184.

(*d*) As to this, *see* Coleb Dig. Bk III Chap I T 29, 48; 2 Str. H. L 223, 226, 228.

(*e*) Datt Mîm. Sec. V. 45, 46; Datt. Chand. Sec. II 18; Sec. VI. 3, 4; MS. 1744. The earlier Roman law required both a *mancipatio* to transfer the son from his family of birth, and a *vindicatio* or claim to him by the adoptive father as son to make a complete adoption. This *vindicatio* had to take place before a judicial officer, whereby formality and publicity were secured. *See* Ortolan, Inst. § 133 Note, § 140. Later the requisite sanction was derived either from an imperial rescript for the case of one *sui juris* or an order of a judge for one *alieni juris*. *Ib.* §§ 136, 137.

(*f*) Datt. Mîm. Sec. III. 1—3.

caste, the adoption is null and the boy is to receive maintenance as a dâs or slave." (a) A Smṛiti passage frequently repeated says: "If a doubt arises as to a remote kinsman (adopted) *i. e.* as to his qualifications, the adopter shall set him apart like a Sûdra." (b)

The decisions recognizing the particular status we are now considering have been very few. In one it was held that a Hindû invalidly adopted is entitled to maintenance in the adoptive family. (c) In another case it was ruled that the adopted son of one whose adoption has been held invalid, cannot claim through the right of his adoptive father to be maintained by the alleged adoptive grandfather. (d)

The Sâstris treat this semi-adoption as a living institution, as in the following answers:—"A son illegally adopted had," it was said, "a right to maintenance and marriage expenses." (e) "A boy adopted after his chûḍa and other sacraments becomes a dâs entitled only to such property as may be conferred on him by gift." (f)

(a) Steele, L. C. p. 16

(b) Vas. XX. 7

(c) *Ayyâvu Muppanâr* v. *Niladatchi Ammal*, 1 M. H. C. R. 45

(d) *Bawâni Sankara* v. *Ambabay Ammâl*, 1 M. H. C. R. 363. The adopted father's adoption had been pronounced invalid on the ground, that the widow adopting had not authority from her husband.

(e) MS. 1744. *See* above, p. 935. He is put on an equal footing with an illegitimate, and "the father is obliged to support his natural son, he performing the duties of a servant." Steele, L. C. p. 179.

(f) MS. 1674. The Śâstri, 2 Str. Hindû Law, 121, speaks of a Nitya Datta or permanent adoption, and an Anitya Datta or temporary one, and this, as he explains, depends on the performance or non-performance of the upanâyana before adoption. Colebrooke says, the son of such a dvyâmushyâyana belongs to the family of his father's upanâyana (and consequent gotraship).

The British Courts, rejecting generally any distinction except that of belonging to the one or the other family, regard an essentially defective adoption as no adoption. Thus it was said, an authority to adopt "must be strictly pursued, and, as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the widow alone for any purpose required by the Hindû law give to the adopted child, even after her death, any right to the property inherited by her from her husband." (a) An attempt was made in one case to establish the principle, that an adoption incompetent to the person who made it through the existence of a representative of the family and estate might, on the removal of this person by death, acquire the validity it would have had in the absence of the obstacle at the time when it was made. (b) In *Bhoobun Moyee's* case (c) it was ruled, that a power to adopt could not be exercised after the death of the natural son leaving a widow. This in a later case (d) was interpreted as meaning that the adoption was absolutely invalid, not merely ineffectual to deprive the son's widow of her estate by succession to the deceased son her husband. (e) The argument of the High Court of Calcutta that the adoption, though ineffectual as against the son's widow, became effectual on her death, and made the adopted

(a) *Chowdry Puddum Singh* v. *Koer Oodey Singh*, 12 M. I. A. 350, 356.

(b) The nearest analogy perhaps would be the setting up of a bigamous marriage amongst Christians, as validated by the subsequent death of the obstructive spouse. The adoption of a son in the lifetime of another is not validated by the death of the latter. *See* above, p. 945.

(c) 10 M. I. A. 279.

(d) *Pudma Coomari Debea* v. *The Court of Wards*, L. R. 8 I. A. 229.

(e) An opinion of Colebrooke to precisely the same effect, even where the adopted was a nephew of the deceased adoptive father is given at 2 Str. H. L. 93.

son, then a brother by adoption of her deceased husband, was rejected by the Judicial Committee. The elder widow could not indeed give effect by acquiescence or ratification to that which was absolutely void; and the so-called adopted son was held not to have taken any rights. (*a*) In Bombay the son's widow would, unless he had intimated his dissent, have had a right to adopt to him as a separated Hindû, (*b*) and with his authority, or the sanction of his united brethren, if he was unseparated. (*c*) But as in Bengal the mother armed with authority from her deceased husband could not adopt (*d*) after the estate and the sacra had wholly centred in her son by the completion of his saṃskâras, (*e*) neither in Bombay could she by such an authority, or by a mere implied authority drawn from her son, adopt so as to withdraw the son's property from him to whom the law had intermediately given it. (*f*) It is the widow and she only who continues her husband's spiritual existence, (*g*) and can replace him at any moment by an adopted son, (*h*) subject in a united family to the assent of the surviving male members on account of her religious subordination to them. (*i*)

(*a*) L. R 8 I. A. 229

(*b*) Above, pp. 971, 984. 990.

(*c*) Above, p. 986.

(*d*) This seems to be the correct doctrine See above pp. 984 ss. But the rule has not been judicially laid down. Comp. *V. V. Krishnarao* v. *Venkatrama Lakmi*, I. L. R. 1 Mad. at p. 187.

(*e*) As to the theory advanced in *Ram Soondur Singh* v. *Surbanee Dossee*, 22 C. W. R. 121, see above, Sub-sec. I 1. B. 2. 2. No adoption is approved by the Hindû law over an initiated man's head, even when he has migrated to the other world. Even a single adoption may be replaced by a widow's sacrifices and austerities. See above, pp. 873, 1148, and Coleb. Dig. Bk. IV. Chap III. Sec. II.

(*f*) Above, p 984. Sutherland, in 2 Str. H. L. 94, denies that a mother can adopt for a son.

(*g*) Above, pp. 93, 420.

(*h*) Above, pp. 972, 984.

(*i*) Above, p. 986.

I. 2. C.—RELATION AS A GRANTEE.

It may be gathered from what is said of the customary law in Steele, L. C. 183, that under the native system an adoption would not in general be recognized by a sovereign or the grantor of an estate as imparting a right of succession to it without the superior's consent being gained. (*a*)

An adopted son can succeed to his father's jagir, but if he rests his title to succeed on a confirmative sanad, he is bound, it was said, to prove it. (*b*)

II.—CONSEQUENCES OF ADOPTION OR QUASI-ADOPTION NOT GOVERNED BY THE ORDINARY LAW.

II. A.—VALIDITY RECOGNIZED.

A. 1.—WITHOUT LIMITATION (SAVE BY AN EXCEPTIONAL LAW).

"By agreement at the time of adoption a boy may represent both fathers. But without this he cannot succeed to his natural father's property." (*c*)

"If a Brâhman adopts a son of a different gotra the boy is to be regarded as a dvyâmushyâyana, not as a legal son of the adopter. If the boy's chaul and munj have been performed he becomes a dâs entitled only to maintenance. But he may perform the adoptive father's Srâddha and succeeds in the absence of [a begotten] son, widow, and other near relatives." (*d*)

"A boy adopted from a different gotra after his munj becomes a dvyâmushyâyana," which the Śâstri describes as one "bound to observe the prohibitions as to marriage applicable to both families." (*e*)

(*a*) *See* above, pp. 955, 1009. Comp. Blackst. Comm. Bk. II. Ch. 4, as to the feudal succession, recognition, and relief.

(*b*) *Maharajah Juggurnath Sahaie et al* v. *Musst Mukhun Koonwur*, 3 C. W. R. 24 C. R.

(*c*) MS. 1692. *See* above, pp. 896 ss, 1041 ss.

(*d*) MS. 1675.

(*e*) MS. 1674. The boy would generally be dvyâmushyâyana merely because he could not properly be given except as a dvyâmushyâyana.

A dvyâmushyâyana does not take the name of his adoptive father. (a)

When an only son is adopted he succeeds to his natural as well as to his adoptive parents (b) if taken as a dvyâmushyâyana. The effect by the Hindû law of an adoption as a dvyâmushyâyana (son of two fathers) is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his father's estate. (c) But in Bombay he does not inherit from his real father except in the absence of other sons. (d)

II A.—VALIDITY RECOGNIZED.
A. 2.—WITH LOCAL LIMITS

A kṛitrima son adopted by a male inherits, it was said, in both families; (e) and similarly it was said that "one adopted by the kṛitrima form, which is in use in Behar, Tirhoot, &c., takes the inheritance both in his own family and in that of his adoptive father." (f)

(a) *Musst. Edul Koonwar* v. *Koonwar Debee Singh*, 5 N. W P. Dec. 341.

(b) *Nilmadhub Doss* v *Biswambar Doss*, 12 C. W. R. p. 29 P. C.; S C. 3 Beng. L R p 27 P C.; S C 13 M. I. A. 85 The Judicial Committee say :—" Again, if there is, on the one hand, a presumption that Gooroopros̄had Doss would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as Dvyâmushyâyana, or son to both his uncle and his natural father."

(c) *Nilmadhub Doss* v. *Biswambar Doss et al*, 13 M. I. A. 85. *See* above, p. 899.

(d) *See* above, p. 898.

(e) *Musst. Deepoo* v. *Gowreeshunkur*, 3 C. S. D. A. R. 307. *See* above, p. 1015. The kṛitrima adoption like that of a pâlak putra bears a pretty close resemblance to the Roman adoption in its latest stage. *See* above, pp. 925, 926.

(f) *Srinath Serma* v. *Radhakaunt*, 1 C. S. D. A. R. 15.

With regard to kritrima adoptions it has further been ruled that—A person adopted by the husband stands to him in the relation of a son, and is heir to his estate; but does not become the adopted son of the adoptive wife, nor succeed to her peculiar property. (*a*)

Nor does the person adopted by the wife, as her son, become the adopted son of her husband, or succeed to his property, even by the Maithila shâsters, though the adoption should have been permitted by the husband. But, as her son, he will succeed to her property. (*b*) But if the husband and wife jointly appoint an adopted son, he stands in the relation of a son to both, and is heir to the estate of both. (*c*)

When an adoption has been made in the kritrima form, the sons of the adopted have no right to set aside alienations which the adoptive father of the adoptee made of his self-acquired property for alleged illegitimate purposes. (*d*)

A son, adopted by a widow without her husband's permission, has no right to her property until her death. (*e*)

II. A.—VALIDITY RECOGNIZED.

3.—AMONGST CERTAIN CLASSES.

Among the Talabda Kolis of Surat, the son adopted according to their fashion celebrates his adoptive father's obsequies with a feast, and succeeds him. His adoptive father may dispose of his property as he pleases, but failing this the adopted son succeeds. (*f*)

(*a*) *Srinarain Rai et al* v. *Bhya Jha*, 2 C S. D. A. R 27.

(*b*) *Ibid.*

(*c*) *Ibid.* *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 C W R. 500.

(*d*) *Baboo Banee Pershad* v *Moonshee Syud Abdool Hye*, 25 C. W. R. p. 192.

(*e*) 2 Hay, 410. This of course implies where she has a right, Otherwise the adoption would be invalid for all purposes. *See* above. I. 2 B.; 2 Str. H. L. 91.

(*f*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

An adoptive father may, according to the custom of the Talabda Koli caste, repudiate an adopted son for such reasons as would justify a natural father in disinheriting his son. (*a*)

II. B.—VALIDITY NOT RECOGNIZED.
1.—OBSOLETE.

A person cannot succeed as adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter if she had brothers when she married, nor can he succeed as claiming under a bought son. (*b*)

One sold or given by his parents or by himself ranks as a slave according to Manu quoted by Jagannâtha in Coleb. Dig. Bk. III. Chap. I. Sec. I. T. 33 and Commentary. Attempts to procure a son in this way are thus made abortive in the present age.

B. 2.—ADOPTION PARTLY ASSIMILATED TO THAT UNDER THE ORDINARY LAW

Two brothers attempting to adopt the same sons declared—"According to our Sâstras the said two adopted sons will perform our obsequies, and shall become successors of our ancestral and self-acquired property." Though this showed an intention to make and take a gift, yet it was pronounced inoperative if the persons did not fulfil the character of adopted sons. (*c*)

(*a*) *Bhali Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67, 70.

(*b*) *Yachereddy Chinna Bussavapa* v. *Yachereddy Gowdapa*, 5 W. R. P. C. 114.

(*c*) *S Siddesory Dossee* v *Doorgachurn Sett*, 1 Bourke, 360. The Datt. Mîm. Sec. I. 30 says the same person cannot be adopted by two, but caste custom seems to have recognized it in a few instances in Central India. And the Datt. Mim. II. 47, 49, allows the adoption of one son (a nephew) by several united brothers, on the principle that the son of one is in a sense the son of all

"A person taken as pupil by a Gosavî cannot on his natural father's death claim a debt due to the latter." (*a*)

B. 3.—MERELY ANALOGOUS.

A son-in-law having been adopted succeeded to the estate. It was attached for the debt of the adoptive father. The Sâstri said that the adopted son's son by a wife not his adoptive father's daughter had no claim to raise the attachment. (*b*)

The Hindû law does not recognize any legal status for the foster-son, either in the matter of performing ceremonies or of inheritance. (*c*) "Nephews, though separated, inherit before a mere foster-son." (*d*)

(*a*) MS. 1248

(*b*) MS. 31. If there was a true adoption, the son-in-law would transmit to his son the same rights as if he had been a son by birth. Probably the case was one like an Illatam adoption in Madras, *see* above, p. 421. Amongst the Motati Kapus, a low caste in Madras, an affiliation is allowed of a son-in-law in the absence of a begotten son He takes the place of such a son in succession, and shares equally with one born after his affiliation. The question of his resembling an adopted son in other respects than for the purpose of succession was not decided, *Hanumantamma* v. *Râmi Reddi*, I. L. R. 4 Mad. 272, 274. Similar customs are recognized by some of the Bombay castes; thus—" Should a man have a daughter and no son, he may give her in marriage to a gharjawâhee, who is invested with the management of the house and property, but who becomes proprietor only of such property as his father-in-law gives him at his marriage, or with the consent of his other relations." Steele, L. C. App. p. 358

(*c*) *Bhimana Gaudu* v. *Tayappa*, M. S. D. A. R. 1861, p. 124; *Samy Josyen* v. *Ramien*, M. S. D. A. R. 1852, p. 60; *Nilmadhub Doss* v. *Biswambhar Doss*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I. A. 85; *Kalee Chunder* v. *Sheeb Chunder*, 2 C. W. R. 281. *See* above, p 925.

(*d*) MS. 119. The Śâstri, above, p 1015 (*e*), allowed that a foster-son might be heir by custom; and amongst Śûdras he was in one instance given a place in the family. *See* above, p. 381, Q. 10.

"A pâlak putra is not entitled to share in any property *de jure* (a) generally in the Dakkhan; but in a few cases, such as the one above, p. 373, Q. 18, the Śâstris havebeenmore indulgent. In the case at 2 Str. H. L. 426, the Śâstri so far assimilates the foster-son to an ordinary son, that he says a gift may be made to him in his absence without delivery of possession. (b)

The Oudich (Kaletiya) Brâhmaṇas of Broach answered Borradaile that either a foster-son or an adopted son might be taken. He would share *equally* with an after-born son, and he might, failing any other son of his real father, take both estates (like a dvyâmushyâyana). (c)

(a) Steele, L. C. p. 184.

(b) *See* above, pp. 179, 685. The passages cited by H. H. Wilson, Works, vol. V. p. 90, show that while some change of possession is necessary in general to complete a title, yet a partial possession may, when rightly taken, be extended to the whole, and may be dispensed with where the deed is incontrovertible As to the distinction taken by the Śâstri between the ceremonies necessary for the transfer of immoveable and of moveable property, *see* the Mit. Chap. I. Sec. I. para 31; Coleb. Dig. Bk. II. Chap. IV. T. 33 Comm.; Bk. V. T. 390 Comm.

(c) MS. Book A. p. 63. The place given to the foster-son in this Section is assigned to him only in deference to the uniform effect of the decisions of the Courts. *See* above, p. 927. Since that page was printed, the present writer has re-examined in the Borradaile MS. Collection the accounts given of their usages by 51 castes and sub-castes in Gujarâth. Of these 38 reject both the adopted and the foster-son; of this number are Brâhmaṇas of various classes. Two castes allow either kind of son. Ten allow only the foster-son. Two allow adoption only, but limited to a brother's son. In one caste (Vaghirs) the only recognized affiliation is by purchase. Four or five allow a dharma-putra to perform the parents' obsequies. Wherever the pâlak-putra is allowed, his heritable right to his foster-father is recognized, and, with a couple of exceptions, a right in relation to his real father, like that of a dvyâmushyâyana. In one caste, (Surya Vaṃshi Kshatris of Broach) the foster-son takes only the self-acquired property of the foster-father, not the ancestral estate. In another (Guduja Mâchi) "one may take a boy and give him a little." One (Sura-

Adoption (so-called) amongst Naikins does not create any legal rights similar to those arising from a true adoption. (b).

thiya Mâli) expressly excludes him from collateral succcession in his new family. In most cases the foster-son is allowed to share equally with an after-born son; in others he is reduced to one-third or one-half as much. The relative shares are in a couple of instances subject to control by the father. A widow may take a foster-son from her husband's family, except (in some castes) when there is a nephew. The sanction of the family is required to her taking from her own family or a stranger, if there is property left by the husband (Surya Vaṃshi Kshatris). Liberty to remarry disqualifies a widow for taking a foster-son (Kahnumiya Hajjâm). No rites are prescribed for taking as a foster-son beyond an expression of consent by the parties concerned.

It may be gathered that adoption is generally disallowed or unknown as a usage in Gujarâth, though, should any one take it on himself to adopt, the castes wonld find it hard to contend against the Śâstra; and it is supposed that in such a case the ceremonies would be governed by the scripture rules. Where a substitutionary son is allowed, it is, considering the relative members in the castes, in at least nine cases out of ten, a foster-son The actual usage of the pecple thus seems to be quite opposed on this subject to the opinions of the Śâstris, and the decisions of the Conrts influenced by those opinions. The difference is the more important, as from many of the answers of the castes it appears they were by the Government of the day promised the maintenance of their customary law when thus ascertained.

(b) *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545. The mere nurture and recognition by a temple woman of a man as her son was apparently thought sufficient by the Śâstri to make him her heir. (*See* Sec. IV *ad fin.* Above, p. 1068).

SECTION VIII.

SUITS AND PROCEEDINGS CONNECTED WITH ADOPTION.

The principal decisions bearing on the substantive law of Adoption have been considered in the preceding Sections. (*a*) In the present Section it is proposed to supplement them with a certain number illustrating the questions that arise in litigation, and the way in which these have been dealt with by the Courts. The decisions will be distributed with reference mainly to the object of the litigation. Such a classification, though wanting in scientific precision, seems the most convenient for the practical purposes at which the present Section aims.

The exercise of jurisdiction by the Sovereign in this class of cases is fully recognized by the Hindû law. (*b*) The source of the rights and duties that come in question is in the religious law, but the relations themselves are of a kind on which the Civil Courts are bound to adjudicate. According to the customary law—"The caste is competent to decide on the question of a legal adoption. If unsettled by them, it may be referred to the Sirkar." (*c*)

1.—SUITS AND PROCEEDINGS ARISING OUT OF NON-ADOPTION.

"A man cannot cancel his agreement to adopt by entering into a different one." (*d*)

(*a*) The cases of adoption in the Bombay Presidency "may be taken to be governed by the Mayûkha." (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397, 439.)

(*b*) Compare what is said on matrimonial law by the Judicial Committee in *Ardaseer* v. *Perozeboye*, 6 M. I. A. at p. 391.

(*c*) Steele, L. C. pp. 185, 186. As to the jurisdiction of the caste and the appellate jurisdiction of the Courts of the King recognized, in all cases, *see* Ellis in 2 Str. H. L. 267—268; Yâjñavalkya, Chap. II. 5, and the commentary of Vijñâneśvara, 1 Macn. H. L. pp. 133, 141 ss.

(*d*) MS. 1745.

No suit can be maintained for an order directing a minor widow to adopt, nor, it was said, was this a case in which a decree could be made declaring the validity of a direction (*a*) to adopt.

Where a will says—" I declare that I give my property to *K.*, whom I have adopted. My wives shall perform the ceremonies and bring him up.........Should he die, and my younger brother have more than one son, my wives shall adopt a son of his"—the gift to *K.* is absolute. So long as he is alive, no other can be adopted, nor can his right as devisee be defeated, whether the widows perform or decline to perform the ceremonies. (*b*)

Where a person made a will to the effect that two sons should be adopted in case his pregnant widow should bear a daughter, and no child was born, and one of the two to be adopted died, and the other was not adopted, the latter was held not entitled to take any property as adopted son or legatee under the will. (*c*)

A suit to declare void certain deeds of gift and acceptance of a child in adoption, brought by the donee against the donor,—the child not being a party to the suit,—was held not to be maintainable. The deeds, it was held, were not necessary to a valid adoption, and if the deeds were set aside, the adoption, if it had taken place, might be proved *aliunde.* If the deeds operated merely as an agreement to give and take in adoption, and a breach thereof had occurred, such breach, it was held, would not render the deeds void, or constitute any ground for setting them aside, or for declaring them void. (*d*)

(*a*) *Musst. Pearee Dayee* v. *Musst. Hurbunsee Kooer*, 19 C. W R. 127. *See* above, pp. 997, 1011.

(*b*) *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(*c*) *Abhai Charan* v. *Dasmani Dasi*, 6 Beng. L. R. 623.

(*d*) *Sree Narain Mitter* v. *Sreemutty Kishen Soondory Dassee*, L R. Supp. I. A. 149.

2.—SUITS AS TO RIGHTS AND DUTIES OF WIDOW PRIOR TO ADOPTION.

A suit to obtain a declaration that a widow is heir of her deceased husband will lie, though she had authority to adopt. She does not forfeit her right by her omission or refusal to adopt. (a) It seems she cannot be forced to adopt. Where no adoption is made "under an authority for the purpose," the widows having equal rights in the estate may no doubt share it, making due provision for the maintenance of "the mother and sister of the deceased husband." (b)

"In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater nor less than it would be if she enjoyed no such power or died without making an adoption. She has the same power, no greater and no less, to deal with the estate. Such acts of hers as are authorized and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorized and in excess of her powers may be challenged by the son adopted or by any other successor to the estate." (c)

An adopted son is at liberty to question alienations made by the widow, the adoptive mother, before his adoption. But a presumption exists in favour of her transactions assented to by the persons next in succession when they took place. (d)

A Hindû widow claimed a share of ancestral property (under an anumatti patra, or deed of permission to adopt a son, alleged to have been executed by her husband) on behalf of the son whom she might adopt. It was held by the

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(a) *Bamundoss Mookerjea* v. *Musst. Tarinee Dibbeah*, B. S. D. A. R. for 1850, p. 533; S. C. 7 M. I. A. 169; and *Prasannamayi Dasi* v. *Kadambini Dasi*, 3 B. L. R O C. J. 85.

(b) Coleb. in 2 Str. H. L. 91 See above, pp. 103, 248.

(c) *Lakshmana Ráu* v. *Lakshmi Ammál*, I. L. R. 4 Mad. 160, 164.

(d) *Jadomoney Dabee* v. *Sarodaprosunno Mookerjee*, 1 Bouln. 120; *Rajkristo Roy* v. *Kishoree Mohun*, 3 C. W R. 14, in which many earlier cases are referred to.

Sudder Dewanny Adawlut, that, until the adoption was made, no action would lie, and that the expression of any opinion as to the anthenticity of the deed was in the present action uncalled for. (*a*)

The possession of a widow (who has authority to adopt) previous to the adoption is not that of a trustee for the son to be adopted, so as to prevent limitation (*b*) from operating. A widow in Bengal adopted a boy under a power from her deceased husband in the course of a suit by her against his unseparated brother. This was held competent to her, and also the continuance of the suit in her own name, as that had not been objected to, and she might take the estate as trustee for her son. (*c*)

A widow does not incur a penalty of absolute forfeiture by an attempt at a false adoption of a son. (*d*)

If a widow succeeds to her adopted son, and then adopts again, her intermediate alienation is not affected by such adoption. (*e*)

3.—SUITS TO ESTABLISH ADOPTION.

A party claiming in Bengal as a son adopted by a widow must establish by evidence—(1) authority given by the husband to adopt; (2) his actual adoption by the widow as her husband's son. (*f*)

(*a*) *Musst. Subudra Chowdhryn* v. *Goluknath Chowdree et al.* 7 C. S. D. A. R. 143

(*b*) *Gobin Chandra* v. *Anand Mohan*, 2 B. L. R. A C. J. 313. *See* above, pp. 94, 95.

(*c*) *Dhurm Das Pandey* v. *Musst. Shama Soondri Debiah*, 6 C. W. R. 43, Pr. Co.

(*d*) *Komul Monee Dossee* v. *Alhadmonee Dassee*, 1 C. W. R. 256.

(*e*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183 *See* above, p. 367.

(*f*) *Chowdhry Pudum Singh* v. *Koer Oodey Singh*, 12 C. W. R. P. C. 1; S. C. 2 B. L. R. P. C. 101.

A plaintiff who desires, as an adopted son, to recover property, must sue for it, not for a mere declaration of his status as adopted son. (*a*)

A vatandar in possession of vatan property may, as such, sue for a declaration of his adoption, preliminary to his application to the Collector for recognition of his right to officiate as a vatandar (under Bom. Act III. of 1874). (*b*)

An adopted son, who is afterwards discarded, may maintain a suit to establish his rights. According to the Hindû law the suit may be brought on his behalf by any kinsman or friend. (*c*) This would now be subject to the provisions of the Code of Civil Procedure (Act XIV. of 1882, Secs. 440 ss) and to the ruling of the Judicial Committee in *Doorga Persad's* case. (*d*)

On an estate descending to an adopted son, and from him to his widow, a further power to adopt given by the adoptive father to his widow becomes incapable of execution. (*e*) An adoption under it is void. It does not give to the adopted a right ripening into that of a duly adopted son when the elder widow succeeds to the property. (*f*)

Where a widow adopts under authority of her husband, the authority must be strictly proved. (*g*) If the husband's

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(*a*) *Ramchandra Narayan* v. *Krishnaji Moreshwar*, Bom. H. C. P. J. 1881, p. 288

(*b*) *Ramchandra* v. *Radhabai*, Bom. H. C. P. J 1880, p 160.

(*c*) 2 Str. H. L. 79.

(*d*) Above, p 766.

(*e*) *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 I. A. 229. *See* above, Sec. VII. I. 2 B., and pp. 974, 982.

(*f*) *See* above, Sec. VII. I. 2 B. "Relation shall never make an act good which was void for defect of power." Vin. Abrt. Tit. Relation (H) 4; *Butler and Baker's* case, 3 Rep. 29 A. *See* too *Hawkins* v. *Kemp*, 3 Ea. 410.

(*g*) *Chowdhry Pudum Singh* v. *Koer Oodey Singh*, 12 C. W. R. P. C. 1; 2 B. L. R. 101 P. C.; 12 M. I. A. 350.

authority to adopt is verbal, it must be proved by witnesses; the widow's testimony alone being insufficient. (*a*)

If the husband's authority is in writing, and his handwriting is proved, the signature of witnesses is unnecessary. Otherwise it must be proved by witnesses. (*b*)

In a case of inconsistent evidence as to the fact of adoption, the non-designation of the adopted in a public document as son of the adoptive father decided the Court against the alleged adoption. (*c*)

In *Gangava* v. *Rangangavda,* (*d*) the following facts were held inconsistent with an alleged adoption :—

(1) The adoptive mother's name continued in Government records for lands belonging to her husband, after the alleged adoption. (2) The adopted acted as deputy under the adoptive mother. (3) The adoptee assumed his natural father's name after the date of his alleged adoption. (*e*)

A presumption arises against the genuineness of a deed of permission to adopt from its not being acted on for 17 years after the husband's death. (*f*)

The omission of the usual intimations and ceremonies is a ground for strong suspicion as to the genuineness of an alleged adoption. (*g*)

The registration of deeds giving power to the widow to adopt was recommended. When such a deed is not registered,

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(*a*) *Musst. Tara Munee Dibia* v. *Dev Narayun Rai et al,* 3 C. S. D. A. R. 387 ; *Ry Sevagamy Nachiar* v. *Heraniah Gurbah,* 1 Mad. Dec. 101 ; 2 Macn. H. L. 183.

(*b*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah,* 1 Mad. S. D. A. Dec. 101.

(*c*) *Musst. Sabitree Daee* v. *Sutur Ghun Sutputtee,* 2 C. S. D. A. R. 21.

(*d*) Bom. H. C. P. J. 1881, p. 248.

(*e*) *See* above, p. 1209.

(*f*) *Chundermonee Debia Chowdhoorayn* v. *Munmoheenee Debia,* 8 M. I. A. 477.

(*g*) *Sootrugun Sutputty* v. *Sabitra Daee,* 2 Knapp, 287.

the weight of evidence for or against an alleged adoption has to be compared. (*a*) In the particular case it removed suspicion.

In the absence of strong documentary evidence for an alleged adoption, the Privy Council preferred the judgment of the lower Appellate Court to that of the High Court, as it had a better opportunity of testing the probabilities of the case. (*b*)

Evidence is not necessary of the execution of a permission to adopt according to the exactness required in the case of a will. (*c*)

When the Court is satisfied of the power comparatively slight evidence of the ceremonies will suffice. (*d*)

The identity of a deed of permission to adopt was held sufficiently established by a reference to it in a subsequent proved deed. (*e*)

The probabilities are in favour of an alleged adoption, where the document authorizing the widow to adopt bears the genuine signature of the deceased husband, and the next heir who disputes the document is shown to be on bad terms with the deceased. (*f*)

In some cases upon a disputed question of adoption, though the Courts in India held the evidence not sufficient to prove

(*a*) *Chundernath Roy* v. *Kooar Gobindnath*; *The Collector of Moorshedabad* v. *Ry Shibessuree Dabea*, 11 B. L. R. 86.

(*b*) *Nilmadhub Das* v. *Biswambhar Das*, 12 C. W R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I A. 85.

(*c*) *See* above, pp 961, 964.

(*d*) *Mohendrolal* v. *Rookiney Dabey*, Coryt. R 42.

(*e*) *Kishen Shunker Dutt* v. *Moha Mya Dossee*, C. W. R. Sp. No. 210.

(*f*) *Sri Virada Pratapa Raghunada* v. *Sri Brozo Kishoro Patta Deo* 25 C. W. R. P. C. 291; S. C I L. R. 1 Mad. 69; S. C. 7 M. H. C. R. 301.

the adoption, the Privy Council has reversed the decision and decreed in favour of the adoption. (*a*) Thus the Privy Council decided in favour of adoption, upon a conflict of evidence as to whether it took place during pollution or not. (*b*)

A bequest to two persons as adopted sons was held to fail through the simultaneous double adoption being void. (*c*)

Where the plaintiff claims the full rights arising under an ordinary adoption, a different form of adoption (*i. e.*, dvyâmushyâyana) cannot be set up. (*d*)

Persons claiming as adopted sons of a widow must prove their own adoption, and that the widow had possession in her own right; (*e*) so too where plaintiff sues as adopted son of the owner himself; (*f*) but the plaintiff need not in the former case prove how the widow came into possession. (*g*) A suit to establish adoption independently of any claim to property can be maintained upon an institution fee of rupees ten, provided the plaintiff shows distinctly that he has a cause of action and a right to consequential relief. (*h*)

(*a*) *Huradhun Mookurjia* v. *Muthooranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. P. C. 71; *Rungama* v. *Atchama et al*, 4 M. I. A. 1; S. C. 7 C W. R. P. C. 57.

(*b*) *Ramalinga Pillay* v. *Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

(*c*) *Siddesory Dossee* v *Durgacharn Sett*, Bourke, 360. Above, p. 981.

(*d*) *Musst. Edul Koonwar* v *Koonwar Dabee Singh*, 5 Dec. N. W P. 341.

(*e*) *Chutturdharee Lall* v. *Musst. Parbutty Kowar*, 12 C. W. R. 120.

(*f*) *Bhairabnath Sye* v. *Maheschandra*, 4 B. L. R. A. C. J. 162; *Ishur Panday* v. *Musst. Buskeela Koonwar*, B S. D. A. R. for 1858, p. 471.

(*g*) *Chutturdharee Lall* v. *Musst. Parbutty Kowar*, 12 C W. R. 120.

(*h*) *Baji Balvant* v. *Raghunath Vithal*, Bom. H C. P. J. for 1876, p. 142.

A certificate cannot be refused to administer an adopted minor's estate, though his adoption has never been recognized, for such a certificate is necessary to clothe any administrator with authority to sue for such recognition of the adoption of the minor. (*a*)

A certificate of guardianship under Act XL. of 1858 will not entitle a minor or his guardian, until the adoption is proved, to interfere with the possession of the estate by the widow of the deceased who denies the adoption. (*b*)

4.—SUITS TO SET ASIDE ADOPTION.

The Legislature has by Acts VII. of 1870 and IX. of 1871 and XV. of 1877 recognized the right to bring a suit to set aside an adoption independently of any claim to property. (*c*)

The *onus probandi* lies on the adopted son, though defendant, to prove the validity of the adoption, and not on the plaintiff suing as heir to prove its invalidity, even though he alleges fraud, and adduces no evidence in support of it. (*d*)

The presence of a brother of the adoptive father at an adoption and his associating the adopted son as such with him in a suit prevents his sons from afterwards denying the adoption. (*e*)

(*a*) *Chintaman* v. *Sitaram*, Bom. H. C. P. J. 1879, p. 566.

(*b*) *Panch Cowree Mundul* v. *Bhugobutty Dossia*, 6 C. W. R. Misc. 47.

(*c*) *Kalova* v. *Padapa*, I. L. R. 1 Bom. 248, per Westropp, C. J. In the same case the points for consideration on a question of adverse possession by a widow, and on one of the validity of an adoption, are set forth with a reference on the latter point to earlier cases.

(*d*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468; *Roopmonjooree* v. *Ramlall Sircar*, 1 C. W. R. 145; *Kripa Moyee Debia* v. *Goluck Chunder Roy*, 4 C. W. R. 78; *Bissessur Chuckerbutty* v. *Ram Joy Mojoomdar*, 2 C. W. R. 326. *See* above, Sec. VI. A. 5.

(*e*) *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, L. R. 3 I. A. at pp. 253, 256; *Chintu* v. *Dhondu*, 11 Bom. H. C. R. 192. The principle of estoppel was followed in the similar case, *Sadashiv* v. *Hari*, *ib*. 190. *See* above, Sec. VI. A. 5.

The following grounds have been held insufficient for setting aside an adoption, once effected :—

(1) Its not having taken place at the usual residence of parties (*a*) ; (2) Its having taken place long after the death of adoptive father (*b*) ; (3) Want of permission from Government (*c*) ; (4) Tonsure having been performed in the family of birth after gift and acceptance but before fire sacrifice (*d*) ; (5) Existence of a nearer relation than adoptee available for adoption (*e*) ; (6) Want of presence of the mother (natural or adoptive), of burnt offerings, or of drinking saffron water by other than adoptive father, amongst Śûdras. (*f*)

A has two sons *B* and *C*. *B* marries *D* and dies before *A*. *C* dies unmarried after *A*. *E*, as widow of *A*., relinquishes her rights in favor of *D* and her adopted son *F*. This being sufficiently proved, *E* cannot question *F's* adoption. (*g*)

A stranger having no interest in the matter has no right, even with the consent of the presumptive reversionary heirs, to sue for a declaration that an adoption made by a widow is invalid. (*h*)

Although a suit, to contest an adoption, made by a Hindû widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the

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(*a*) *Bhasker Buchajee* v *Narro Ragoonath*, Bom. Sel. R. 24

(*b*) *Ib.*

(*c*) *Ib.*

(*d*) *Musst. Dullabh De* v. *Manu Bibi*, 5 C. S. D. A. R. 50.

(*e*) *Gocoolanund Dass* v. *Wooma Daee*, 15 B L. R. 405; S. C. 23 C. W. R. 340; *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd Edn.).

(*f*) *Alvar Ammal* v. *Ramasawmy Naiken*, 2 M. S. D. A. R. for 1867; *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp 287; S. C. 5 C. W. R. P. C. 109.

(*g*) *Musst. Ladoo* v. *Musst. Oodey Kowree*, N. W. P. S. D. R. Pt. II. 1864, p. 365.

(*h*) *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241.

estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering.

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue, and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of (the husband of) a daughter of a brother of the father of the deceased, under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee without deciding that as an adopted son this minor had the same rights as a natural-born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant bandhu, (a) and that he had not a vested, but at most a contingent, interest. Their Lordships held, that there being, in fact, heirs nearer in the line of succession than this minor,

(a) *See* above, pp. 489, 498.

the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated. (*a*) The conclusions in the suit referred to were, that a suit to set aside an adoption by a widow may be brought—(1) by a presumptive reversionary heir; (2) by an heir a little more distant, in case the former act in collusion with the widow; possibly (3) by an adopted son of a deceased brother's daughter's son, as a bandhu. (*b*)

An obscure association of a boy as adopted son of a deceased person, in a suit brought by his widows to recover the husband's share in joint property, was held not conclusive of the boy's adoption. A reversioner was allowed to prove its not having taken place. (*c*)

In a suit on a ground of existing right of inheritance and for possession and mesne profits in which the claims to relief are abandoned, the Court will not allow a change of claim and declare an adoption invalid. (*d*)

A power to adopt imposed the condition of the consent of the husband's mother. A suit was brought against the adopted son, but the objection of non-fulfilment of the condition precedent of consent was not raised until the case was taken in appeal to the Privy Council. It was held then too late. (*e*)

Ignorantia legis non excusat, it was said, is a maxim applicable to the Hindû law of adoption. (*f*) There may

(*a*) *Rani Anand Kunwar et al* v. *The Court of Wards*, I. L. R. 6 Calc P. C. 764. *See* above, p. 498.

(*b*) *Ib.*

(*c*) *B. Sheo Manog Singh* v. *B. Ram Prakas Singh*, 5 C.S.D.A.R. 145.

(*d*) *Ry Rajessuree Koonwar* v. *Maharanee Indurjeet Koonwar*, 6 C. W. R. 1.

(*e*) *Rajendronath Holdar* v. *Jagendronath Banerjee*, 14 M I. A. 67; so also *Musst. Mulleh* v. *Purmanund*, 4 Dec. N. W. P. 201.

(*f*) *Radhakissen* v. *Sreekisson*, 1 C. W. R. 62. Ignorance of the law does not relieve from a liability, but it operates no further. *See* per Blackburn, J., in *Reg.* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. pp. 629, 635. *See* also per Lord Westbury in *Cooper* v. *Phibbs*, L. R.

however be an excusable ignorance as when the Judicial Committee said :—" The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The appellant is a Hindû female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a will in fact, and a valid will. The acts attributed to her are really no confirmation of the respondent's case, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption." (*a*)

An acquiescence arising from ignorance is not binding, though the ignorance is of the law applicable to the particular case. (*b*) So too consent given by the first adopted son to an arrangement of his father under which the second adopted son was allotted certain property would not, it was ruled, be binding on the first adopted son, if he gave the consent in ignorance of his right, or if the father departed from the arrangement to the complete disinherison of the first son himself. (*c*)

An assent obtained by a widow on a representation of an authority from her husband will not avail as against the

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2 E. and I. A at p 170. Jagannâtha in Coleb. Dig. Bk. II. Chap. IV. T. 54, and the judgment of the Judicial Committee in *Periasami* v. *Periasami*, L. R. 5 I. A. 61, 76.

(*a*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*b*) See *Rangamma* v. *Atchamma*, 4 M I. A. 1. ; *Beauchamp* v. *Winn*, L. R. 6 E. and I. A. 223 ; *Thomson* v. *Eastwood*, L. R. 2 A. C. 215, and per Sir G. Jessel, M. R. in *Lacey* v. *Hill*, L. R. 4 Ch. D. at. p. 546.

(*c*) *Sudanund Mohapattur* v. *Bonomallee*, Marshall, 317.

sapiṇḍa heirs. The assent, too, being moved by self-interest, was held insufficient. (*a*)

5.—SUITS IN WHICH ADOPTION IS AN INCIDENTAL QUESTION

An adoption *de facto* must be supposed to be valid until set aside. (*b*) An objection that an adoptee was the eldest son of his natural father was rejected in special appeal, because though raised it was not pressed in the lower Courts, nor taken specially in the petition of special appeal. (*c*)

A case in which a conveyance was absolute, unless the grantor should adopt a son, but in that case to be subject to redemption, was held a sale subject to conversion into a mortgage during the vendor's life, but to become irredeemable on his death. (*d*)

A widow may resist an ejectment brought by a person whom she has recognized as adopted son on the ground of the invalidity of the adoption, though her acknowledgment has been acted on by the authorities. (*e*)

A plaintiff sued as widow of an adopted son for property of the adoptive father, and also on the ground of devise to the son. The adoption was held invalid according to Hindû law, yet the High Court held that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, that person was entitled to the property, although the testator conceived him to possess a character, which, in point of law, could not be sustained. (*f*) In a similar case it was held by the Judicial Committee that

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(*a*) *Karunabdhi* v. *Gopala*, I. L. R 7 I A. 173, 177. Savigny denies the generally nullifying effect of error. *See* his System, Vol. 3, App. VIII. and in the same sense Coleb Bk. II Ch. IV. T. 54 Comm.

(*b*) *Nunkoo Singh* v. *Purm Dhun Singh*, 12 C. W. R. 356.

(*c*) *Joy Tara Dossee* v. *Roy Chunder Ghose*, 1 C. W. R 136. *See* above, Sub-Sec. 4.

(*d*) *Subhábhat* v. *Vásuderbhat*, I. L. R. 2 Bom. 113.

(*e*) *Thakoor Oomrao Singh* v. *Thakooranee Mahtab Koonwar*, 2 Agra Rep 103 *See* above, Sub-Sec. 4, p 1227.

(*f*) *Jivanee Bhayee* v. *Jiru Bhayee*, 2 M H C. R 462.

according to the true construction of the testator's will there was a gift of property to a designated person, independently of the performance of ceremonies. (*a*)

6.—SUITS AND PROCEEDINGS CONSEQUENT ON ADOPTION

In granting a certificate under Act XXVII. of 1860 to an adopted son, a nephew of the deceased, the Judge ought to look into the fitness as well as the propinquity of the adoptee. (*b*)

After adoption, the father had a son born to him. In a partition he gave the adopted boy a larger share than he was by law entitled to receive. The father then married a second wife, and had by her several children. These, it was held, could not contest the above disposition in favour of the adoptee. (*c*)

Documents of the like tenor were executed by a man and his adopted son by which the property of the former was made over to his wife for life, without power of alienation, and a succession was secured to the adopted son. This was construed as a family settlement, giving to the son an estate in remainder, not as giving to the wife as a widow such an estate as if there had been no son. (*d*)

The title of a second (invalidly) adopted son could not be maintained, it was held, on the ground of acquiescence by the first, as this had proceeded on an assertion by the father of the second son's right. Whether the first son's ratification would have the effect in such a case of previous consent was thought doubtful; but at any rate there had not been the knowledge which would make it binding. (*e*)

(*a*) *Nidhoomoni Debya* v. *Saroda Pershad*, L. R. 3 I. A. 253.

(*b*) *Nunkoo Singh* v *Purm Dhun Singh*, 12 C. W. R. 356.

(*c*) *Yekeyamian* v. *Agniswarian et al*, 4 M H. C. R. 307. *See* above, pp. 77, 702, 776.

(*d*) *Musst Bhagbuttee Daee* v. *Chowdry Bholanath Thakoor*, L. R. 2 I. A. 256.

(*e*) *Rangamma* v. *Atchamma*, 4 M. I. A. 1, 103 On the doctrine of Acquiescence see *Beauchamp* v. *Winn*, L. R. 6 E & I. App. 233. On

The first adopted son, however, was allowed to retain all he could claim against the father's disposition only on condition of giving up to the second all over which the father had unfettered power.

An adoptee, like a natural born son, cannot claim to have a specific share declared and defined, but is only entitled to a decree declaring that the property is ancestral.(*a*) A suit by the son of a first adopted son having been brought as heir of the second adopted son, the plaintiff cannot in appeal change his ground of action, treat the second adopted son as trespasser, and seek to recover property as belonging to his ancestor.(*b*)

A son adopted *pendente lite*, to be bound by a pending suit affecting his adoptive father's ancestral property, must be made a party to the suit. (*c*)

A representation made by one party for the purpose of influencing the conduct of the other party (as to marriage, giving in adoption, &c.), and acted on by him will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation. (*d*)

After the death of an adopted son, a widow alienated part of the property and subsequently adopted again. It was held that the second adopted son took subject to the alienation.(*e*)

Election *see* per James, L. J., in *Codrington* v. *Lindsay*, L. R. 8 Ch. A. pp. 578, 592.

(*a*) *Heera Singh* v. *Burzar Singh*, 1 Agra H. C. R 256. He cannot claim definition without partition, as the shares may vary through births and deaths, &c.

(*b*) *Gopee Lall* v. *Musst. Chandraolee Buhoojee*, 11 B. L. R. P. C. 391; S. C. 19 C. W. R. P. C. 12. The adoption here of the second son was invalid according to Hindû law, as the first had left a son. *See* above, p. 944.

(*c*) *Rambhat* v. *Lakshman Chintáman Mayála*, I. L. R. 5 Bom. A. C. J. p. 630.

(*d*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*e*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183. Reference is made to *Bhoobun Moyee's* case, 10 M. I. A. 165; see *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. 6 Misc. R. Above, p. 367.

A widow redeems a mortgage of her husband and sells the property at a profit. She then adopts a boy; and in the deed of adoption agrees to let the boy have the property "when released." The purchaser is said to have attested the deed of adoption. It was held that the attestation does not bind the purchaser either as to an agreement of resale or as to the price for which the property was to be sold. (*a*)

When a widow applies under Act XL. of 1858 for a certificate in respect of an estate alleged to belong to an adopted son, the questions for inquiry are : (1) minority of the boy; (2) fitness of the petitioner for management. (*b*) A certificate under Act XL. of 1858 is rightly given to the guardian, where there is no doubt of the fact of adoption, the objector, who does not claim to be the guardian, having no *locus standi.* (*c*) A certificate of guardianship was refused when the validity of the adoption was disputed. (*d*)

An adoptive mother, as next heir, was held entitled to the management of a lunatic's estate in preference to a uterine brother. (*e*)

A lady who has adopted a son may, as his guardian, be served with an order of foreclosure under the Bengal law. (*f*)

"In a Nuggur Panchaet case . . . in which both parties and Panch were Brâhmans and Kulkarnis, the widow of an adoptee obtained a decree for the possession of a vatan given to him by tho adopter (by the deed of adoption), in opposition to a claim set up by the nephew of the latter according to blood." (*g*)

(*a*) *Rambhat* v *Ramchandra,* Bom H. C. P. J. 1879, p. 426.

(*b*) *Brohmo Moyee* v *Chettur Monee,* 8 C. W. R. 25.

(*c*) *Kisto Kishore Roy* v. *Issur Chunder Roy,* 15 C. W. R. 166.

(*d*) Above, pp. 1021—22.

(*e*) *Huree Kishore Bhya* v. *Nullita Soonduree Goopta,* 18 C. W. R. 340.

(*f*) *Ras Muni Dibiah* v. *Pran Kishen Das,* 4 M. I. A. 392. *See* now above, p. 674.

(*g*) Steele, L. C. p. 188.

A widow has not really such an interest in the appeal or such a *locus standi* as entitles her to insist that an appeal should go on, though the minor party, her adopted son, in whose name the suit was brought, after coming of age, wishes to withdraw from it. (*a*)

A widow, claiming under the will of her husband, is the proper person to obtain a certificate under Act XXVII. of 1860, notwithstanding the objection of a person alleged to be the adopted son of deceased. (*b*)

A, alleging himself to be an adopted son, opposed the application for the grant of certificate under Act XXVII. of 1860 to *B*, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased; the Court before which the application was made refused to grant the certificate on the ground that sufficient *primâ facie* evidence existed establishing the validity of the adoption. On appeal it was held that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the *factum* of the adoption, would not be justified in setting aside the decision on the ground that such Court was wrong in entering into and deciding the question as to the validity of the adoption. It was laid down that on an application for the grant of certificate under Act XXVII. of 1860, opposed by a party alleging a preferential title to it, the Courts should adjudicate the question of title with a view to determine which party has the preferential right to the certificate. (*c*)

(*a*) *Ry Bistoopria Putmadaye* v. *Nund Dhull*, 13 M. I. A. 602.

(*b*) *Bissumbhur Shaha* v. *Sy Phool Mala*, 21 C. W. R. 31; *i. e.* until he establishes his adoption.

(*c*) *Sheetanath Mookerjee* v. *Promothonath Mookerjee*, I. L. R. 6 Calc. 303.

Reference was made to *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee*, 5 Calc. L. R. 517; *Musst Anundee Kooer* v. *Bachoo Sing*, 20 C. W. R. 476; *In re Oodoychurn Mitter*, I. L. R. 4 Calc. 411; *Koonj Behary Chowdhry* v. *Gocool Chunder Chowdhry*, I. L. R. 3 Calc. 616.

A permission to adopt during the life of the son cannot have effect given to it. (*a*)

A widow, by virtue of the authority given by her husband's will, adopted a son and afterwards discarded him for misbehaviour. The boy, on attaining maturity, applied for the withdrawal of the certificate and for the grant of one to him. The validity of the will, it was said, could only form the subject-matter of a regular suit. It could not be contested in a summary proceeding. (*b*)

Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession only after her death, providing further that if the adopted son died unmarried the estate should pass to the testator's nearest *sapinda gnyati*, it was held that the gift or bequest was, according to the doctrine laid down in the case of *Tagore* v. *Tagore*, void and of none effect, because the nearest sapinda was a person who might not be in existence at the death of the testator, and one who could not be ascertained at that time. (*c*)

"The case of *Baijnath Sahai* v. *Desputty Singh* (*d*) was this. A Hindû testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption, and made a will of which *B* applied for probate, and it was held under the *Succession Act* and *Hindû Wills Act* that creditors of *C* were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision." (*e*)

(*a*) *See* above, p 968.

(*b*) *Issur Chunder* v *Poorunna Beebee*, 1 C. W. R. Misc. 16. It would be hard to find any authority for a widow's "discarding" a son really adopted. She is dependent on him, not he on her *See* above, pp. 1153, 1173

(*c*) *Ramgutty Acharjee* v. *Kristo Soonduree Debia*, 20 C W. R. 472 *See* above, p 217

(*d*) L. R 2 Calc 208

(*e*) *Rajah Nilmoni Singh Deo Bahadoor* v *Umanath Mookerjee*, L. R 10 I A pp 80, 86.

7.—JUDGMENTS AND EVIDENCE IN PREVIOUS CASES.

A decision by a competent Court upon a question of adoption is not a judgment *in rem* or binding upon strangers, nor is a decree in such a case admissible as evidence against strangers, (*a*) nor is it binding on any reversionary heir not a party to the suit, nor upon an adoptee in a suit by a reversionary not a party to the former suit. (*b*)

The plaintiff's adoption, it was said, having been in issue in a former suit, though the defendant was not a party to it, and decided in the plaintiff's favour, was to be held good against the defendant until he got proof against the adoption (*c*) or could prove fraud or collusion. (*d*) But in *Padma Coomari Debea's* case (*e*) it was held that a former judgment against the validity of an adoption was not *res judicata* when the parties had been changed, but that the decision of the point of law on which the judgment had turned was binding as a precedent. A suit to set aside the adoption of the defendant, in which the adoptive mother was made a party, was held barred by Section 2 Act VIII. of 1859, because the same issue as to the validity of the adoption had been tried substantially in a former suit between the same parties as to a portion of the property now at issue. (*f*) A plaintiff suing for property belonging to a Hindû widow on the ground of his being an adopted son of

(*a*) *Kanhya Lall* v. *Radha Churn*, 7 C. W R. 338

(*b*) *Jumoona Dassya* v. *Bamasoondari Dassya*, 25 C W. R. 235; S. C. I. L. R. 3 I. App. 72 There is not in fact a recognized process by which an adoption can be established or set aside as to all persons.

(*c*) *Seetaram* v. *Juggobundoo Bose*, 2 C W. R. 168.

(*d*) *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar*, 3 C. W R. 14.

(*e*) L. R 8 I. A. 229

(*f*) *Kristo Beharee Roy* v. *Bunwaree Loll Roy*, 19 C W. R. 62. *See* now Act XIV. of 1882, Sec. 13.

her husband's brother is not barred by a decision, in respect of other property, that he was not such. (*a*)

In a suit between the adopted son of a landlord and the adopted son of his tenant, the decree being in favor of plaintiff by a competent Court, an appeal to the Privy Council or an omission to take rent for many years or to eject defendant, did not, it was held, alter the relationship of landlord and tenant between the parties. (*b*)

The denial by *A* in an inquiry under Bombay Regulation VIII. of 1827 that *B* was adopted son of *C*, does not absolutely estop *A* from asserting in a subsequent suit that *C* adopted *B*. (*c*)

A deposition of a plaintiff, in a suit against defendant, a widow (managing for her minor first adopted son) is not admissible in evidence under Sec. 33 of the Evidence Act in a subsequent suit by the defendant widow as mother and guardian of a second adopted son, as that son is not a representative in interest of the widow who was party to the former suit, but sues in his own right. (*d*)

(*a*) *Kripa Ram* v. *Bhugwan Doss*, 10 C. W. R. 100 The parties having been the same would be bound by a prior adjudication on the same question of right or jural relation between them, though the physical objects of their contention were different, *see* Act XIV of 1882, Sec. 13; *Krishna Behari Roy* v *Musst. Brojeshwari Chowdhrani*, L R. 2 I. A. 285 A question of limitation decided in a suit as to one piece of property was disallowed in a suit as to another in *Mahâraja Rajender Kishen Sing* v. *Raja Saheb Pershad Sein.* Pr. Co. 21, May, 1874.

(*b*) *Huronath Roy* v. *Golucknath Chowdhry*, 19 C. W. R. 18. Limitation is computed from the determination of the tenancy, and the time is 12 years Act XV. of 1877, Sch II. Art. 139.

(*c*) *Pandurang Ballal* v. *Dhondo Ballal*, Bom. H. C. P. J. 1876, p. 209.

(*d*) *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 B. L. R. 1; S. C. 23 C. W. R. 42. The decision may be questioned on the ground that there must be a continuity of the estate and of representation of it. The other party must of course be the same in both suits to make his deposition admissible.

A certificate may be granted to a widow, as guardian of her minor son, to collect her husband's debts, notwithstanding that her husband's adoption has been set aside. (*a*)

8 —LIMITATION.

The limitation prescribed for a suit for a declaration of the validity of an adoption is six years from an interference with the rights of the adopted son as such. (*b*) In a suit for a declaration that an adoption was not made or was not valid, the same period of limitation runs from "when the alleged adoption becomes known to the plaintiff." (*c*)

Where a widow, after the death of her son, adopts a boy under an alleged will of her husband, and a sister of the natural son sues for the inheritance on behalf of her son, disputing the will and the adoption, the cause of action arises on the death of the widow, not on the date of the adoption. An acknowledgment of the sister, previous to the birth of her son, admitting the adoption, does not bar the son's right (*d*); and he may sue within three years from attaining his majority. A reversioner's right to sue for possession by setting aside an adoption by a widow accrues on the death of the widow and not on the date of an adop-

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(*a*) *Nitto Kallee Debee* v *Obhoy Gobind*, 5 C. W. R. Misc. R. 10.

(*b*) Act XV. of 1877, Sch. II. Art. 119. The intention must, it seems, be to bar a suit on the ground of adoption in respect of the rights interfered with. An adoption cannot be cancelled by a mere seizure of an insignificant piece of property on a denial of adoption which remains unchallenged only because it is not worth while to challenge it.

(*c*) *Ib.* Art. 118. *See* above, p. 1002, Note (*a*).

(*d*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468. *See* note (*c*). In Bombay the daughter would have to sue in her own right, which precedes that of her son. *See* above, pp. 104, 107.

tion. (*a*) Possession by strangers as adopted sons of a widow is not adverse against the reversioners so long as she is alive. (*b*) As against an adopted son, suing for his share in the ancestral estate, limitation begins on demand and refusal. (*c*) The time now runs from when a person excluded is aware of the exclusion. (*d*)

(*a*) *Srinath Gangopadhya* v. *Mahes Chandra Roy*, 4 B. L. R 3 F. B. *Musst Raj Koonwar* v *Musst Inderjeet Koonwar*, 13 C.W.R 52; *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L R. A. C. J. 145; S C. 11 C. W. R. 468 Comp. note (*c*) p. 1236.

(*b*) *Srinath Gangopadhya* v *Mahes Chandra*, 4 B. L. R. 3 F. B.

(*c*) *Ayyavu Muppanar* v. *Niladatchi Ammal*, 1 M. H. C. R. 45; 3 M. H. C. R. 99.

(*d*) *Hari* v. *Maruti*, I. L R. 6 Bom. 741; Act XV. of 1877, Sch. II. Art. 127.

APPENDIX.

Translations of Yâjñavalkya, II. 47, 50, and 175, with the Commentary on these verses of the Mitâkshară. BY DR. A. FÜHRER.

Yâjnavalkya, II. 47. (*a*)

"A son need not pay, in this world, money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised."

Vijnâneśvara's Commentary.

A debt incurred by a drinker of spirituous liquors, or under the influence of lust for the sake of enjoying a woman, or caused by losses at play, what remains due of a fine or toll, (*b*) and money idly promised, that is, promised to impostors, bards, wrestlers, or the rest; for it is declared in a *Smṛiti*: "Fruitless is a present given to an impostor, a bard, a wrestler, a quack, a knave, a fortune-teller, a spy, or a robber";—all such debts incurred by the father, his son or other heir need not pay to the vintner and the rest. In the above clause, it is mentioned that the remaining portion of a fine or toll should not be paid; by that is not to understand that he has to pay the whole sum, if it is to be paid. For *Uśanas* says in his Smṛiti: "The son need not pay the fine or the balance of a fine, a toll or the balance of a toll, or [any debt of the father] which is not proper." (c) Also *Gautama* [XII, 41] says: "Money due by a surety, a commercial debt, a toll, debts contracted for spirituous liquors, a loss at play, and a fine shall not involve the sons, that is, they shall not be paid by the sons [of the debtors]" In this way it has been mentioned which kinds of debts should not be paid.

(*a*) See above, p. 625

(*b*) Haradatta in his Commentary on Gautama, XII. 41, explains śulka "fee due to the parents of the bride." The same does Jagannâtha, *see* Colebrooke, Digest I. 202.

(c) According to Vîramitrodaya, 1 106, p. 1, debts for wines and spirits are improper debts.

Yâjñavalkya, II. 50. (*a*)

"The father being gone to a foreign country, or deceased [naturally or civilly], or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses."

Vijñânesvara's Commentary.

If the father is dead [naturally deceased, or having become a religious anchorite], or has gone to a distant abode in a foreign country, before having paid the due debts, or if he be afflicted with an incurable disease, the debts contracted by him must be paid by the sons and grandsons, even if he has left no property, on account of their being his sons and grandsons. The order of paying is this; In the absence of the father the son, in the absence of the son the grandson; but if the son or the grandson were to deny, that which has been proved by witnesses and the rest [*i. e* documents] should be discharged. In the first clause, it is said that the debt should be paid off in case the father has gone to a foreign country; but as to the question when it should be paid off, the date fixed by Nârada is to be admitted. For *Nârada* says in his Smṛiti [I. 3, 14]: "The father, paternal uncle, or elder brother, having travelled to a foreign country, the son [or nephew, or younger brother even] shall not be forced to discharge the debt, until twenty years have elapsed." After the death of the father, the son if he be aprâptavyavahâra [*i. e.* if he have not yet reached full age], is not bound to pay the debt: otherwise, if he be fully grown up, he is to discharge it The time has also been fixed by *Nârada*, for he says [I 3, 37, 38*a*]: "A child is comparable to an embryo up to his eighth year; a boy is called youth (pauganḍa) up to his sixteenth year. Afterwards he is of age and independent, in case his parents be dead" He is not bound to pay the debt, even after the death of his parents, though he be independent, being still a boy For it is said in a *Smriti*: "If he have not yet reached full age—aprâptavyavahâra—and be independent, he is not bound to pay the debt, because the independence depends on his age, and that age is to be counted by qualifications and the years." The term aprâptavyavahâra includes also those that are forbidden to proclaim and to summon (before a court of law) For a *Smriti* says: "Aprâptavyavahâras, messengers, those that are ready to give alms, ascetics, or those immersed in difficulties should not be proclaimed to or summoned by the king." Therefore it is declared

(*a*) See above, p. 625

in another *Smṛiti*: "When the son has reached his full age—**prâpta-vyavahâra**—he should, not caring for his own interest, discharge the debt in such a way that he may not go to hell." As regards the performance of funeral rites (Śrâddha), even a boy is admitted. For *Gautama* [II. 5] says: "Except the religious performances in honor of the deceased father, the boy is not allowed to recite Vedic texts anywhere." By the plurality of sons and grandsons spoken of in the first clause it is to be understood, that if there are many, they should discharge the debt each in proportion to his own share, if living separated. And if living united, the head of them all should pay it from the common stock in the proportion of the different debts (gunapradhâna). For *Nárada* [I. 3, 2] says: "After the death of the father, the sons, living separated, shall discharge the debt according to their respective shares, and if living united, he who has taken the burden [of a paterfamilias] upon himself, shall pay it." Though, in the first clause, it is said in general that the sons and grandsons shall discharge the debt of the father, still it should be paid by sons with the interest as the father does; the difference being that the grandson should only pay the principal and not the interest. For *Brihaspati* says: "The sons must pay the debts of their father, when proved, as if it were their own [*i. e.* with interest]; the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he have assets." When proved, signifies when established by the testimony of witnesses. Thus has been shown the liability for debts of the debtor, his son, and his grandson, and to whom it belongs to pay when they exist together.

Vijñánesvara's Commentary on Yájñavalkya, II. 175. (*a*)

On the Resumption of Gifts. Now, according to the lawful and unlawful way, I mention at large the chapters on law (vyavahâra) styled "Non-Resumption of Gifts" (dattânapâkarma) and "Resumption of Gifts" (dattâpradânika). *Nárada* [II. 4, 1] thus mentions the form of dattâpradânika: "When a man, having unduly given a thing, desires to recover it, it is called "Resumption of Gift," which is a title of judicial procedure. Resumption of gifts is that title of administrative justice according to which a man wishes to take back a gift which has not been made in a due form [that is, in a prohibited mode] *i. e.* that title of law by which a gift is with-

(*a*) *See* above, p. 759.

drawn which has been made unduly. That title of law is styled "Non-Resumption of Gifts" (dattânapâkarma) by which a gift cannot be taken back when once given by ways sanctioned by laws. Gifts are four-fold; for *Nárada* [II. 4, 2] says: "In civil affairs, the law of gift is four-fold: what may be given (deya), or what may not be given (adeya); and what is a valid gift (datta), or what is not a valid gift (adatta)." An alienable gift is that which is fitting the dânakriyâ (the action of giving gifts), and which is sanctioned by law. An unalienable gift is that which cannot be given as a gift either because one cannot own it or because its giving is not sanctioned by law. An alienated gift is that which is given away and cannot be taken back because of its being given by one when in a sane state. An unalienated gift is that which can be taken back though once given. Now I mention briefly the four-fold gifts. *Yájñavalkya* [II 175] says: "Without injuring the family estate, personal property may be given away, except a wife or a son; but not the whole of a man's estate, if he have issue living; nor what he has promised to another." That may be given away which is one's self-acquired property and which has been left after the expenses for the maintenance of the family have been defrayed, because the support of the family is necessary. For *Manu* [VIII. 35] says: "Aged parents, an honourable wife, an infant child must be maintained even by means of a hundred trespasses." Thereupon it has been stated that alienable gifts are of one kind only, namely as regards personal property. What is bailed for delivery, what is let for use, a pledge, joint property, and a deposit: these five have been proved, on the contrary supposition, to be unalienable gifts. For *Nárada* [II. 4, 4, 5] mentions eight unalienable things: "An article bailed for delivery, a thing borrowed for use, a pledge, joint property, a deposit, a son, a wife, the whole estate of a man who has issue living, and [of course], what has been promised to another: the sages have declared unalienable even by a man oppressed with grievous calamities." By saying "these five things are unalienable" is not to be understood that we have only a (mere) claim on these things, since a wife, son, and what has been promised are included in the term "personal property;" but that personal property may be given away, excepting a wife, or a son. If then a son, or grandson, or the like survive, the whole property shall not be given away. For it is said in a *Smṛiti*: "He who has begotten a son and performed his tonsure shall provide for his sustenance." If he has promised a golden piece or the like to somebody, he is not allowed to keep his promise (at the cost of privation to his offspring).

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* Bo. Gov. Rec. No. 114, p. 134.

† For the Śrâddhas in actual use *see* R. S. V. N. Mandlik's Vyav. May. Introd. pp. xxxvi ss.

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* St. 21 Geo. III. Ch. 70, Sec. 18.
† ——— 17.

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